

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

Initial Brief of Appellants

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Statement of Issues on Appeal

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

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 ____} Appellant Oskin is a judgment creditor of Respondent Johnson, and the holder of an assignment of the O’Connell judgment {Amended Order, R ____} 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 ____}

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 {Id} 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 ____}

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 ___, ___} 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 ___} The matter proceeded to trial on February 15, 2010 {Transcript of Hearing, R ___}¹ The master entered a written order denying Appellants the relief sought in the complaint {Final Order Ending Action filed March 26, 2010, R ___} 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 ___} Appellants filed a timely notice of appeal with this Court {Notice of Appeal, R ___}

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 ___} 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 May 6, 2006, R ___} Johnson failed to respond to that lawsuit {Trans p 160, line 22—p 161, line 2, R ___}

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 ___} Johnson, however, was unable to obtain financing for the purchase due to his credit rating at the time {Trans p 140, R ___} 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 ____} Michael Brown and Johnson hold title to the property as tenants in common {Trans p 135, R ____} 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 ____} 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 ____} Johnson initially paid the monthly payments, taxes, and insurance on the mortgages on the property {Trans p 147, R ____} 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 ____} 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 ____} 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 ____} In response to a request from Michael Brown, Johnson emailed a

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.

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 ____} Michael Brown also knew of the judgment of O'Connell that had been purchased by Oskin³ {Trans p 171-172} 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 ____}

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 ____} 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 {Amended Order, R ____} 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, Affidavit of Anne Wilson p 2, R ____} At the time, the property appraised for \$2.5 million {Trans p 90, R ____} SCB&T informed Michael Brown that it would only accept a full payoff of the loan {Affidavit of Anne Wilson p 2, R ____} Michael Brown also expressed his concerns with how this potential judgment would affect his interest in the property {Id} On November 4, 2008, one day after the summary judgment hearing in Oskin's³ breach of contract action, Michael Brown informed SCB&T of the

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

possibility of a judgment against Johnson {Id} 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} 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 ____}

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 ____} The filing was expedited and Michael Brown personally paid the expedited filing fee {Trans p 180-181, Exhibit 19, R ____} 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 ____} 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 ____}

Joan Conner Brown, Michael Brown's wife, was listed as J Conner's sole member {J Conner Operating Agreement, R ____} 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 ____} 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 ____}

Michael Brown continued discussions with Wachovia Bank, N A , about lending the \$3.5 million⁴ needed to facilitate J Conner's acquisition of the note and mortgage from SCB&T {Trans p 191, lines 14-20, R ____} Michael Brown was the only party to negotiate with Wachovia about obtaining these funds {Trans p 92-93, 191, R ____} According to Wachovia, Michael Brown was aware the property was "facing

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

some judgment liens if the property is not taken out of its existing structure ” {Trans p 98 line 23—p 99 line 2, R ____}

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 ____}. The sixth account was in the name of Joan Conner Brown {Trans p 113, R ____}. Michael Brown’s hedge fund account pledged to secure the loan was to be liquidated⁶ to pay down approximately \$2 million of the \$3.5 million debt to Wachovia {Trans p 110-11, R ____}. In addition, Wachovia required that Michael Brown execute a personal guaranty agreement {Trans p 192, lines 6-21, R ____}. 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 ____}.

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 ____}. 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 ____}. As a result, Michael Brown delivered a personal check drawn from his personal account to

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

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 ____} 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 ____} 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 ____} 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 ____}

Thereafter, Appellants instituted this declaratory judgment action against Respondents {Complaint dated April 17, 2009, R ____} 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 ____}

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 {Id} The master entered a written order denying Appellants the relief sought in the complaint {Final Order Ending Action filed March 26, 2010, R ____} The master thereafter denied Appellants' Rule 59, SCRPC, motion {Order Denying Motion for Reconsideration to Alter or Amend or for a New Trial filed May 6, 2010} Appellants filed this appeal {Notice of Appeal, R ____}

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. ____} 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. ____} Such a holding ignores the clear language

of the statute⁷ 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, Mudd⁸ 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 Elizabeth⁹ 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 (Wis. 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 Statute 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 ____} The master's ruling is not supported by evidence This Court should reverse

The evidence¹² 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 These 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 ____} 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 ____} 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 ____} 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 Brown¹³ 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 ____, ____} The master also held that, even if

¹³ The order reverses the parties stating the court was not convinced by the evidence that Michael Brown is the alter ego of J Conner. This brief sets forth the correct order.

the 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 ____} All three findings 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 ____} 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 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 ____} 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. ____} Joan Conner Brown admitted J. Conner has no business activities. {Trans. p. 248, line 25—p. 249, line 2, R. ____} 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 ____} 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 to retain 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 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. ____}. 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 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. ____}. 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 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

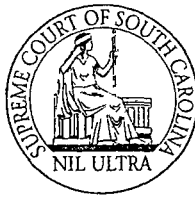
By 

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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
February 17, 2011



The Supreme Court of South Carolina

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BRENDA F. SHEALY
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February 15, 2012

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Danny Villacarlos Butler, Esquire
Henrietta Golding, Esquire
P O Box 336
Myrtle Beach, SC 29578

Re Oskin, Robert v. Johnson, Stephen

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Appellants 20 minutes

Respondents 20 minutes

Appellants in Reply 5 minutes

This case is scheduled for hearing on Wednesday, February 22, 2012 at 10 30 a m

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins
Administrative Assistant

DES/dmh

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

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December 15, 2011

Hand Delivered

The Honorable Daniel E. Shearouse

Clerk of Court

South Carolina Supreme Court

Post Office Box 11330

Columbia, SC 29211

RECEIVED

DEC 15 2011

SC Supreme Court

RE Robert Oskin, et al v Johnson, et al

Case No 06-CP-26-2371

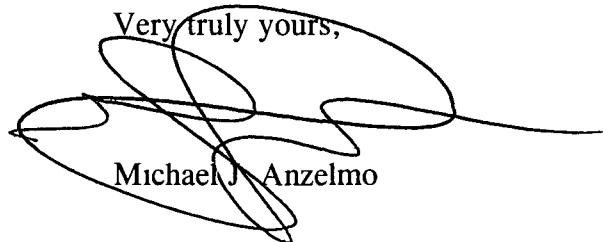
Our file no 37169/01500

Mr. Shearouse

In response to your letter dated December 12, 2011, counsel for Appellants Robert W. Oskin, Glenn Small, and Freddie Kanos has no scheduling conflicts with the proposed argument dates of February 7, 8, 9, 22 and 23. However, undersigned counsel will have ankle surgery in mid-January that will cause him to be out of the office for some time. This surgery will severely limit my ability to prepare for an argument date in early February 2012. Accordingly, I respectfully request an oral argument date on either February 22 or 23. Either of those dates would allow me adequate time to recover and adequately prepare for oral argument. I thank the Court for the consideration of this request.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Michael J. Anzelmo

MJA:jbl

cc Henrietta Golding

C. Scott Masel



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Michael J. Anzelmo Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s):

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Oskin, Robert v. Johnson, Stephen



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Mark Andrew Brunty Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Oskin, Robert v. Johnson, Stephen



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

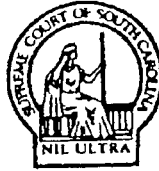
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To: Danny Villacarlos Butler Esquire
Henrietta Golding
From: Daniel E. Shearouse
Date: December 12, 2011
RE: February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Oskin, Robert v. Johnson, Stephen



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
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J

To C. Scott Masel Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Oskin, Robert v. Johnson, Stephen

The Supreme Court of South Carolina

Robert W Oskin, Glenn Small,
and Freddie Kanos, Appellants,

v

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

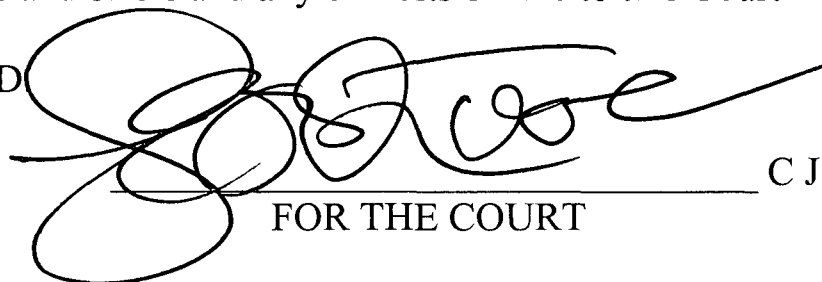
And which State of South
Carolina ex rel Allan Wilson,
Attorney General is, Intervening Party

The Hon Cynthia Howe
Horry County
Trial Court Case No 2009-CP-26-03470

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED


C J
FOR THE COURT

Columbia, South Carolina

November 14, 2011

cc Mark Andrew Brunty, Esquire
Michael J Anzelmo, Esquire
C Scott Masel, Esquire
Danny Villacarlos Butler, Esquire
Henrietta Golding
The Honorable Tanya Gee

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July 26, 2011

Hand Delivered

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JUL 26 2011

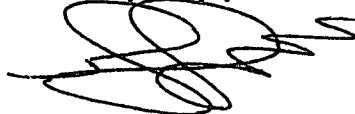
SC Court of Appeals

RE Robert Oskin, et al v Johnson, et al
Case No 06-CP-26-2371
Our file no 37169/01500

Dear Ms Gee

Per the letter dated July 22, 2011, attached please find an original and one copy each of a Proof of Service and two Certificates of Counsel, with original signatures in the above-referenced matter. Please file the original and return a clocked copy to me. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

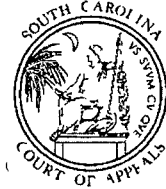


Michael J Anzelmo

MJA jlee

Enclosures

cc Henrietta Golding
C Scott Masel



The South Carolina Court of Appeals

TANYA A. GEE
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V. CLAIRE ALLEN
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July 22, 2011

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Henrietta Golding
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Myrtle Beach, SC 29578

Re Oskin, Robert v. Johnson, Stephen
2010164046

Dear Counsel

We have received the Record on Appeal, the Supplemental Record on Appeal, the Appellants' Final Brief, the Appellants' Final Reply Brief, the Final Brief of Respondent Stephen Mark Johnson, and the Final Brief of Respondents Michael Brown, Joan Conner Brown and J. Conner, LLC.

The Certificate of Counsel for the Record on Appeal was filed without an original signature.

The Supplemental Record on Appeal was filed without a Proof of Service and the Certificate of Counsel was filed without an original signature. It will be necessary for the Appellants to file a Certificate of Counsel for the Record on Appeal with an original signature, a Proof of Service for the Supplemental Record on Appeal, and a Certificate of Counsel for the Supplemental Record on Appeal with an original signature. Please file these documents within ten (10) days of the date of this letter.

The caption should read as shown in our letter of June 22, 2010.

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

It will be necessary that the Appellants and the Respondents come to the Court or send someone authorized by them to correct the covers of the Final Briefs to show the correct caption within ten (10) days of the date of this letter.

Very truly yours,


CLERK

TAG/mpm

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

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July 8, 2011

The Honorable Tanya A Gee
Clerk of Court
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1015 Sumter Street - 5th Floor
Columbia, SC 29201

RECEIVED
JUL 08 2011
SC Court of Appeals

RE Robert Oskin, et al v Johnson, et al
Case No 06-CP-26-2371
Our file no 37169/01500

Dear Ms Gee

Enclosed please find the original and sixteen copies each of Appellants' Final Brief, Final Reply Brief, and Record on Appeal in regard to the above-referenced matter. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of the final briefs. The Record on Appeal was previously served on June 20, 2011.

Very truly yours,



Michael J Anzelmo

MJA lpw

Enclosures

cc Henrietta Golding, Esquire
C Scott Masel, Esquire

MCNAIR
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July 6, 2011

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Columbia, SC 29211

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Re Oskin, et al v Johnson, et al
Civil Action No 2009-CP-26- 3470
Case Tracking No 2010164046

Dear Ms Gee

Enclosed please find an original and 15 copies of the Final Brief of Respondents Michael Brown, Joan Conner Brown and J Conner, LLC and Certificate of Counsel, along with an original and copy of the Proof of Service

Please return the clocked original of the Final Brief and a clocked copy of the Proof of Service to me in the enclosed stamped, self-addressed envelope

By copy of this letter to counsel of record, and as shown on the Proof of Service enclosed herein, I hereby serve a copy of the Final Brief of Responds Michael Brown, Joan Conner Brown and J Conner, LLC on the parties of record

Thank you

Very truly yours,

McNair Law Firm P A

Dan V Butler

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JUL 07 2011
SC Court of Appeals

DVB ccd

Enclosures

cc Michael J Anzelmo, Esq
(Via Regular Mail and Email michael.anzelmo@nelsonmullins.com)
C Scott Masel, Esq
(Via Regular Mail and Email smasel@newbylaw.com)
Mr Michael Brown (Via email only)

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June 29, 2011

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE Robert W Oskin, Glenn Small and Freddie Kanos v Stephen Mark Johnson,
Michael Brown Joan Conner Brown, and J Conner, LLC
Case No 2009-CP 26-3470

Dear Ms Gee

Enclosed for filing you will find the original and fifteen (15) copies of the Final Brief of Respondent Stephen Mark Johnson relating to the above case. Also enclosed you will find for filing the Original Certificate of Counsel and Proof of Service upon opposing counsel.

Please file these documents in your office and return a copy to me with your filing date stamped thereon in the self-addressed envelope provided.

Thank you for your assistance in this matter. If you have any questions, please contact my office.

Very truly yours,

NEWBY SARTIP MASEL & CASPER, LLC



C. Scott Masel

CSM/km
encl
cc

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SC Court of Appeals

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

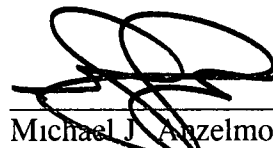
Respondents

Certificate of Counsel for Amended Designation of Matter

Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation of matter filed on May 18, 2011, contains no matter which is irrelevant to the appeal

NELSON MULLINS RILEY & SCARBOROUGH LLP

By



Michael J. Anzelmo
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Post Office Box 11070 (29211-1070)
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803 799 2000

Attorneys for Appellants

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JUN 20 2011
SC Court of Appeals

Columbia, South Carolina

June 20, 2011

Nelson Mullins

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June 20, 2011

Hand Delivered

The Honorable Claire V. Allen
Deputy Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, South Carolina 29201

RE Robert Oskin, et al v Johnson, et al
Case No 06-CP-26-2371
Our file no 37169/01500

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JUN 20 2011
SC Court of Appeals

Dear Ms. Allen

Per your letter dated June 15, 2011, please find enclosed an original and two copies of the requested separate Certificate of Counsel for Appellants' Amended Designation of Matter in the above-referenced matter. Please file the original and return a clocked in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Michael J. Anzelmo

MJA:jlee
Enclosure
cc Henrietta Golding
C. Scott Masel

Nelson Mullins

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June 17, 2011

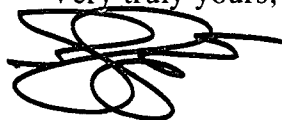
The Honorable Tanya A Gee
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE Robert Oskin, et al v Johnson, et al
Case No 06-CP-26-2371
Our file no 37169/01500

Dear Ms Gee

Enclosed please find an original and two copies of a Proof of Service for the Record on Appeal in the above-referenced matter. Please file the original and return a clocked-in copy to me in the envelope provide. Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Michael J Anzelmo

MJA jlee
Enclosure
cc Henrietta Golding
C Scott Masel

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JUN 20 2011

SC Court of Appeals



The South Carolina Court of Appeals

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June 15, 2011

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Brunty Law Firm
P.O. Box 70907
Myrtle Beach, SC 29572

Re Oskin, Robert v. Johnson, Stephen
2010164046

Dear Counsel

We have received the Appellants' Initial Reply Brief and Designation of Matter. However, the Designation of Matter was filed without a Certificate of Counsel, in accordance with Rule 209 of the South Carolina Appellate Court Rules. Please provide this Court with a Certificate of Counsel for the Designation of Matter within ten (10) days of the date of this letter.

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm

cc C Scott Masel, Esquire
Danny Villacarlos Butler, Esquire
Henrietta Golding

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

Appellants' Amended Designation of Matter

Pursuant to Rule 209, SCACR, Appellants designate the following material for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation contains no matter which is irrelevant to the appeal.

Orders

- 1 Final order dated March 26, 2010
- 2 Order denying Appellants' Rule 59 motion dated May 6, 2010
- 3 Order denying Appellants' Motion for Summary Judgment
- 4 Order denying Respondents' Motion for Summary Judgment
- 5 Order granting summary to Oskin against Johnson dated December 11, 2008

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6 Amended order of Judge Goodstein

7 Order of Reference

8 Notice of Appeal

Pleadings/Motions

9 Summons and Complaint dated April 2009

10 Answer of Respondents Michael Brown, Joan Conner Brown, and J Conner
LLC

11 Appellants' Motion to Alter or Amend or for a New Trial and Memorandum in
Support

Transcripts

12 February 15, 2010 trial transcript

13 Deposition of Jim Boyd p 29-30

Exhibits/Documents

14 Deed to Lot 13, Grande Dunes, recorded December 5, 2006 in Book 3198,
Page 1933

15 \$3 5 million Note to SCB&T dated November 30, 2006

16 \$3 5 million Mortgage to SCB&T recorded November 30, 2006

17 Assignment of Note dated December 30, 2008

18 Allonge to Note

19 Assignment of Mortgage recorded January 14, 2009

20 Articles of Organization of J Conner LLC filed November 20, 2008

21 Limited Liability Operating Agreement of J Conner LLC

22 \$3 5 million Promissory Note to Wachovia Bank dated December 16, 2008

- 23 Security Agreement to Wachovia Bank dated December 16, 2008
- 24 Control Agreement to Wachovia Bank dated December 16, 2008
- 25 Unconditional Guaranty of Michael Brown dated December 16, 2008
- 27 Letter to North Carolina Secretary of State from McGirt expediting the filing of
J Conner LLC

NELSON MULLINS RILEY & SCARBOROUGH LLP

By



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803 799 2000

Attorney for Appellants

Columbia, South Carolina

May 18, 2011

HE 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

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

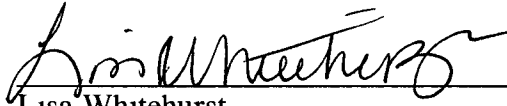
Appellants' Amended Designation of Matter

Counsel Served

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SC Court of Appeals

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Lisa Whitehurst
Administrative Assistant

May 18, 2011

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May 18, 2011

Hand Delivered

The Honorable Tanya A Gee
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SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

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MAY 18 2011
SC Court of Appeals

RE Robert Oskin, et al v Johnson, et al
Case No 06-CP-26-2371
Our file no 37169/01500

Dear Ms Gee

Enclosed please find an original and two copies each of the Initial Reply Brief of Appellants and Appellants' Amended Designation of Matter in the above-referenced matter. Please file the original and return a clocked in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am serving opposing counsel.

Sincerely,



Michael J Anzelmo

WCWJR jlee

Enclosure

cc Henrietta Golding
C Scott Masel

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

Initial Reply Brief of Appellants

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SC COURT OF APPEALS

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Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

-- 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 ____}

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

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

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

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

-- Michael Brown agreed that one of those accounts, a hedge fund account solely owned by him, should be liquidated to pay down approximately \$2 million of the \$3.5 million debt to Wachovia

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

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

-- Michael Brown wrote a personal check, drawn on his personal account, in the amount of \$44,303.31 to cover the shortfall in the payment amount owed to SCB&T to complete the transaction

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

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

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

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

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

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

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

The master erred in finding that J. Conner was not the alter-ego of Michael Brown and that the \$3.5 million payment to SCB&T was not a full payment of the note and mortgage. This Court should reverse.

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

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

⁴ Respondents also claim Appellants failed to preserve for appeal the issue of whether the Statute of Elizabeth applies to persons other than debtors. {Resp. Br. p. 15-16} This argument is manifestly without merit. Appellants' entire position throughout this litigation was that the statute applied to transactions such as the one instituted in this action despite the lack of debtor/creditor relationship. The master specifically ruled against Appellants when she held the statute only applied to those in a debtor/creditor relationship. Thus, the issue was addressed by the Court in its Rule 59 SCRC motion and this issue is properly before this Court.

a J Conner was the alter-ego of Michael Brown

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

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

As set forth fully in section II, *supra*,⁵ the preponderance of the evidence established that Michael Brown created, controlled, and designed J Conner to further his own personal goal He initiated the process to structure a transaction relating to the SCB&T note and mortgage in order to protect his interest in the property from being affected by Oskin's judgment against Johnson He alone he created J Conner to accomplish this goal He negotiated on behalf of J Conner to obtain the \$3.5 million

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

from Wachovia. He wrote nearly \$95,000 in personal checks to facilitate J. Conner obtaining the Wachovia loan. He guaranteed the Wachovia loan to allow J. Conner to obtain the \$3.5 million. He signed both the Wachovia security agreement and control agreement as "borrower." In sum, Michael Brown misused J. Conner to thwart Appellants' legitimate claims against the property. J. Conner exists solely to shield the property from the reach of Appellants as intended by Michael Brown. Thus, this Court should find the preponderance of the evidence established J. Conner was the alter-ego of Michael Brown.

b The future advance clause in the mortgage does not preclude a finding that the \$3.5 million payment to SCB&T constituted a payment of the principal of the note and mortgage

Respondents again rely on Central Production Credit Assoc. v. Page, 268 S.C. 1, 8, 231 S.E.2d 210, 214 (1977), to support their belief that "J. Conner retains first priority mortgage lien for the full amount (\$3.5 million) in addition to any future advances made by J. Conner." {Resp. Br. p. 20} This again misconstrues Central Production. That case actually supports Appellants. Respondents also fail to refute the fact that the mortgage can remain valid and not affect Appellants' right to recover at all. Central Production simply allows J. Conner to retain priority as to future advances only.

Here, SCB&T was entitled to \$3.5 million plus interest from the Michael Brown and Johnson. Once that amount was paid in full, then the SCB&T note and mortgage has been paid in full as to the principal of the note and mortgage. The mortgage holder, now J. Conner, is not entitled to receive any more money to satisfy the principal amount (as it has been fully paid). The only amounts the mortgage holder

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

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

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

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

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

As stated by Respondent, in order to allow Michael Brown to seek equitable subrogation, the Court must first find his payment of \$3.5 million constituted a full pay-off of the note and mortgage. Further, as set forth above and in Appellants' brief, if the note and mortgage were paid in full, then Michael Brown's actions in creating J Conner would have been for the sole purpose of precluding Appellants from enforcing their judgments against the property. Such a course of action establishes that Michael Brown acted with unclean hands—he paid off the note and mortgage then J Conner to thwart Appellants' legitimate claims against the property and improperly shield the property from the reach of Appellants. As a result, he is precluded from receiving equitable relief. The master erred in holding otherwise and should be reversed.

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

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

Id Ultimately, Caroprop stopped paying on the note and mortgage, and Interstate instituted foreclosure proceedings Id Auten, to avoid foreclosure, satisfied the Interstate note and mortgage Id Auten then instituted an equitable subrogation Id at 3, 446 S E 2d at 416 First South counterclaimed, alleging its mortgage had priority over Auten's subrogation interest Id The sole issue before the court was if Auten was primarily or secondarily liable for the debt Id at 3, 446 S E 2d at 417 The Court held that "upon Atlantic's conveyance of its share of the property, Auten, in equity, became secondarily liable for the debt Id at 4, 446 S E 2d at 417

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

Conclusion

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

{Signature Page Follows}

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May 18, 2011

HE 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,

v

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

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MAY 18 2011
SC Court of Appeals

Appellants,

Respondents

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' Initial Reply Brief
Counsel Served	Henrietta Golding Dan V Butler McNair Law Firm 2411 Oak Street Myrtle Beach, SC 29577

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Lisa Whitehurst
Administrative Assistant

May 18, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Master-in-Equity

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

SC Court of Appeals

Case No 2009-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,

Of which

State of South Carolina ex rel
Henry D McMaster, Attorney General is

Intervening Party

DESIGNATION OF MATTERS TO
BE INCLUDED IN THE RECORD ON APPEAL
BY RESPONDENTS MICHAEL BROWN,
JOAN CONNER BROWN AND J CONNER, LLC

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Michael Brown, Joan Conner Brown and J Conner, LLC

The Respondents Michael Brown, Joan Conner Brown and J Conner, LLC, hereby designate the following materials to be included in the Record on Appeal pursuant to Rule 209 of the South Carolina Appellate Court Rules

ORDERS

- Order of Reference, dated June 12, 2009
- Stipulation of Dismissal of SCB&T, filed September 2, 2009
- Final Order Ending Action, dated March 25, 2010
- Order Denying Motion for Reconsideration, dated May 5, 2010

PLEADINGS/MOTIONS

- Complaint, dated April 6, 2009
- Answer of Defendants Michael Brown, Joan Conner Brown and J Conner, LLC, dated May 6, 2009
- Amended Complaint, dated November 20, 2009
- Plaintiff's Motion to Alter or Amend, dated April 5, 2010
- Memorandum in Support of Plaintiffs' Motion to Alter or Amend

TRIAL TRANSCRIPT

Page Numbers 37 thru 45, 49 thru 65, 75, 77, 90 thru 95, 105, 109 thru 110, 113, 117, 122 thru 127, 140, 147, 167 thru 168, 177 thru 178, 182, 197 thru 199, 206, 212, 214 thru 217, 243 thru 247

TRIAL EXHIBITS

- Plaintiffs Trial Exhibit Numbers 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 24, 26
- Defendants Trial Exhibit Numbers 4, 5, 11, 16, 17, 18, 19
- Deposition Transcript of James W Boyd, page numbers 17, 29, 31, 37, 38, 40, 43

CERTIFICATION

We hereby certify that Respondents' Designation herein contains no matter which is not relevant to this Appeal

RESPECTFULLY,

A handwritten signature in black ink, appearing to read "D. V. Butler", written over a horizontal line.

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April 18, 2011
Myrtle Beach, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
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The Honorable Cynthia Graham Howe
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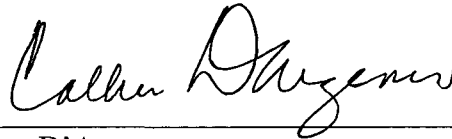
PROOF OF SERVICE

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 (i) Initial Brief of Respondents Michael Brown, Joan Conner Brown, and J Conner, LLC, (ii) Designation of Matters by Respondents Michael Brown, Joan Conner Brown, and J Conner, LLC, and (iii) Proof of Service on counsel for Appellants and Respondent Stephen Mark Johnson, by United States Mail, postage prepaid, and Email on the 18th day of April, 2011, at the following addresses

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A handwritten signature in black ink, reading "Colleen D'Argenio", written in a cursive style.

Colleen D'Argenio

April 18, 2011

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Re Oskin, et al v Johnson, et al
Civil Action No 2009-CP-26-3470
Case Tracking No 2010164046

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SC Court of Appeals

Dear Ms Gee

Enclosed please find an original and two copies of the (i) Initial Brief of Respondents Michael Brown, Joan Conner Brown and J Conner, LLC, (ii) Designation of Matters of Respondents Michael Brown, Joan Conner Brown and J Conner, LLC, and (iii) Proof of Service

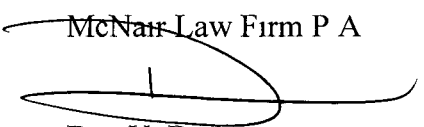
Please return two clocked copies of each document to me in the enclosed stamped, self-addressed envelope

By copy of this letter to counsel of record, and as shown on the Proof of Service, I hereby serve a copy of the enclosed documents on the parties of record

Thank you

Very truly yours,

McNair Law Firm P A


Dan V Butler

DVB ccd

Enclosures

cc Michael J Anzelmo, Esq
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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-26-03470

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APR 19 2011

SC Court of Appeals

Robert W Oskin, Glenn Small
and Freddie Kanos,

Appellants,

v

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

Respondents,

Of which

State of South Carolina ex rel
Henry D McMaster, Attorney General is

Intervening Party

INITIAL BRIEF
OF RESPONDENTS MICHAEL BROWN,
JOAN CONNER BROWN AND J CONNER, LLC

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<i>Dodge City of Spartanburg Inc v Jones</i> , 317 S C 491, 454 S E 2d 918 (Ct App 1995)	23
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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 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 (Answer of Defendants M Brown, J Brown and J Conner, LLC)

On June 23, 2009, the matter was referred to the Horry County Master in Equity pursuant to Rule 53, SCRCP (Order of Reference)

By Stipulation of Dismissal dated September 2, 2009, SCB&T was dismissed from the lawsuit (Stipulation of Dismissal, dated September 2, 2009)

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 (Amended Complaint)

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 (Final Order)

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 (Plaintiffs’ Motion for Reconsideration and Memorandum in Support of Motion) A hearing on the Motion for Reconsideration was held before the Master-in-Equity on April 30, 2010 The motion was denied (Order Denying Motion for Reconsideration)

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”) (Transcript P 140, 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 (Pl Exh 15) 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 (Pl Exh 15) The note was secured by a first mortgage lien on the Property (the “SCB&T Mortgage”) (Pl Exh 16) Title to the Property was conveyed to M Brown and Johnson as tenants in common (Pl Exh 14)

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 (Def Exh 4, 5) The debt to Ameris Bank, which arose in April 2007, remained outstanding at the time of the trial (Transcript p 212, 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 (Transcript p 147, lines 12-19)

In October 2008, M Brown contacted Wachovia Bank with respect to refinancing the SCB&T loan (Transcript p 75, lines 5-17, p 77, lines 12-16) 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 (Transcript, p 214, line 16 thru p 215, line 2) Due to the low appraisals on the Property,¹ Wachovia Bank could not approve the \$3 5 million loan if the loan was to be secured by a mortgage on the Property (Transcript p 90, line 8 thru p 91, line 10) However, Wachovia Bank could issue the loan if it was secured by marketable securities valued at \$3 5 million (Transcript p 92, lines 2-15)

In early November 2008, M Brown approached SCB&T in an attempt to reduce the note balance (Transcript p 167, 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 (Transcript p 168, 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 (Transcript p 177, line 3 thru p 178, line 16, p 243, line 18 thru p 244, line 3)(Boyd Depo p 17, lines 16-25, p 29, lines 13-15)

On November 20, 2008, J Conner, LLC was formed, with J Brown being its sole member (Pl Exh 9, 10) 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 (Pl Exh 11) The Wachovia Loan is personally guaranteed by, and is secured by separate investment accounts owned by, M Brown and J Brown (Pl Exh 12, 13, 20)(Def Exh 16)

¹ The Property was worth approximately \$2 5 2 6 million in October 2008 (Def Exh 18 19)

The \$3.5 million proceeds from the Wachovia Loan was wired to SCB&T on December 18, 2008 (Transcript p 117, lines 3-25). An additional amount of \$44,303.31 was paid to SCB&T by personal check of M. Brown to complete the purchase (Transcript p 197, line 25 thru p 199, line 11) (Pl. Exh. 21). 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 (Pl. Exh. 22, 24, 26).

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 (Transcript, p 126, line 14 thru p 127, line 23)(Boyd Deposition p 31, 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 (Pl. Exh. 1, 2, 3)(Transcript p 37, 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 (Transcript p 37, line 16 thru p 38, 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 (Pl. Exh. 4). Oskin purchased the Confession of Judgment from O'Connell for \$500.00 on November 4, 2009, nearly seven (7) months after the Complaint was filed (Pl. Exh. 5)(Transcript, p 39, line 6 thru p 40, 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 (Transcript, p 37, line 3 thru p 38, line 15, p 41, 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 (Transcript p 40, line 18 thru p 42, 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, 2007² (Pl Exh 6) 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, LLC³ (Transcript, p 58, line 5-22, p 60, line 7 thru p 61, 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 (Transcript, p 42, line 17 thru p 45, line 17, p 58, line 23 thru p 59, line 6, p 61, line 17 thru p 62, line 1, p 63, line 22 thru p 64, line 9, p 65 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 (Transcript, p 44, line 15 thru p 45 line 45, line 2, p 64, lines 11-25)

² 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 (Transcript p 49 line 20 thru p 57 line 1)

³ 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 (App Brief, p 11-12) Appellants’ protracted interpretation of the term “creditor and others” simply ignores the line of cases that clearly require the transferring party to (i) be indebted to the complaining creditor at the time of the transfer, and (ii) 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 (Transcript p 40, line 18 thru p 45, line 17, p 58, line 5 thru p 59, line 6, p 60, line 7 thru p 62, line 1, p 63, line 22 thru p 64, line 9, p 65 lines 1-13) Appellants' only debtor is Johnson by virtue of the judgments and promissory note held by Appellants (Pl Exh 1,2, 3, 4, 5, 6) 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 (Transcript, p 126, line 14 thru p 127, line 23)(Boyd Deposition p 31, lines 10-24)

As holder of the note and mortgage, SCB&T clearly was the owner of these properties (Pl Exh 15, 16) 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 (Boyd Deposition, p 31, lines 10-24, p 37, line 10 thru p 38, line 25, p 40, lines 15-20, p 43, 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 (Transcript, p 42, line 17 thru p 45, line 17, p 58, line 23 thru p 59, line 6, p 61, line 17 thru p 62, line 1, p 63, line 22 thru p 64, line 9, p 65 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 (Stipulation of Dismissal, dated Sept 2, 2009)
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,⁴ (ii) the Assignment did not affect the solvency of Johnson, the only debtor in this case⁵, 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 (Stipulation of Dismissal, dated Sept 2, 2009). Thus, both the Lebowitz and Dennis cases supports 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. (Final Order, p. 7). 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

⁴ SCB&T was dismissed by Stipulation of Dismissal on September 2, 2009.

⁵ Johnson continues to be a co-owner of the Property with M. Brown. (Pl. Exh. 14).

Appellants' claims against Johnson," thereby perpetuating a fraud on Appellants (App Brief, p 19) 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 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 (Boyd Deposition, p. 31, line 10-18)(Pl. Exh. 22, 24, 26). 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 (Transcript p. 94, line 24 thru p. 95, line 6, p. 105, lines 3-7, p. 124, line 20 thru p. 125, line 19)(Boyd Depo. p. 37, line 10 thru p. 38, line 25, p. 40, 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. Prior to the Assignment, Appellants’ judgments⁶ were subordinate and junior to the \$3.5 million SCB&T first mortgage and \$500,000.00 second mortgage to Ameris Bank. (Pl. Exh. 16, Def. Exh. 5). Thus, when combined with the fact that the Property was only valued at approximately \$2.5 – 2.6 million (*see* Def. Exh. 18, 19), the trial court reasoned that Appellants’ interest in the Property would have been extinguished in the event of foreclosure by SCB&T. (Final Order, p. 8).

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.” (App. Brief p. 19). 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

⁶ With regards to the promissory note issued by Johnson (Pl. Exh. 6) the holder of the note would have no interests in the Property because the debt had not been taken to judgment.

wife even though she was a co-debtor) and sought to set aside the conveyance pursuant to 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. (Pl. Exh. 14). 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 (Final Order, pp 6-7) 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 (Final Order, p 7)

In their Motion for Reconsideration, Appellants did not contest this specific ruling. Instead, Appellants argued that the statute applied because (1) the Assignment of the mortgage was “a ward to keep creditors at bay and shelter Brown and Johnson”, (11) the note and mortgage was “transferred, charged, alienated, and encumbered in an effort to hinder or delay the Plaintiffs”, and (11) M Brown was a creditor of Oskin by virtue of M Brown’s co-ownership of the Property with Johnson (Memorandum in Support of Motion for Reconsideration, pp 12-14) 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 (App Brief, p 19-25) 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 (Pl Exh 10, p 1)
- J Brown is the only person that has executed any documents on behalf of the LLC (Pl Exh 9 10, 11, 12, 13, 16, 17)(Def Exh 11, 17)
- The LLC maintains its own bank account separate from M Brown from which payment on the Wachovia Loan were paid (Transcript p 109, line 20 thru p 110, 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 (Transcript p 92, line 20 thru p 93, line 13, p 122, line 23 thru p 123, 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 (Transcript p 113, lines 10-17, p 123, lines 4-21, p 245, line 25 thru p 246, line 11)
- John Lee Scott dealt predominantly with M Brown regarding the Wachovia Loan due to health issues with J Brown (Transcript p 125, line 20 thru p 126, line 6)
- The LLC was formed for the purpose of purchasing, holding and enforcing the \$3 5 million SCB&T note and mortgage (Transcript p 93, lines 14-24, p 182, lines 1-13, p 206, lines 21-23, p 216, line 3 thru p 217, line 23, p 243, line 24 thru p 244, line 3, p 247, 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 (Transcript p 94, line 24 thru p 95, line 6, p 105, lines 3-7, p 124, line 20 thru p 125, line 19)(Boyd Depo p 37, line 10 thru p 38, line 25, p 40, lines 15-20)
- The Wachovia Loan is personally guaranteed by, and is secured by separate investment accounts owned by, M Brown and J Brown (Pl Exh 12, 13, 20)(Def Exh 16)

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 ” (Transcript p 94, line 24 thru p 95, line 6, p 105, lines 3-7, p 124, line 20 thru p 125, line 19)(Boyd Depo p 37, line 10 thru p 38, line 25, p 40, 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 (App. Brief, pp. 25-27). 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.⁷ *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).

⁷ J. Brown testified that J Conner, LLC made a future advance of \$20,000 (Transcript p. 245, lines 4-12).

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 (App Brief, p 27) 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

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.

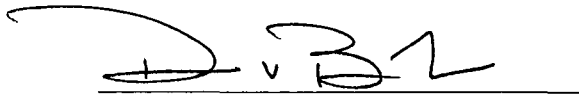
In response to Appellants’ contention that equitable subrogation was not properly pled in Respondents’ Answer, this issue was neither raised at or prior to the trial nor in Appellants’ Motion for Reconsideration, therefore, Appellants’ failed to preserve this issue for appeal. *See I’On supra* (parties 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,

A handwritten signature in black ink, appearing to read "D. V. Butler", is written over a horizontal line.

McNAIR LAW FIRM, P A
Henrietta U Golding, S C Bar No 2173
Dan V Butler, S C Bar No 72791
2411 Oak Street, Suite 206
Post Office Box 336 (29578)
Myrtle Beach, SC 29577
(843) 444-1107

Attorneys for Respondents
Michael Brown, Joan Conner Brown and J
Conner, LLC

April 18, 2011
Myrtle Beach, SC

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 2009-CP-26-3470

RECEIVED
MAR 16 2011
SC Court of Appeals

Robert W Oskin, Glenn Small,
and Freddie Kanos,

Appellants,

v

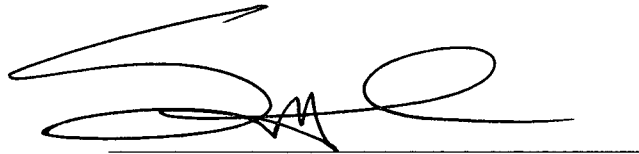
Stephen Mark Johnson, Michael Brown,
Joan Conner Brown, and J Conner LLC

Respondents

RESPONDENTS DESIGNATION OF MATTER

Pursuant to Rule 209, SC ACR, Respondent Johnson designates the following material for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209 (c), that the designation contains no matter which is irrelevant to the appeal.

1 Answer of Respondent Johnson



C. Scott Masel
Newby Sartip Masel & Casper, LLC
4593 Oleander Drive, Suite 100
Post Office Box 808
Myrtle Beach, South Carolina 29578
Attorney for Respondent Johnson

March 14, 2011
Myrtle Beach, SC

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 2009-CP-26-3470

RECEIVED

MAR 16 2011

SC Court of Appeals

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 SERVICE

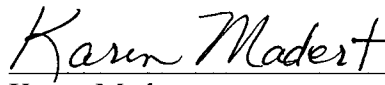
I, the undersigned Legal Assistant of the law offices of Newby Sartip Masel & Casper, LLC, attorneys for Stephen Mark Johnson, do hereby certify that I have served all counsel in this action with a copy of the Initial Brief and Designation of Matter of Respondent Johnson, hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses

Michael J Anzelmo
Nelson Mullins Riley & Scarborough LLP
1320 Main Street/ 17th Floor
Columbia, South Carolina 29201

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

Henrietta Golding
Dan V Butler
McNair Law Firm
2411 Oak Street
Myrtle Beach, South Carolina 29577

March 14, 2011


Karen Madert

NEWBY SARTIP MASEL & CASPER LLC
ATTORNEYS AT LAW

FRED B NEWBY
MICHAEL H SARTIP†
C SCOTT MASEL‡
JULIET M CASPER◊†
C LEIGH ANDREW

†ALSO ADMITTED IN NC
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TELEPHONE (843) 449 9417
FACSIMILE (843) 449 9419
RIAL ESTATE FACSIMILE (843) 429 1362
E mail nps@newbylaw.com

March 14, 2011

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumpter Street
Columbia, South Carolina 29201

RECEIVED

MAR 16 2011

RE Robert Oskin, et al v Stephen Mark Johnson, et al
Case No 2009-CP 16-3470

SC Court of Appeals

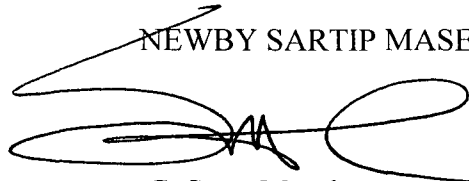
Dear Ms Gee

Enclosed you will find the original and one (1) copy of Respondent Stephen Mark Johnson's Initial Brief, Designation of Matter, and Certificate of Service in the above-referenced matter. Please file the original and return a clocked copy in the self-addressed envelope provided.

By copy of this letter and its enclosures, I am serving all counsel of record.

Very truly yours,

NEWBY SARTIP MASEL & CASPER, LLC



C Scott Masel

CSM/km
encl
cc Michael J Anzelmo
Mark a Brunty
Henrietta Golding
Dan Butler

THE STATE OF SOUTH CAROLINA
11th Court of Appeals

APPEAL FROM HORRY COUNTY
Master-In-Equity

Cynthia Graham Howe, Master-in-Equity

Case No. 2009-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

**Initial Brief of Respondent
Stephen Mark Johnson**

C. Scott Masel
Newby Sartip Masel & Casper, LLC
4593 Oleander Drive, Suite 100
Post Office Box 808
Myrtle Beach, South Carolina 29578
Attorney for Respondent Stephen Mark Johnson

RECEIVED
MAR 16 2011
SC Court of Appeals

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Table of Authorities

CASES

<u>Albertson v. Robinson</u> , 371 S. Ct. 411 (Ct. App. 2006)	2
<u>Mid-South Management Co., Inc. v. Sherwood Develop. Corp.</u> , 374 S. Ct. 588 (Ct. App. 2007)	2
<u>Pinckney v. Warren</u> , 344 S. Ct. 382, 544 S. E. 2d 620 (2001)	3

STATEMENT OF ISSUES ON APPEAL

- 1 WHETHER THE MASTER IN EQUITY PROPERLY ENTERED JUDGMENT IN FAVOR OF RESPONDENT JOHNSON WHEN THE EVIDENCE SHOWS THAT JOHNSON UNDERTOOK NO ACTION IN THIS MATTER?

STATEMENT OF THE CASE

Appellants filed this declaratory judgment action against all Respondents seeking a judgment for discharge of the SCB&T Note and Mortgage, for a finding that J Conner, LLC is the alter-ego of Respondent Brown, and for a declaration that the assignment of the SCB&T mortgage to J Conner, LLC violated the South Carolina Fraudulent Conveyance Statute. Johnson answered the complaint denying liability and asserting that he undertook no action with regard to the subject transaction [Johnson Answer]. The other Respondents also filed answers denying that Appellants were entitled to the relief sought.

The case was referred to the Master-In-Equity by order dated July 28, 2009 [Order of Reference]. Following discovery, the parties filed Motions for Summary Judgment, which were denied, and this matter proceeded to trial on February 15, 2010 [Orders Denying Summary Judgment]. By Order filed March 26, 2010, the master decided in favor of the Respondents and denied Appellants' request for relief [Order Filed March 26, 2010]. The master thereafter denied Appellants' Motion for Reconsideration to Alter or Amend or for a New Trial [Order filed May 6, 2010]. This appeal follows.

FACTS

The following discussion primarily relates to those facts which pertain to Respondent Johnson's actions, and, more notably, his inactions with regard to the subject case

Johnson owns the subject property with Respondent Michael Brown as tenants in common. It is not disputed that Appellants are creditors of Johnson. Moreover, it is not disputed that the creditor claims of Oskin and O'Connell serve as judgment liens on Johnson's half interest in the property.¹

Notably, however, that is where Johnson's role in this case ends. There is no evidence that Johnson conveyed any property or interest in property, nor any evidence that he personally participated in the forming of, or took any ownership or control interest in, J Conner, LLC, nor any evidence that he made any decisions or undertook any actions with regard to the manner of payment of money by one bank to another, nor any evidence that he engaged in any activity whatsoever for any purpose or intent to hinder his creditors' claims. Indeed, the only pertinent evidence of record simply reflects that Johnson, at all times relevant, was broke, and did nothing other than simply remain individually subject to the claimed debts of the Appellants.

STANDARD OF REVIEW

Appellants seek review of their claims to set aside a transfer as fraudulent and under an alter-ego theory, both of which are equitable in nature. Albertson v. Robinson, 371 S.C. 311 (Ct. App. 2006), Mid-South Management Co., Inc. v. Sherwood Develop. Corp., 374 S.C. 588 (Ct. App. 2007). Therefore, as these are actions in equity, this Court may find facts in accordance with its own view of the preponderance of the evidence. Pickney v. Warren, 344 S.C. 382 (2001).

¹ It is equally undisputed that the Appellants are not creditors of Michael Brown nor do their creditor claims serve as liens on Michael Brown's half interest in the property.

ARGUMENT

1 THE MASTER IN EQUITY PROPERLY FOUND IN FAVOR OF RESPONDENT JOHNSON AS TO ALL CAUSES OF ACTION

A Statute of Elizabeth

The Statute of Elizabeth generally voids any such transaction “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 ” S C Code Ann § 27-12-10(A)

Respondent Johnson engaged in no transaction He was not even consulted about the status of the SCB&T note and mortgage [Trans P 156] In fact, any possible participation by Johnson would have been “futile, fruitless”, as Johnson had no money and had no assets [Id] Moreover, he was not involved in the formation of J Conner, LLC [Trans P 215] As such, Johnson had no conversations with anyone at Wachovia, was not a party to any transaction with Wachovia, and his personal finances had nothing to do with the loan from Wachovia to J Conner, LLC [Trans P 126, 127] The preponderance of evidence, if not the totality of evidence, reflects that Respondent Johnson did not engage in any transaction remotely applicable to the Statute of Elizabeth, and that he undertook no action that could be construed as being performed with the intent or purpose to hinder or defraud his creditors Therefore, the master’s order in this regard should be affirmed

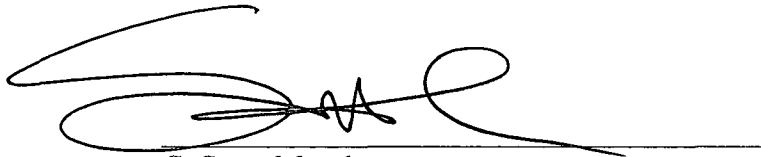
B Alter-Ego

As described above, Respondent Johnson did not participate in any manner with regard to the formation or activities of J Conner, LLC, nor is there any allegation that he did Again, at all times relevant, Johnson was broke and there is no allegation that he performed any action that

could be construed as a payment or satisfaction of the SCB&T loan. Therefore, the master's order in this regard should be affirmed.

CONCLUSION

For the reasons set forth above, the Orders of the Master In Equity finding in favor of Respondent Johnson should be affirmed.

A handwritten signature in black ink, appearing to read 'C. Scott Masel', is written over a horizontal line.

C. Scott Masel
NEWBY, SARTIP, MASEL & CASPER
4593 Oleander Drive
Myrtle Beach, SC 29577
(843) 449-9417
Attorney for Respondent
Stephen Mark Johnson

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

Appellants Designation of Matter

Pursuant to Rule 209, SCACR, Appellants designate the following material for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation contains no matter which is irrelevant to the appeal.

Orders

- 1 Final order dated March 26, 2010
- 2 Order denying Appellants' Rule 59 motion dated May 6, 2010
- 3 Order denying Appellants' Motion for Summary Judgment
- 4 Order denying Respondents' Motion for Summary Judgment
- 5 Order granting summary to Oskin against Johnson dated December 11, 2008

RECEIVED

FEB 17 2011

SC Court of Appeals

6 Amended order of Judge Goodstein

7 Order of Reference

8 Notice of Appeal

Pleadings/Motions

9 Summons and Complaint dated April 2009

10 Answer of Respondents Michael Brown, Joan Conner Brown, and J Conner
LLC

11 Appellants' Motion for Summary Judgment and Memorandum in Support with
exhibits

12 Appellants' Motion to Alter or Amend or for a New Trial and Memorandum in
Support

Transcripts

13 February 15, 2010 trial transcript

14 Deposition of Jim Boyd p 29-30

Exhibits/Documents

15 Affidavits of Anne Wilson dated May 22, 2009 and August 19, 2009

16 Deed to Lot 13, Grande Dunes, recorded December 5, 2006 in Book 3198,
Page 1933

17 \$3 5 million Note to SCB&T dated November 30, 2006

18 \$3 5 million Mortgage to SCB&T recorded November 30, 2006

19 Assignment of Note dated December 30, 2008

20 Allonge to Note

21 Assignment of Mortgage recorded January 14, 2009

- 22 Articles of Organization of J Conner LLC filed November 20, 2008
- 23 Limited Liability Operating Agreement of J Conner LLC
- 24 \$3 5 million Promissory Note to Wachovia Bank dated December 16, 2008
- 25 Security Agreement to Wachovia Bank dated December 16, 2008
- 26 Control Agreement to Wachovia Bank dated December 16, 2008
- 27 Unconditional Guaranty of Michael Brown dated December 16, 2008
- 28 Letter to North Carolina Secretary of State from McGirt expediting the filing of J Conner LLC

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

Attorney for Appellants

Columbia, South Carolina

February 17, 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 SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Robert W Oskin, Glenn Small, and Freddie Kanos, do hereby certify that I have served all counsel 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

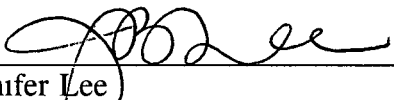
Appellants' Initial Brief and Designation of Matter

Counsel Served

Henrietta Golding
Dan V Butler
McNair Law Firm
2411 Oak Street
Myrtle Beach, SC 29577

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FEB 17 2011
SC Court of Appeals

C Scott Masel
Newby, Sartip, et al
P O Box 808
Myrtle Beach, SC 29578



Jennifer Lee
Administrative Assistant

February 17, 2011

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

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February 17, 2011

Hand Delivered

The Honorable Tanya A. Gee
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Robert Oskin, et al v Johnson, et al
Case No 09-CP-26-3470
Our file no 37169/01500

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FEB 17 2011
SC Court of Appeals

Dear Ms. Gee

Enclosed please find an original and one copy of Appellants' Initial Brief and Designation of Matter in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am serving counsel of record.

Very truly yours,



Michael J. Anzelmo

MJA:lee

Enclosures

cc Henrietta Golding
Dan V. Butler
C. Scott Masel

The South Carolina Court of Appeals

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 Henry D McMaster, Attorney
General is,

Intervening Party

The Hon Cynthia Howe
Horry County
Trial Court Case No 2009-CP-26-03470

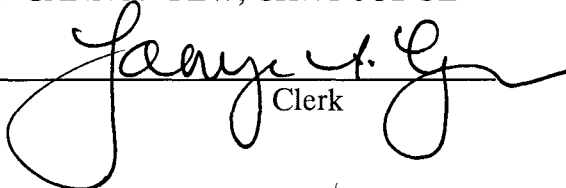
ORDER

Pursuant to a telephone conference with the parties, the Appellants' Initial Brief and Designation of Matter are due on February 17, 2011 The Respondents' Initial Brief and Designation of Matter are due April 18, 2011 The Appellants' Initial Reply Brief is due thirty days thereafter

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

BY


Clerk

Columbia, South Carolina

cc Mark Andrew Brunty, Esquire
Michael J Anzelmo, Esquire
C Scott Masel, Esquire
Danny Villacarlos Butler, Esquire
Henrietta Golding

FILED

2/16/10



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

JOHN C. CALHOUN BUILDING
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 734-1890
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E MAIL jfew@sccourts.org

November 13, 2010

Michael J. Anzelmo, Esquire
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P O Box 808
Myrtle Beach, SC 29578-0808

Danny Villacarlos Butler, Esquire
Henrietta Golding
P O Box 336
Myrtle Beach, SC 29578

Re Oskin, Robert v Johnson, Stephen
2010164046

Dear Counsel

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until December 17, 2010. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 10:00 a.m. on Monday, December 6, 2010 to discuss an overall approach to setting due dates for all filings in this appeal. **The Appellant is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes.

The participants in the call. I include counsel for all parties and in preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Monday, December 6, 2010

Sincerely yours,

John Cannon Few, by Janyce L. Gen
John Cannon Few Clerk

JFC/mpm

FILED
11/23/10

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law
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November 12, 2010

Hand Delivered

The Honorable Tanya A Gee
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street, Fifth Floor
Columbia, South Carolina 29201

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SC Court of Appeals

RE Robert W Oskin, et al v Stephen Mark Johnson, Michael Brown, Joan
Connor Brown, and Jay Connor LLC
Case No 06-CP-26-2371
Our file no 37169/01500

Ms Gee

Due to the fact that undersigned counsel was recently retained as well as other work obligations, Appellant Robert Oskin respectfully requests a thirty (30) day extension of time to file his Initial Brief and Designation of Matter in the above-referenced action. This is the first request for an extension of time. According to our calculations our Initial Brief and Designation are currently due on November 17, 2010. With the additional thirty day extension, Appellant's Initial Brief and Designation of Matter will be due on December 17, 2010. Respondent's counsel, Ms Henrietta Golding, Esquire, consents to this request. Lastly, we ask that the filing deadline be held in abeyance pending resolution of this motion.

Our check for \$25.00 is enclosed as the required motion fee. With kind regards, I remain

Very truly yours,



Michael J Anzelmo

MJA jbl

cc Henrietta Golding
C Scott Masel

11/17/10 18
12/17/10

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

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michael.anzelmo@nelsonmullins.com

October 27, 2010

The Honorable Tanya A Gee
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Robert W Oskin, Glen Small, et al v Stephen Mark Johnson, Michael Brown,
Joan Connor Brown, and Jay Connor LLC
Civil Action No 06-CP-2371

Dear Ms Gee

Please allow this letter to advise the Court that Appellant Oskin received the transcript in the above-referenced matter on October 18, 2010 Per my calculations, Appellant Oskin's initial brief and designation of matter is due on November 17, 2010

Very truly yours,



Michael J Anzelmo

MJA jbl

cc Mark Brunty, Esquire
Henrietta Golding, Esquire
C Scott Masel, Esquire

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OCT 29 2010
SC Court of Appeals

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 06-CP-26-2371

Robert W Oskin, Glenn Small, and Freddie Kanos, Appellants,

v

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

NOTICE OF APPEARANCE

Michael J Anzelmo of the law firm of Nelson Mullins Riley & Scarborough, LLP, hereby enters his appearance as counsel of record on behalf of Appellant Robert W Oskin

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

Attorney for Robert W Oskin

Columbia, South Carolina

October 27, 2010

RECEIVED

OCT 28 2010

SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Robert W Oskin a/k/a Woody Oskin, do hereby certify that I have served all counsel 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

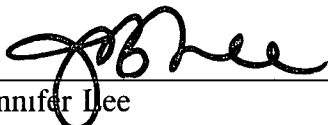
Notice of Appearance

Counsel Served

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Jennifer Lee
Administrative Assistant

October 27, 2010

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OCT 28 2010

SC Court of Appeals

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michael.anzelmo@nelsonmullins.com

October 27, 2010

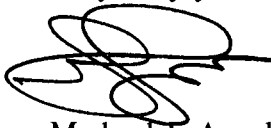
The Honorable Tanya A Gee
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Robert W Oskin, Glen Small, et al v Stephen Mark Johnson, Michael Brown,
Joan Connor Brown, and Jay Connor LLC
Civil Action No 06-CP-2371

Dear Ms Gee

Please find enclosed a Notice of Appearance for Appellant Robert W Oskin We ask that all future correspondence be direct to my attention Please let me know if you need any additional information

Very truly yours,



Michael J Anzelmo

MJA jbl

cc Mark Brunty, Esquire
Henrietta Golding, Esquire
C Scott Masel, Esquire

RECEIVED
OCT 28 2010
SC Court of Appeals

RAYL REPORTING SERVICE

P O Box 2833
Myrtle Beach S C 29578
843 293 1774 843-424 3431

RECEIVED

OCT 18 2010

October 14, 2010

South Carolina Office of Court Administration
1015 Sumter Street S-201
Columbia, S C 29201

SC Court of Appeals

RE Robert W Oskin, Glenn R Small, and Freddie Kanos
Appellants, vs Stephen Mark Johnson, Michael Brown
Joan Conner Brown, and J Conner, LLC, Respondents,
And which State of South Carolina ex rel Henry
D McMaster, Attorney General is, Intervening Party

Dear Sir or Madam

I am in receipt of a letter from Brunty Law Firm dated October 12th, 2010 sent to you by Mark Brunty regarding the transcript of the hearing in the above entitled matter. The letter states that Mr Brunty has not received the final transcript and is unaware of an extension being granted or requested by the Court Reporter. As I am the Court Reporter in this case, I thought I would write to state the facts of what has happened to this point and why the hard copy of the transcript was not delivered sooner.

- 1) On March 8, 2010, Mr Brunty requested that I transcribe the proceedings of the hearing that took place on February 15, 2010.
- 2) I then proceeded to transcribe the case and sent an e-transcript to Mr Brunty at Brunty Law Firm, on 4-16-10, as he had requested it sent in that fashion and sent an invoice for my work.
- 3) I received an e-mail from Mr Brunty on 6-19-2010 saying that he needed to order a hard copy per the Rules and shortly afterward received a letter from Mr Brunty asking for the hard copy.
- 4) I produced that hard copy by 7-25-10 and e-mailed to tell Mr Brunty it was ready for delivery, that I had been out of the office due to some health issues that required me to have tests done in the hospital and it had taken me a few days past the 30 days allowed to put it out, but before it could be mailed, I received a phone call from Mr Brunty saying that it was okay, that he was actually going to see if I could hold it for awhile as his wife had a new baby and he needed some time out of the office, which I agreed to do.
- 4) I received a check later that week dated 7-26-2010 in payment for the transcript and my appearance at this hearing. Before

I could cash the check, I got another phone call from Mr Brunty asking me to hold the check, as the money was no longer in the account and that he would let me know when to deposit the check. I asked him then if he wanted me to send the transcript and he said he would let me know when to deposit the check and send the transcript. That is the last communication before this letter that I received from Mr Brunty or his firm. I was still waiting to hear when he wanted it delivered.

- 5) I received a phone call from Ms Golding's office, McNair Law Firm a few days ago asking me the status of this transcript. I told them the same thing I stated above, that it had been produced and e-traned, but I was asked to hold the hard copy. I told them I would e-tran them a copy and mail out the hard transcript this week, which I have done.

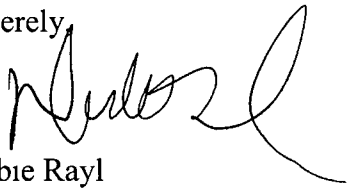
I wanted to let everyone know what happened in this instance, as the letter seems to indicate that I should have asked for an extension of time to produce this transcript. I obviously did not ask or need an extension since I did produce the transcript in a timely manner, as evidenced by the check that I am in possession of, as well as emails showing the delivery of the e-tran and correspondence. I am totally perplexed as to why the letter would seem to indicate that I had been lax in preparing the transcript when Mr Brunty was in possession of the e-tran and knew he could have the hard copy by simply sending an e-mail or phone call. I apologize if I misconstrued any of Mr Brunty's requests, but the transcript has been ready since April, 2010 and could have been delivered at any time.

I have sent out the hard copy of this transcript and am copying this letter to all parties involved. I was not holding the transcript, but only waiting for Mr Brunty to let me know he was ready to have it delivered, since he is the party that requested the hearing be transcribed and as I have been very busy had not followed up with him, but simply waited for him to let me know he still wanted it. I was unaware of whether the case had settled or what the status of it was, as I had had no further correspondence with Mr Brunty.

Hopefully this will clear up any mystery as to why the transcript was not delivered before now and I apologize if I did anything wrong in holding the transcript per Mr Brunty's request. It was not my intent to hold up any proceedings, but simply to comply with Mr Brunty's wishes in this matter, as he is the Party who ordered the transcript from me.

Thank you for your attention to this matter and let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Debbie Rayl', with a long, sweeping horizontal stroke extending to the right.

Debbie Rayl
Court Reporter

Cc McNair Law Firm
 Brunty Law Firm
 S C Attorney General's Office
 Newby, Sartip, Masel & Casper
 Tanya A Gee, Clerk of Court

BRUNTY LAW FIRM

October 12, 2010

RECEIVED
OCT 14 2010
SC Court of Appeals

South Carolina Office of Court Administration
1015 Sumter Street, Suite 201
Columbia, SCS 29201

Re Robert W Oskin Glenn R Small and Freddie Kanos Appellants,
vs Stephen Mark Johnson Michael Brown Joan Conner Brown
and J Conner LLC, Respondents And which State of South Carolina ex
rel Henry D McMaster, Attorney General is Intervening Party

2010164046

Dear Sir or Madam

I am writing in response to a letter from the Clerk of the Court of Appeals dated October 5, 2010 regarding the transcript in this matter I have not yet received the final transcript in this matter I am unaware of an extension being granted or requested by the Court Reporter

Thank you for your assistance in this matter

Sincerely,

BRUNTY LAW FIRM, INC



Mark A Brunty

Enclosures

cc Tanya A Gee Clerk of Court
Other Counsel of Record (see following page)
Rayl Reporting Services

Other Counsel of Record

Daniel Butler
Henrietta Golding
McNair Law Firm, P A
P O Box 336
Myrtle Beach SC 29578
Attorneys for Respondents Michael
Brown, Joan Conner Brown and J
Conner Brown LLC

Warren Ganjehsani
S C Attorney General's Office
P O Box 11549
Columbia SC 29211
Intervening Party

The Honorable Tanya A Gee
Clerk South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

C Scott Masel
Newby Sartip Masel & Casper, LLC
P O Box 808
Myrtle Beach, SC 29578
Attorney for Respondent Stephen Mark Johnson



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29901
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

October 5, 2010

Mark Andrew Brunty, Esquire
Brunty Law Firm
P O Box 70907
Myrtle Beach, SC 29572

Re Oskin, Robert v Johnson, Stephen
2010164046

Dear Mr Brunty

Our records indicate that the transcript in the above matter should have been delivered by August 17, 2010. As of today's date, we have received no information indicating that the court reporter has been granted an extension, nor have we received your initial brief.

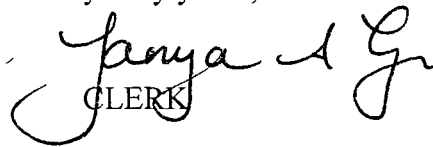
If you have not yet received the transcript, you must contact the Office of Court Administration per Rule 207 of the South Carolina Appellate Court Rules. The address for Court Administration is as follows:

South Carolina Office of Court Administration
1015 Sumter Street, Suite 201
Columbia, SC 29201

Be sure to copy the Court and opposing counsel with all correspondence concerning the transcript.

Please advise the Court of the status of the transcript within ten (10) days of the date of this letter, or your appeal may be dismissed.

Very truly yours,


CLERK

TAG/mpm

cc C Scott Masel
Danny Villacarlos Butler, Esquire
Henrietta Golding

AMENDED NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe Master in Equity

Case No 2009-CP-26-3470

RECEIVED

JUL 27 2010

SC Court of Appeals

Robert W Oskin, Glenn R Small, and Freddie
Kanos,

Appellants,

v

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

Respondents,

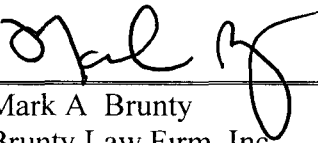
And which State of South Carolina ex rel Henry
D McMaster, Attorney General is,

Intervening Party

AMENDED NOTICE OF APPEAL

Robert W Oskin, Glenn R Small, and Freddie Kanos appeal the order of the Honorable Cynthia Graham Howell dated May 5, 2010 Appellant received written notice of entry of this order on May 25, 2010 Further, Appellant received a request to Amend the Notice of Appeal on July 23, 2010

July 26, 2010



Mark A Brunty
Brunty Law Firm, Inc
Post Office Box 70907
Myrtle Beach, South Carolina 29572
(843) 449-1500
Attorney for Appellants

(Other Counsel of Record on following page)

Other Counsel of Record

Daniel Butler

Henrietta Golding

McNair Law Firm, P A

P O Box 336

Myrtle Beach, SC 29578

Attorneys for Respondents Michael

Brown, Joan Conner Brown and J

Conner Brown, LLC

Warren Ganjehsani

S C Attorney General's Office

P O Box 11549

Columbia, SC 29211

Intervening Party

C Scott Masel

Newby Sartip Masel & Casper, LLC

P O Box 808

Myrtle Beach, SC 29578

Attorney for Respondent Stephen Mark Johnson

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Cynthia Graham Howe, Master In Equity

Case No 2009-CP-26-3470

RECEIVED

JUL 27 2010

SC Court of Appeals

Robert W Oskin Glenn R Small,
And Freddie Kanos,

Appellants,

v

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

Respondents

CERTIFICATE OF SERVICE

The undersigned attorney for the Appellants hereby certifies that a copy of the AMENDED NOTICE OF APPEAL in the above-referenced matter was deposited in the U S Mail and addressed to the following on the 26th day of July, 2010

Daniel Butler Esquire
Henrietta Golding Esquire
McNair Law Firm P A
PO Box 336
Myrtle Beach SC 29578

C Scott Masel Esquire
Newby Sartip Masel & Casper LLC
PO Box 808
Myrtle Beach SC 29578

Warren Ganjehsani
SC Attorney General's Office
PO Box 11549
Columbia SC 29211

Honorable Melanie Huggins
Horry County Clerk of Court
PO Box 677
Conway SC 29526

BRUNTY LAW FIRM, INC

Bv


Mark A Brunty, Esquire
S C Bar No 68295
4605-B Oleander Drive, Suite 203
Myrtle Beach SC 29577
(843)449-1500
Attorney for the Appellants

July 26, 2010

BRUNTY LAW FIRM, INC.

P O Box 70907
MYRTLE BEACH, SC 29572
PHONE (843) 449 1500
FAX (843) 492 5675
mbrunty@bruntylaw.com

July 26 2010

RECEIVED

JUL 27 2010

SC Court of Appeals

The Honorable Tanya A Gee
Clerk South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Robert W Oskin Glenn R Small, and Freddie Kanos, Appellants,
vs Stephen Mark Johnson Michael Brown Ioan Conner Brown
and J Conner, LLC, Respondents And which State of South Carolina ex
rel Henry D McMaster, Attorney General is, Intervening Party

2010164046

Dear Ms Gee

Enclosed for filing in your office is the original Amended Notice of Appeal regarding the above-referenced matter, which is being sent to you along with a Certificate of Service This is sent in response to your letter of June 22, 2010, which was not received by my office until July 23, 2010 I am unaware of why the mailing was delayed

By copy of this correspondence I am herewith serving Henrietta Golding Esquire, Daniel Butler Esquire, and C Scott Masel, Esquire, as evidenced by the enclosed Certificate of Service In addition I am forwarding two copies of the Notice of Appeal to the Honorable Melanie Huggins, Clerk of Court for Horry County, and requesting that she file same and return a copy of the Notice to me

Thank you for your assistance in this matter

Sincerely

BRUNTY LAW FIRM, INC



Mark A Brunty

Enclosures

cc Honorable Melanie Huggins Horry County Clerk of Court
Other Counsel of Record (see following page)

• Other Counsel of Record

Daniel Butler
Henrietta Golding
McNair Law Firm, P A
P O Box 336
Myrtle Beach, SC 29578
Attorneys for Respondents Michael
Brown, Joan Conner Brown and J
Conner Brown, LLC

Warren Ganjehsani
S C Attorney General's Office
P O Box 11549
Columbia, SC 29211
Intervening Party

C Scott Masel
Newby Sartip Masel & Casper, LLC
P O Box 808
Myrtle Beach SC 29578
Attorney for Respondent Stephen Mark Johnson

BRUNTY LAW FIRM, INC.

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MYRTLE BEACH, SC 29572
PHONE (843) 449-1500
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mbrunty@bruntylaw.com

RECEIVED
JUN 22 2010
SC Court of Appeals

June 18 2010

Debbie Rayl
Post Office Box 2833
Myrtle Beach South Carolina 29578

RE *Robert H. Oskin et al vs Stephen Mark Johnson et al*
Civil Action # 2009-CP-26-3470

Dear Mrs. Rayl

On February 15, 2010 the above case was tried before the Honorable Cynthia Graham Howe Master-in-Equity for Horry County. Please allow this letter to confirm our telephone conversation wherein I ordered the transcript of the hearing. It is my understanding that you have prepared the transcript and will be providing it soon. Upon delivery I will pay the per page charge as provided by Rule 607 SCACR.

Thank you for your attention to this matter.

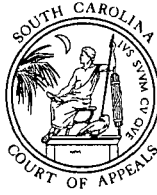
Sincerely,



Mark A. Brunty
MAB/mm

Enclosures

cc S C Court Administration
Clerk Court of Appeals
Warren Ganjehsani Esquire
Dan Butler Esquire
Henrietta Golding Esquire
C. Scott Masel Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

June 22, 2010

Mark Andrew Brunty, Esquire
Brunty Law Firm
P O Box 70907
Myrtle Beach, SC 29572

Re Oskin, Robert v Johnson, Stephen
2010164046

Dear Mr Brunty

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

Upon review, it has come to the Court's attention that it is not clear which counsel represents which party.

Furthermore, the caption should read as follows:

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
Henry D. McMaster, Attorney General is,

Intervening Party

Please provide this Court with an Amended Notice of Appeal showing which counsel represents which party and with the correct caption within ten (10) days of the date of this letter.

We suggest that large cells such as copies of final briefs and the ord On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201 Thank you for your attention to this Failure to file in the proper court may result in the dismissal of your appeal

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization issuance, or proposed issuance of general obligation debt, revenue institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours

V. Claire Allen, Deputy

Tanya A Gee
CLERK

TAG/mpm

cc C Scott Masel
Danny Villacarlos Butler, Esquire
Henrietta U Golding, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

June 22, 2010

Mark Andrew Brunty, Esquire
Brunty Law Firm
P O Box 70907
Myrtle Beach, SC 29572

Re Oskin, Robert v Johnson, Stephen
2010164046

Dear Mr Brunty

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/mpm

cc C Scott Masel
Danny Villacarlos Butler, Esquire
Henrietta U Golding, Esquire

The Supreme Court of South Carolina

RE Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution our State Constitution and our common law, court records are presumptively open to the public and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc. 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions, documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts:

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix, and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall

be the same as that required for the brief record on appeal motion or other filing that includes the redacted documents

If the caption of the case contains any of the personal data identifiers listed above the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e. In the Interest of John S. a Juvenile)

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings *supra* must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed, the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED

s/Jean H. Toal _____ C J

s/James E. Moore _____ J

s/John H. Waller, Jr. _____ J

s/E. C. Burnett, III _____ J

s/Costa M. Pleicones _____ J

Columbia, South Carolina

August 13, 2007

¹ See e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 SCACR; Rule 402(n) SCACR; and Rule 403(l) SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402 SCACR requires many of these personal identifiers to be disclosed.

PM 06/18/10
PO 06/10/10

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howell, Master in Equity

Case No 2009-CP-26-3470

RECEIVED
JUN 18 2010
SC Court of Appeals

Robert W Oskin, Glenn R
Small, and Freddie Kanos,

Appellants

v

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

Respondents

NOTICE OF APPEAL

Robert W Oskin, Glenn R Small, and Freddie Kanos appeal the order of the Honorable Cynthia Graham Howell dated May 5, 2010 Appellant received written notice of entry of this order on May 25, 2010

June 3, 2010



Mark A Brunty
Post Office Box 70907
Myrtle Beach, South Carolina 29572
(843) 449-1500
Attorney for Appellants

Other Counsel of Record
Daniel Butler
Henrietta Golding
McNair Law Firm, P A
P O Box 336
Myrtle Beach, SC 29578

C Scott Masel
Newby Sartip Masel & Casper, LLC
P O Box 808
Myrtle Beach, SC 29578

Warren Ganjehsani
S C Attorney General's Office
P O Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Cynthia Graham Howell, Master In Equity

Case No 2009-CP-26-3470

RECEIVED

JUN 18 2010

SC Court of Appeals

Robert W Oskin, Glenn R Small,
And Freddie Kanos,

Appellants,

v

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

Respondents

CERTIFICATE OF SERVICE

The undersigned attorney for the Appellants hereby certifies that a copy of the NOTICE OF APPEAL in the above-referenced matter was deposited in the U S Mail and addressed to the following on the 10th day of June, 2010

Daniel Butler, Esquire
Henrietta Golding, Esquire
McNair Law Firm, P A
PO Box 336
Myrtle Beach, SC 29578

C Scott Masel, Esquire
Newby, Sartip, Masel & Casper, LLC
PO Box 808
Myrtle Beach, SC 29578

Warren Ganjehsani
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Honorable Melanie Huggins
Horry County Clerk of Court
PO Box 677
Conway, SC 29526

BRUNTY LAW FIRM, INC

By



Mark A Brunty, Esquire
S C Bar No 68295
4605-B Oleander Drive, Suite 203
Myrtle Beach, SC 29577
(843)449-1500
Attorney for the Appellants

BRUNTY LAW FIRM, INC.

P O Box 70907
MYRTLE BEACH, SC 29572
PHONE (843) 449 1500
FAX (843) 492 5675
MBRUNTY@BRUNTYLAW.COM

June 15, 2010

RECEIVED

JUN 18 2010

SC Court of Appeals

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Robert W Oskin, Glenn R Small, and Freddie Kanos, Appellants,
vs Stephen Mark Johnson, Michael Brown, Joan Conner Brown,
and J Conner, LLC, Respondents
Civil Action No 2009-CP-26-3470

Dear Ms Gee

Enclosed for filing in your office is the original Notice of Appeal regarding the above-referenced matter, which is being sent to you along with a Certificate of Service and copy of the Orders being challenged I also enclose my check in the amount of \$100 00 for the filing fee

By copy of this correspondence, I am herewith serving Henrietta Golding, Esquire, Daniel Butler, Esquire, and C Scott Masel, Esquire, as evidenced by the enclosed Certificate of Service In addition, I am forwarding two copies of the Notice of Appeal to the Honorable Melanie Huggins, Clerk of Court for Horry County, and requesting that she file same and return a copy of the Notice to me

Thank you for your assistance in this matter

Sincerely,

BRUNTY LAW FIRM, INC

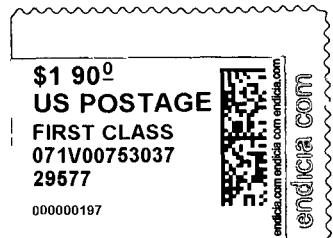


Mark A Brunty

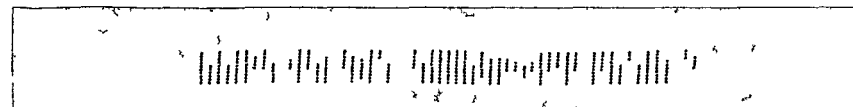
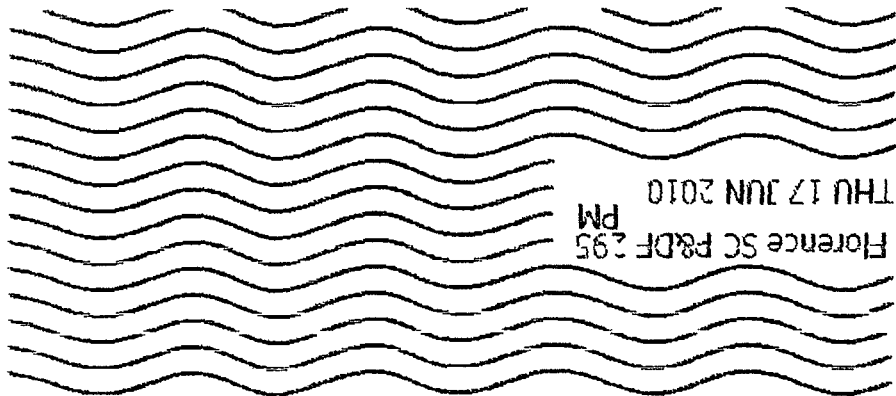
Enclosures

cc Honorable Melanie Huggins, Horry County Clerk of Court
Henrietta Golding, Esquire
Daniel Butler, Esquire
C Scott Masel, Esquire

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The Honorable Tanya Gee
Clerk South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A 2009-CP-26-3470

Robert W Oskin Glenn Small,
and Freddie Kanos

Plaintiffs,

vs

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

Defendants,

Of which,

State of South Carolina *ex rel*
Henry D McMaster, Attorney General

Intervening Party

ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION
TO ALTER OR AMEND OR FOR
A NEW TRIAL

FILED
HORRY COUNTY
2010 MAY -6 AM 10:27
PAULE HUGGINS-MARL
CLERK OF COURT

A hearing was held April 30 2010 upon Plaintiffs Motion to Alter or Amend the Final
Order Ending Action dated March 25, 2010, or for a New Trial

After careful consideration of the arguments of counsel and Memorandum submitted to
this Court, Plaintiffs have failed to demonstrate any error of fact or law sufficient to alter or
amend the Final Order or that a new trial is warranted

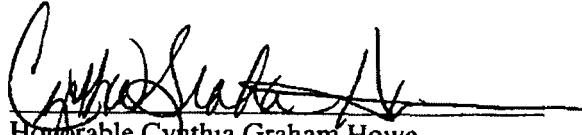
However, there exists a scrivener s error on the second paragraph of the first page of the
Final Order wherein the date of the Final Hearing should have been "February 15, 2010"

THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Alter or Amend
the Final Order Ending Action dated March 25 2010, or for a New Trial, is hereby denied,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the second paragraph of the first page of the Final Order shall be revised as follows 'February 15, 2009 shall be deleted and replaced with "February 15, 2010",

IT IS SO ORDERED


Honorable Cynthia Graham Howe
Master-in Equity for Horry County

May 5, 2010
Conway, South Carolina

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CPT

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Robert W Oskin, Glenn Small,
and Freddie Kanos,

Plaintiffs,

vs

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

Defendants,

Of which,

State of South Carolina *ex rel*
Henry D McMaster, Attorney General,

Intervening Party

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A 2009-CP-26-3470

FINAL ORDER
ENDING ACTION

2010 MAR 25 AM 9 48
CLERK OF COURT

 Pursuant to Rule 53(e) of the South Carolina Rules of Civil Procedure, and by Consent Order of Reference issued by the Honorable Larry B Hyman on June 12, 2009, this case was referred to the Master-in-Equity for Horry County to make appropriate findings of fact and conclusions of law, with authority to enter a final judgment, with any appeal from the final judgment to be to the South Carolina Court of Appeals or Supreme Court

The Final Hearing was held February 15, 2009 All parties entitled to notice were duly and timely served with notice of the Final Hearing

Appearing at the Final Hearing were (i) Mark A Brunty, attorney for the Plaintiffs, (ii) Henrietta U Golding and Dan V Butler, attorneys for the Defendants Michael Brown, Joan Conner Brown and J Conner, LLC, and (iii) C Scott Masel, attorney for the Defendant Stephen Mark Johnson The State of South Carolina *ex rel* Henry D McMaster, Attorney General, did

not appear at the Final Hearing Plaintiffs' counsel advised the Court that the State elected not to appear and would abide by any order issued by this Court in this action

STATEMENT OF THE CASE

The Complaint was filed April 6, 2009 alleging causes of action for Declaratory Judgment and "Punishment Under South Carolina Fraudulent Conveyance Statute" relating to an assignment of a promissory note and mortgage from South Carolina Bank and Trust, N A to the Defendant J Conner, LLC that occurred on or about December 30, 2008 Plaintiffs allege that (i) the payment relating to the assignment resulted in pay-off of the note, (ii) the pay-off of the note extinguished the mortgage, and (iii) the assignment of the note and mortgage was a fraudulent conveyance in violation of S C Code Ann § 27-23-10 *et seq* , also known as the "Statute of Elizabeth " Plaintiffs seek recovery of the civil penalty under S C Code Ann § 27-23-30, to set aside the assignment of the note and mortgage and for this Court to declare the mortgage void

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Originally, South Carolina Bank and Trust, N A was a Defendant, however, it was dismissed by Stipulation of Dismissal filed September 2, 2009 In addition, the State of South Carolina *ex rel* Henry D McMaster, Attorney General moved to intervene as a party, which motion was granted September 2, 2009

Plaintiffs amended their Complaint on November 20, 2009 to incorporate a Confession of Judgment in favor of David O'Connell against the Defendant Stephen Mark Johnson which Confession was assigned to the Plaintiff Robert O Oskin

Based on the witness testimonies and documentary evidence presented at the Final Hearing and applicable law, I find and conclude as follows

FINDINGS OF FACT

1 On November 30, 2006, the Defendants Michael Brown and his wife's nephew, Stephen Mark Johnson, purchased a lot and home in the Grande Dunes Oceanfront Development located in Myrtle Beach, South Carolina (hereinafter the "Property") Title to the Property was conveyed to Michael Brown and Stephen Mark Johnson as tenants in common

2 The Property purchase was financed by a loan obtained by Michael Brown and Stephen Mark Johnson, jointly, from South Carolina Bank and Trust, N A ("SCB&T") in the principal amount of \$3 5 million (the "Note") The Note provided for interest-only payments for the first 23 months, with a final balloon payment due on or about November 30, 2008

3 The Note is secured by a first mortgage lien on the Property (the "Mortgage")

4 The Property is also encumbered by a second mortgage lien in favor of Ameris Bank in the amount of \$500,000 00 recorded April 27, 2007 The loan secured by the second mortgage lien remains outstanding

5 Michael Brown, a Charlotte resident, testified that he expected his nephew, Stephen Mark Johnson, to make the payments on both loans and that initially, Stephen Mark Johnson did, in fact, pay the monthly interest payments, taxes and insurance on these loans Then in early 2008, Stephen Mark Johnson could no longer pay, which required Mr Brown to pay the monthly interest payments on the loans as well as the taxes and insurance for the Property

6 Prior to the maturity date on the Note, Michael Brown negotiated with SCB&T regarding the purchase of the Note and Mortgage

7 After weeks of negotiation, SCB&T agreed to assign the Note and Mortgage at face value and, on December 30, 2008, SCB&T assigned the Note and Mortgage to J Conner, LLC, a North Carolina limited liability company formed for the purpose of acquiring, holding and, if necessary, enforcing the Note and Mortgage

8 Joan Conner Brown, wife of Michael Brown, is the sole member of J Conner, LLC

9 As consideration for the assignment of the Note and Mortgage, SCB&T was paid a total of \$3,544,303.31, comprised of the proceeds of a loan obtained by J Conner, LLC from Wachovia Bank, N A ("Wachovia Bank") in the principal amount of \$3.5 million (the "Wachovia Loan"), plus a personal check from Michael Brown for \$44,303.31

10 Both Michael Brown and Joan Conner Brown negotiated with Wachovia Bank in obtaining the Wachovia Loan. The Wachovia Loan is secured by investment securities owned by Michael Brown and investment securities owned by Joan Conner Brown. In addition, Michael Brown and Joan Conner Brown each executed an Unconditional Guaranty for the payment of the Wachovia Loan.

11 J Conner, LLC maintains a business account at Wachovia Bank from which the monthly payments under the Wachovia Loan are automatically debited. In 2009, Joan Conner Brown deposited at least \$20,000.00 into her LLC's business account.

12 At or around the time of the assignment of the Note and Mortgage, the Property was worth approximately \$2.5 million.

13 Plaintiff Robert W Oskin is a judgment creditor of Stephen Mark Johnson by virtue of an Order for Summary Judgment signed December 8, 2008 by the Honorable Diane S Goodstein in the amount of \$1 million. The Order was later amended to add pre-judgment interest of \$262,499.99. Robert W Oskin testified that the premise for the judgment was a real

estate commission owed by Stephen Mark Johnson and that he did not come out of pocket for these monies owed to him by Stephen Mark Johnson

14 Robert W Oskin is also a judgment creditor of Stephen Mark Johnson by virtue of a Confession of Judgment signed by Stephen Mark Johnson in favor of David O'Connell for the amount of \$31,000 00, which Confession was assigned to Robert W Oskin for the price of \$500 00

15 Plaintiffs Glenn Small and Freddie Kanos are creditors of Stephen Mark Johnson by virtue of monies owed by Stephen Mark Johnson to them, which were not disputed

16 The claims of all Plaintiffs against Stephen Mark Johnson are subordinate in priority to the first mortgage lien securing the loan from SCB&T and to the second mortgage lien securing the loan from Ameris Bank

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17 Stephen Mark Johnson is the only Defendant indebted to any of the Plaintiffs at the time this action was commenced

18 Stephen Mark Johnson did not participate in any of the negotiations relating to the Assignment nor the Wachovia Loan

19 Before this lawsuit, none of the Plaintiffs had any business transactions with Michael Brown or his wife Joan Brown

20 None of the Plaintiffs dispute that the \$3 5 million loan from SCB&T was a valid loan Also, none of the Plaintiffs dispute the right of SCB&T to sell the Note and Mortgage

21 Neither SCB&T, nor any of the Defendants J Conner, LLC, Michael Brown or Joan Conner Brown, have ever been indebted to any of the Plaintiffs

CONCLUSIONS OF LAW

I Statute of Elizabeth

22 Plaintiffs assert that the assignment of the Note and Mortgage (hereinafter the "Assignment") violated S C Code Ann § 27-23-10, also known as the "Statute of Elizabeth," because the Assignment was effected for the specific intent and purpose of defrauding the Plaintiffs

23 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 (1976)

24 Under South Carolina jurisprudence regarding the Statute of Elizabeth, conveyances will be set aside under two conditions (1) if there is valuable consideration paid for the transfer, the transfer is made by the grantor with the actual intent to defraud his creditors and that intent is imputable to the grantee, or (2) if the transfer was made without valuable consideration, even if the transfer is made without actual intent to defraud his creditors McDaniel v Allen, 265 S C 237, 217 S E 2d 773 (1975)

25 The line of South Carolina cases applying the Statute of Elizabeth specifically require the grantor to be indebted to the complaining creditor at the time of the transfer, as made clear by the South Carolina Supreme Court

Under § 27-23-10, a transfer made without valuable consideration will be set aside as a fraudulent conveyance if the grantor was indebted to the

plaintiff at the time of the transfer and the grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect. 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.

Future Group, II v Nationsbank, 324 S C 89, 96, 478 S E 2d 45, 48-49 (1996)(citations omitted)

26 The parties to the transfer – the assignment of the Note and Mortgage – were SCB&T, the holder of the Note and Mortgage, and J Conner, LLC, the assignee. Neither of these parties are, or were ever, indebted to any of the Plaintiffs. Therefore, by the very language of the statute, the Statute of Elizabeth is not applicable to the Assignment. See In re Ducate, 369 B R 251, 258 (Bkrtcy D S C 2007)(“The Statute of Elizabeth allows a creditor to avoid a fraudulent transfer of property by a debtor”)

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27 Even if applicable, the Assignment did not violate the Statute of Elizabeth. Clearly, there was valuable consideration paid for the Assignment -- \$3,544,303.31. Thus, to prevail on this claim, the Plaintiffs must prove that the Assignment was the result of an actual intent to defraud the Plaintiffs. McDaniel *infra*.

28 Based on the witness testimonies and documentary evidence, Plaintiffs failed to prove, by the preponderance of the evidence, that the Assignment was the result of an actual intent to defraud the Plaintiffs.¹ The Assignment was effectuated only after weeks of negotiation and due diligence, and only after valuable consideration was paid to SCB&T. The funds paid to SCB&T for the Assignment, \$3,544,303.31, were from proceeds of the \$3.5 million Wachovia Loan obtained by J Conner, LLC and a personal check from Michael Brown.

¹ No South Carolina case law is dispositive on the issue of the standard of proof; however, for purposes of this Order, this Court will apply the lower standard of preponderance of the evidence.

29 This Court does not believe any “injustice” or “fraud” was perpetrated on the Plaintiffs as a result of the Assignment Plaintiffs’ interest in the Property as creditors of Stephen Mark Johnson, if any, is clearly junior and subordinate to the first and second mortgage liens on the Property held by SCB&T and Ameris Bank, respectively, in the total principal amount of \$4 million Furthermore, Plaintiffs did not dispute that the Property was valued at approximately \$2.5 million at the time of the Assignment Thus, the Property had a negative equity value of approximately \$1.5 million when considering the underlying debts secured by the first and second mortgage liens If the Assignment had not occurred and SCB&T had foreclosed on the Note and Mortgage, Plaintiffs’ interest in the Property, if any, would have been extinguished by the foreclosure action Additionally, Plaintiff Robert W Oskin testified that he did not come out of pocket for the monies owed to him by Stephen Mark Johnson pursuant to the Order of Judge Goodstein, and that he only paid \$500.00 to purchase the Confession of Judgment executed by Stephen Mark Johnson in favor of David O’Connell Finally, J Conner, LLC, Michael Brown and Joan Conner Brown are now liable on the \$3.5 million Wachovia Loan, the proceeds of which were used to purchase the Note and Mortgage

30 Based on the foregoing, even if the Statute of Elizabeth was applicable to the assignment of the Note and Mortgage, this transaction did not violate the statute

II Pay-Off of Note and Termination of Mortgage

31 Plaintiffs assert that Michael Brown is the alter ego of J Conner, LLC and, therefore, the payments made to SCB&T for the Assignment (including the proceeds of the \$3.5 million Wachovia Loan obtained by J Conner, LLC) were really payments made by Michael Brown, a co-maker on the Note The Plaintiffs continue that because Michael Brown is a co-obligor on the Note, the payments resulted in a pay-off of the Note, thereby rendering the

Mortgage cancelled, satisfied or released

32 While this Court is aware that payment of a note by a co-obligor can operate to extinguish the note and discharge the liability of any other co-obligor on that note under certain circumstances, *see Jeffcoat v Morris*, 300 S C 526, 389 S E 2d 159 (S C App 1989), this Court is not convinced by the evidence that Michael Brown is the alter ego of J Conner, LLC, nor that the funds used to pay for the Assignment were solely that of Michael Brown's Michael Brown is neither an owner nor officer of J Conner, LLC Furthermore, Plaintiffs' witness, John Scott, an officer at Wachovia Bank, testified that J Conner, LLC was an entity separate and apart from Michael Brown and the LLC's sole member, Joan Conner Brown Upon hearing the testimony of Joan Conner Brown, this Court is not convinced that Michael Brown has the requisite control over either J Conner, LLC, or its sole member, Joan Conner Brown, to be considered the alter ego of the company Joan Conner Brown appeared to be an independent woman who maintains a separate account, and owns substantial investment securities, at Wachovia Bank in her sole name Therefore, Plaintiffs have not shown, by a preponderance of the evidence, that Michael Brown is the alter ego of J Conner, LLC *See Jones v Enterprise Leasing Company Southeast et al*, 383 S C 259, 267-68, 678 S E 2d 819, 823-24 (Ct App 2009)(" [C]ontrol required for liability under an alter ego doctrine amounts to total domination of the subsidiary ")

33 This Court is also not convinced by the evidence that the recognition of J Conner, LLC as an entity separate and apart from Michael Brown would promote fraud, wrong or injustice, or would contravene public policy *See Jones*, 383 S C at 267-68, 678 S E 2d at 823-24 (in determining whether "alter ego" doctrine applies, in addition to control or dominance of the subsidiary, a party must also show that the retention of separate corporate personalities would "promote fraud, wrong or injustice, or would contravene public policy") J Conner, LLC was

properly organized in the State of North Carolina for a legitimate business purpose J Conner, LLC was recognized and accepted by Wachovia Bank, a sophisticated banking institution, as a valid business entity capable of obtaining a \$3 5 million business loan from it J Conner, LLC has a properly executed operating agreement that contains its purpose, membership rights and management provisions In addition, J Conner, LLC maintains a business account at Wachovia Bank separate and apart from Michael Brown and Joan Conner Brown Finally, according to John Scott, officer with Wachovia Bank, the formation of business entities for limited purposes, such as J Conner, LLC, is commonplace and is considered a legitimate business decision

34 Because this Court finds that Michael Brown is not the alter ego of J Conner, LLC, the issue of whether the payments made to SCB&T resulted in a “pay-off” of the Note and the automatic cancellation, satisfaction or release of the Mortgage is moot

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35 However, even if this Court were to find that the payments to SCB&T resulted in a ‘pay-off’ of the Note, Michael Brown would be equitably subrogated to Stephen Mark Johnson’s interest in the Property to the extent of the monies determined to have been paid by Michael Brown in excess of his one-half share of the obligation on the Note See United Carolina Bank v Caroprop, LTD, 316 S C 1, 3, 446 S E 2d 415, 417 (1994)([W]here 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) Michael Brown’s rights and priority with regards to his equitable interest in the Property would be the same as that of SCB&T before the Assignment 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 original creditor)

36 Further, a complete payment of the debt secured by the Mortgage would not have

required the release, cancellation or satisfaction of the Mortgage, nor would any of the Plaintiffs have had any right to require a release, cancellation or satisfaction of the Mortgage under these circumstance because the Mortgage contains a future advance clause See Central Production Credit Association v Page, 268 S C 1, 8, 231 S E 2d 210, 214 (1977)(holding that if a mortgage contains a future advance clause, the mortgage remains open and valid even after payment in full of the underlying debt)

37 In conclusion, based upon the evidence presented at the Final Hearing and applicable law

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- a The assignment of the Note and Mortgage was a valid business transaction resulting from an arms-length negotiation in which valuable consideration was paid for the Assignment,
 - b None of the Plaintiffs was a creditor of SCB&T, the party that received the consideration for the Assignment,
 - c There existed no intent to defraud any persons, much less the Plaintiffs specifically, relating to the Assignment,
 - d Michael Brown is not the alter ego of J Conner, LLC,
 - e The payment to SCB&T did not result in a “pay-off” of the Note nor the cancellation, satisfaction or release of the Mortgage, and
 - f The Note and Mortgage each remain valid and enforceable according to their respective terms

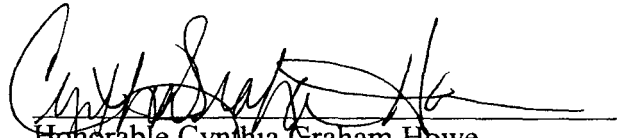
NOW THEREFORE, BASED ON THE FOREGOING,

IT IS ORDERED ADJUDGED AND DECREED that the assignment of the Note and Mortgage to J Conner, LLC was not a fraudulent conveyance in violation of S C Code Ann §

27-23-10 *et seq* , the payments made to SCB&T for the assignment of the Note and Mortgage did not result in a pay-off of the Note, thus, the Note is currently valid and enforceable pursuant to its terms, the assignment of the Note and Mortgage did not result in a cancellation, satisfaction or release of the Mortgage, thus, the Mortgage is currently valid and enforceable pursuant to its terms, and the Plaintiffs' claims be dismissed with prejudice

IT IS ORDERED

March 25, 2010
Conway, South Carolina


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

