

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2010-CP-22-01356

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VistaBank, ..... Respondent,

v.

Doris N. Liles and Lloyd S. Liles, ..... Appellant.

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FINAL BRIEF OF RESPONDENT

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NELSON MULLINS RILEY & SCARBOROUGH LLP

John T. Moore, SC Bar No. 004056

Erik T. Norton, SC Bar No. 73860

Tara C. Sullivan, SC Bar No. 79806

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for VistaBank

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## STATEMENT OF ISSUES ON APPEAL

- I. The circuit court properly granted summary judgment on VistaBank's collection claim because Liles admitted default and his affirmative defenses fail as a matter of law.
- II. This Court should affirm the grant of summary judgment on VistaBank's Statute of Elizabeth claim because Liles was indebted to VistaBank when he voluntarily conveyed the subject property for inadequate consideration leaving him with insufficient assets to repay his indebtedness.
- III. This Court should affirm the grant of summary judgment to VistaBank on Appellants' counterclaims because Appellants have abandoned these claims on appeal.
- IV. This Court should affirm the grant of summary judgment to VistaBank on Appellants' counterclaims because they each fail as a matter of law.
- V. The circuit court properly granted summary judgment because no novel issues of law or fact exist in this matter.

## STATEMENT OF THE CASE

Respondent VistaBank ("VistaBank") filed an action against Appellants Lloyd S. Liles ("Liles") and his wife Doris N. Liles (collectively, "Appellants") on August 26, 2010, asserting a cause of action against Liles for collection on his guaranty and also seeking to set aside Liles' conveyance of property to his wife pursuant to South Carolina's Statute of Elizabeth. {Complaint; R. 9} Appellants filed an Answer and Counterclaim asserting causes of action for declaratory relief, slander of title, breach of contract, breach of contract accompanied by fraudulent acts, and for protection of the South Carolina appraisal statutes. {Answer & Counterclaim; R. 51}

On June 22, 2011, VistaBank filed a motion seeking summary judgment on its claims and all of Appellants' counterclaims with the exception of the action for declaratory relief. {VistaBank's Motion for Summary Judgment; R. 65}. Appellants also filed a motion for summary judgment on July 7, 2011. {App. Motion for Summary Judgment; R. 97}. The circuit court held a hearing on these motions on October 13, 2011. {Transcript of Hearing; R. 342}. Appellants did not conduct any discovery during the more than one year the case was pending prior to the summary judgment hearing. The only factual evidence in the record comes from the deposition testimony and affidavit of Appellants. {Dep. Transcript of Lloyd Liles; Aff. of Lloyd Liles; Aff. of Thomas Walker; R. 107; 338; 242}.

The circuit court granted VistaBank's motion for summary judgment and denied Appellants' motion for summary judgment. {Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgment dated Nov. 22, 2011; R. 1}. The circuit court awarded VistaBank a judgment against

Liles in the amount of \$1,212,504.04, plus attorneys' fees and costs in the amount of \$37,005.89, set aside the transfer of the property pursuant to the Statute of Elizabeth, and ordered title of the property be transferred to Liles subject to execution and levy. {Order p. 6; R. 6}.

Appellants served the notice of appeal on December 15, 2011, and their Initial Appellants' Brief on May 15, 2012. {Notice of Appeal and App. Initial Brief; 377}.

### **STATEMENT OF FACTS**

On June 20, 2008, to induce VistaBank to loan Canal Place, LLC ("Canal Place") the amount of One Million Seven Hundred Fifty Thousand (\$1,750,000.00) Dollars, Liles submitted a financial statement to VistaBank. {Compl. p. 4; Liles Dep. 38:21-39:25 and Ex. 2; 12; 144-145, 242}. The financial statement submitted by Liles listed the property known as 1749 Waccamaw Drive South, Garden City Beach, South Carolina, 29576 ("Property") as an unencumbered asset valued at One Million Seven Hundred Fifty Thousand (\$1,750,000.00) Dollars. Id. Ultimately, VistaBank decided to enter the transaction with Canal Place. {Compl. p. 2; Liles Dep. 37:1-25; R. 10; 143}.

On June 28, 2008, Canal Place executed a promissory note in the amount requested, payable on June 21, 2010. {Compl. p. 2; Liles Dep. 37:1-25; R. 10; 143}. Liles unconditionally guaranteed payment of the note, including renewals, extensions, modifications, and substitutions. {Compl. p. 2; Liles Dep. 15:23-16:23 and 38:1-7; 10; 121-122; 144}. The Unconditional Guaranty executed by Liles provides, inter alia, that a transfer of all or a substantial part of Liles' money or property constitutes an act

of default. {Compl. Ex. B, p. 2, Section 8(K); Liles Dep. 40:5-41:23; R. 27; 146-147}.

On March 30, 2009, just over a year before the Note would mature, Liles voluntarily transferred his interest in the Property to his wife for \$5.00, love, and affection. {Compl. p. 5; Liles Dep. 34:5-12 and 40:1-4; R. 13; 140 & 146}. The Property comprised a substantial part of Liles' assets. {Liles Dep. 38:17-20 and 42:8-11; R. 144 & 148}. At the time of this transfer, Liles was indebted to VistaBank in the approximate amount of One Million Two Hundred Thousand (\$1,200,000.00) Dollars. {Compl. p. 5; Liles Dep. 17:6-22; R. 13; 123}. Liles did not notify VistaBank of the transfer at the time it was made. {Compl. p. 5; Liles Dep. 63:18-25; R. 13; 169}.

Canal Place failed to make the requisite payment once the note matured and is in default. {Compl. p.2; Liles Dep. 17:6-22 and 18:15-19:4; R. 10; 123 & 124}. At that time, as guarantor, Liles owed One Million Two Hundred Twelve Thousand Five Hundred Four and 04/100 (\$1,212,504.04) Dollars, the remaining balance on the loan, plus interest, late fees, and attorney's fees to VistaBank. {Compl. p. 2-3; Liles Dep. 17:6-22; R. 10-11; 123}. Liles never paid this amount. {Compl. p. 2-3; Liles Dep. 17:6-22; 10-11; 123}.

The circuit court granted summary judgment to VistaBank on its collection claim in the amount of \$1,212,504.04, plus attorneys' fees and costs in the amount of \$37,005.89. {Order p. 6; R. 6}. The circuit court also held that a guarantor becomes obligated to pay a loan under the agreed-upon terms when he signs the guaranty agreement. {Order p. 3; R. 3}. The court further held that a guaranty gives a lender the right to seek payment from guarantors without first pursuing collection from the

debtor corporation. {Order p. 3; R. 3}. Additionally, the circuit court found that Canal Place and Liles were in default for failure to pay the loan when due and also found Liles in default for transferring a substantial part of his property during the loan term in breach of his guaranty. {Order p. 3; R. 3}.

The circuit court also granted summary judgment to VistaBank on its Statute of Elizabeth claim. {Order p. 6; R. 6}. The court found that Liles' transfer of the Property valued in excess of \$1,000,000.00 for \$5.00, love, and affection was not a transfer for valuable consideration, and therefore, the transfer would be set aside without regard to Liles' intent if (1) Liles was indebted to VistaBank at the time of the transfer; (2) the conveyance was voluntary; and (3) Liles failed to retain sufficient property to pay the indebtedness to VistaBank in full. {Order p. 3-4; R. 3-4}. The court found these three items were met, noting that Liles admitted he could not pay the amount owed to VistaBank at the time of the transfer of the Property or currently. {Order p. 4; R. 4}.

Finally, the circuit court granted summary judgment to VistaBank on Appellants' counterclaims for slander of title, protection of the South Carolina appraisal statutes, breach of contract, and breach of contract accompanied by fraudulent act. {Order p. 5; R. 5}. The court found that the filing of a lis pendens is absolutely privileged, and therefore, cannot form the basis for a slander of title claim. {Order p. 5; R. 5}. The court held that Appellants are not entitled to protection of the South Carolina appraisal statutes because these statutes apply on in foreclosure proceedings. {Order p. 5; R. 5}.

The circuit court also found that Appellants lacked standing to assert their counterclaims for breach of contract and breach of contract accompanied by fraudulent acts based on VistaBank's alleged failure to disburse loan proceeds under the note and failure to renew the note because guarantors may not maintain a cause of action on behalf of the company whose debt it guaranteed. {Order p. 5; R. 5}. Furthermore, the court found that these counterclaims were barred by the lender's statute of frauds. {Order p. 5; R. 5}. The circuit court considered Appellants' various other arguments and defenses and found them to be without merit. {Order p. 5; R. 5}.

### ARGUMENT

**I. The circuit court properly granted summary judgment on VistaBank's collection claim because Liles admitted default and his affirmative defenses fail as a matter of law.**

The circuit court properly granted summary judgment to VistaBank on its collection claim against Liles for two reasons. {Order p. 6; R. 6}. First, Liles admitted that he and Canal Place were in default. Second, Liles's defenses against the collection action--VistaBank's alleged breach of its loan agreement with Canal Place and VistaBank's alleged impairment of collateral--both fail as a matter of law. Thus, summary judgment was proper because there are no genuine issues of material fact regarding default or Appellants' affirmative defenses to the collection action. Huggins v. Metts, 371 S.C. 621, 625, 640 S.E.2d 465, 467 (Ct. App. 2006) (affirming the circuit court's grant of summary judgment where there were no genuine issues of material fact).

**a. Liles admitted that he and Canal Place were in default.**

Appellants claim that VistaBank must first prove that Canal Place was in default in order to seek a judgment against Liles. {App. Brief p. 7}. This argument is a red herring and without merit. The circuit court found that Canal Place failed to pay off the loan when it became due and is therefore in default. {Order p. 2-3; R. 2-3}. The circuit court further found that Liles is in default for his failure to pay the amounts due and for his transfer of a substantial part of his property in breach of his guaranty. {Order p. 2-3; R. 2-3}. Appellant admitted to facts establishing both of these findings by the circuit court. Therefore, no issue of material fact exists, and the circuit court properly granted summary judgment on this issue.

First, evidence in the Record unequivocally demonstrates that the loan to Canal Place matured and was not paid by Canal Place or Liles. {Compl. p. 2; Liles Dep. 17:6-22; R. 10; 123}. Further, Liles specifically admitted that he and Canal Place were obligated to pay the amounts disbursed by VistaBank: "I think we owe the money and we are going to pay it . . . . We owe the bank whatever we owed them when they stopped funding the loan . . . ." {Liles Dep. 17:6-22; R. 123}.<sup>1</sup> Because Liles admitted that he and Canal Place have not paid the money owed to Vista Bank, the circuit court correctly concluded Canal Place and Liles were in default.

Second, the circuit court properly held that Liles defaulted on the guaranty when he transferred the Property to his wife for no consideration during the term of the loan. Liles' Unconditional Guaranty provides that a transfer of all or substantially all of his assets constitutes a default. {Compl. Ex. B p. 2, Section 8(K); Liles Dep. 40:5-41:25;

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<sup>1</sup> The amount owed when Vista Bank stopped funding the loan is the principal amount due as set forth in the Complaint.

R. 27; 146-147}. Liles admitted the Property constituted a substantial part of his assets, and he transferred the Property during the term of the loan. {Liles Dep. 38:17-20, 40:1-4, and 42:8-11; R. 144; 146 & 148}. Therefore, the circuit court correctly ruled Liles defaulted on the guaranty.

**b. Liles's defense to the collection action based on VistaBank's alleged breach of its loan agreement with Canal Place fails as a matter of law.**

Appellants also argue VistaBank breached its loan agreement with Canal Place by refusing to disburse loan funds to Canal Place in June 2010 and that this breach of Canal Place's loan agreement precluded VistaBank from enforcing Liles's Guaranty. {App. Brief p. 8}. The circuit court correctly found this argument to be without merit. {Order p. 5; R. 5}.

As an initial matter, Appellants fail to cite any authority supporting their argument that the alleged breach of the loan agreement would preclude enforcement of Liles's guaranty. Therefore, Appellants abandoned this argument. See Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (citing Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005)) (noting that an appellant abandons an issue where he fails to cite any supporting authority and makes conclusory arguments). Thus, this Court should decline to address this issue.

To the extent Appellants have not abandoned this argument, their argument is without merit. As an initial matter, Appellants do not cite, and VistaBank is not aware of, any South Carolina authority holding that an alleged breach by a lender of a note

based on a refusal to disburse money excuses a guarantor who is not a party to the note from its obligations under the guaranty.

Further, Liles breached the Unconditional Guaranty prior to the alleged breach by VistaBank. Liles breached the guaranty occurred on March 30, 2009 when he transferred the Property to his wife for no consideration during the term of the loan. {Compl. p. 5; Liles Dep. 34:5-12; R. 13; 140}. Liles does not allege VistaBank breached the Canal Place loan agreement until June 2010, long after he breached the Unconditional Guaranty by transferring the Property. {Compl. p. 5; Liles Dep. 34:5-12 and 40:1-4; App. Brief p. 4; R. 13; 140 & 146}. Therefore, Liles cannot assert VistaBank's alleged subsequent breach served as a basis to avoid summary judgment. Williams v. Riedman, 339 S.C. 251, 277, 529 S.E.2d 28, 41 (Ct. App. 2000) ("[O]ne who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part . . . ") (quoting Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999)).

**c. Liles's defense to the collection action based on VistaBank's impairment of collateral also fails as a matter of law.**

Appellants argue that VistaBank impaired the value of the collateral by failing to disburse loan funds, discharging Liles as a secondary obligor pursuant to S.C. Code Ann. § 36-3-605(d). {App. Brief p. 5-6}. The circuit court again correctly found this argument to be without merit. {Order p. 5; R. 5}.

As previously ruled by the South Carolina Supreme Court in Citizens and Southern Nat. Bank of South Carolina v. Lanford, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994), guarantors are not parties to the note, and therefore, are not entitled to assert defenses based on impairment of collateral. In Lanford, the Supreme Court affirmed summary judgment in favor of a lender because a guarantor is not a "party to the instrument" permitted to assert an impairment of collateral defense based on the former S.C. Code Ann. § 36-3-606 (1976). 313 S.C. at 544, 443 S.E.2d at 551. This section was subsequently incorporated into S.C. Code Ann. § 36-3-605(d) (1976), on which Appellants rely, which provides:

If the obligation of a principal obligor is secured by an interest in collateral, **another party to the instrument** is a secondary obligor with respect to that obligation, and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of the secondary obligor is discharged to the extent of the impairment. . . .

S.C. Code Ann. § 36-3-605(d) (1976) (emphasis added); see South Carolina Reporter's Comments to S.C. Code Ann. § 36-3-605 (1976) (explaining the incorporation of S.C. Code Ann. § 36-3-606 (1976) into S.C. Code Ann. § 36-3-605 (1976)).

The impairment of collateral defense remains unavailable to guarantors. See South Carolina Reporter's Comments to S.C. Code Ann. § 36-3-605 (1976) (explaining that the impairment of collateral defense is not available to those "guaranteeing a maker's obligation on a note" under a separate agreement, consistent with the Lanford decision). The statute therefore only protects parties to the note. Just as in Lanford, Liles is a guarantor and not a party to the note. Therefore, this Court should affirm the grant of summary judgment.

Furthermore, Liles waived the impairment of collateral defense in his guaranty. {Compl. Ex. B p. 2, Section 9(A)(3); R. 27}. The statute providing the impairment of collateral defense specifically provides that it may be waived:

A secondary obligor is not discharged under this section if the secondary obligor consents to the event or conduct that is the basis of the discharge, or the instrument or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

S.C. Code Ann. § 36-3-605(f) (1976). In his guaranty, Liles expressly consented to VistaBank's impairment of collateral and waived any defense based on such impairment. {Compl. Ex. B. p. 2, Section 9(A)(3); R. 27}. Because Liles waived this defense, this Court should affirm summary judgment.

Finally, even if Liles could assert protections under the statute, the record is nonetheless devoid of any evidence to support Appellants' contention that the collateral was impaired by VistaBank's actions. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 821 (Ct. App. 2004). Where the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361-62, 563 S.E.2d 331, 363 (2002). Once the party moving for summary judgment meets this initial burden, as VistaBank has here, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Ellis, at 518, 595 S.E.2d at 821. Rather, the nonmoving party must come forward with specific

facts showing there is a genuine issue for trial. Id. at 518-19, 595 S.E.2d at 821. Appellants in this case failed to come forward with specific facts showing there is a genuine issue regarding impairment of the collateral. Therefore, summary judgment in favor of VistaBank on this defense was appropriate.

**II. This Court should affirm summary judgment on VistaBank's Statute of Elizabeth claim because Liles was indebted to VistaBank when he voluntarily conveyed the subject property for inadequate consideration leaving him with insufficient assets to repay his indebtedness.**

The circuit court properly granted summary judgment to VistaBank on its Statute of Elizabeth claim for three reasons. {Order p. 6; R. 6}. First, the Statute of Elizabeth applies to this matter because Liles was indebted to VistaBank when he transferred the Property. Second, Liles' transfer of the Property was not for valuable consideration. Finally, the Statute of Elizabeth requirements for transfers not made for valuable consideration are met as a matter of law. Thus, summary judgment in favor of VistaBank was proper on this claim.

**a. Liles was indebted to VistaBank at the time he transferred the Property such that the Statute of Elizabeth applies to this matter.**

Appellants first argue incorrectly that the Statute of Elizabeth does not apply to this matter because Liles was a guarantor, and therefore, was not a "debtor" or "indebted" to VistaBank when he transferred the Property to his wife. {App. Brief p. 9-10}. This argument is incorrect as a matter of law. Liles became a debtor and indebted to VistaBank when he signed the guaranty of the loan.<sup>2</sup> TranSouth Financial

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<sup>2</sup> In any event, even if Liles was not a "debtor" or was not "indebted" to VistaBank as Appellants claim, the Statute of Elizabeth would still apply to this matter because it does not require a creditor-debtor relationship in order to set aside a conveyance. S.C. Code Ann. § 27-23-10(A) (Supp. 2004) (setting forth the Statute of Elizabeth's application to creditors "and others"); Lebovitz v. Mudd, 293 S.C. 49,

Corp. v. Cochran, 324 S.C. 290, 295, 478 S.E.2d 63, 66 (Ct. App. 1996) ("A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity."); Leasing Enterprises, Inc. v. Goodwin, 312 S.C. 122, 439 S.E.2d 294 (Ct. App. 1993) (treating both guarantors of an equipment lease as debtors for purposes of the Statute of Elizabeth). Therefore, the circuit court properly applied the Statute of Elizabeth to this matter.

**b. Liles transferred the Property for inadequate consideration.**

Under South Carolina law, courts apply two distinct tests to determine if a transfer should be set aside under the Statute of Elizabeth. Leasing Enterprises, 312 S.C. at 124-25, 439 S.E.2d at 296. Where a transfer is for valuable consideration, the applicable test requires fraudulent intent of the transferor. Id. On the other hand, where the transfer is not made for valuable consideration, another test applies and the intent of the transferor is irrelevant. Id.

In this case, the circuit court correctly found that Liles's transfer of the Property valued in excess of \$1,000,000.00 to his wife for \$5.00, love, and affection was not a transfer for valuable consideration. {Order p. 4; R. 4}. Therefore, the circuit court applied the correct test to this matter. Appellants wrongly argue that the circuit court's order is contrary to South Carolina law and premature. {App. Brief p. 12-13}.

The circuit court properly relied on In re Haddock, 246 B.R. 810 (Bankr. D.S.C. 2000), to find that Liles' transfer of the Property was not for valuable consideration. {Order p. 4; R. 4}. In the Haddock case, Haddock transferred her interest in two pieces of property valued at \$20,000.00 to her daughter for the stated

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358 S.E.2d 698 (1987) holding that the Statute of Elizabeth does not apply solely to creditors seeking to set aside transfers made by his debtor).

consideration of \$5.00, love, and affection. 246 B.R. at 812-13. When Haddock filed bankruptcy, the bankruptcy trustee, standing in the shoes of Haddock's creditors, sought to avoid the transfer pursuant to the Statute of Elizabeth. Id. at 813. The court found that the nominal sum of \$5.00 and the consideration of love and affection was really no consideration at all. Id. at 815. The transfer was "gratuitous" and "without consideration." Id.; see also Albertson v. Robinson, 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006) (finding that a transfer of an interest in property from a husband to a wife for \$5.00, love, and affection was without valuable consideration). Similarly, here, there was no consideration given where Liles transferred the Property for only \$5.00, love, and affection. {Compl. p. 5; Liles Dep. 34:5-12 and 40:1-4; R. 13; 140 & 146}. Therefore, this Court should affirm the circuit court's ruling that the transfer was not for valuable consideration and its corresponding application of the test for transfers not made for valuable consideration.

In support of their argument that the order is contrary to South Carolina law, Appellants attempt to distinguish the Haddock case because Liles claims he did not transfer the property with fraudulent intent. {App. Brief p. 12}. However, Appellants fail to cite any authority to show that the intent of a transfer has any bearing on whether the consideration for the transfer is adequate. A transfer of a property valued at more than \$1,000,000.00 for only \$5.00, love, and affection is simply not a transfer for valuable consideration regardless of whether the transfer was for fraudulent purposes or not. Haddock, 246 B.R. 810; Albertson, 371 S.C. 311, 638 S.E.2d 81. Furthermore, "when considering transfers to family members under either an actual or constructive fraud theory, the burden of proof shifts to the transferee to prove both that valuable

consideration was exchanged between the parties and the bona fides of the transaction." Haddock, 246 B.R. at 816. Therefore, Appellants must establish the transfer of valuable consideration and the bona fides of the transaction "by clear and convincing evidence, not mere preponderance of the evidence." *Id.* (citing First Union Bank v. Smith, 314 S.C. 459, 445 S.E.2d 457, 458-59 (Ct. App. 1994)). Appellants have failed to meet this heightened standard to show sufficient consideration for Liles's transfer of the Property. Thus, this Court should affirm the grant of summary judgment in favor of VistaBank.

Next, in support of their incorrect argument that the circuit court's order is premature, Appellants contend Albertson can be distinguished from the present case because the Albertson conclusion was made not "as a matter of law . . . but after a careful and thorough analysis of the evidence in the record." {App. Brief p. 13}. This argument is nonsensical. Appellants do not suggest that the circuit court failed to adequately review the evidence before it. Furthermore, Albertston involved a declaratory judgment action before a master-in-equity in which this Court found that "the record yields but one reasonable inference," namely that the property transfer was not for valuable consideration. 371 S.C. at 316, 638 S.E.2d at 83. The circuit court necessarily made the same determination when granting summary judgment to VistaBank in this matter. See Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006) ("When the evidence supports but one reasonable inference, it is solely a question of law for court.") (quoting Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002)); Small v. Springs Indus., Inc., 300 S.C. 481, 491, 388 S.E.2d 808, 814 (1989) ("[W]hen only

one reasonable inference not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.'" (quoting National Bank v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 174 S.E. 581, 582 (1934)).

Therefore, the circuit court's order was not premature and properly held that Liles's transfer of the Property to his wife for only \$5.00, love, and affection was not a transfer for valuable consideration.

**c. The Statute of Elizabeth's requirements for transfers for inadequate consideration are met, and Liles's intent is irrelevant to the analysis.**

Finally, Appellants argue that even if the Statute of Elizabeth applies to this matter, it cannot be met because Liles transferred the Property solely for estate planning purposes and did not attempt to or engage in any illegitimate transfers of the Property. {App. Brief p. 10-12}. Appellants' argument relies on the Statute of Elizabeth test applicable to transfers of property for adequate consideration. {App. Brief p. 10}. However, as discussed above, the circuit court properly held that Liles's transfer of the Property was not for adequate consideration, and therefore, relied on the Statute of Elizabeth test applicable to transfers of property not made for valuable consideration:

[W]here the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full-not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.

{Order p. 3-4; R. 3-4}; see also Leasing Enterprises, 312 S.C. at 125, 439 S.E.2d at 296; In re Ducate, 369 B.R. 251, 258 (Bankr. D.S.C. 2007). The circuit court went on to correctly hold Liles' intent was not relevant and found the requirements were met for the transfer to be set aside. {App. Brief p. 4}.

The circuit court's order should be affirmed. Because Liles's transfer of the Property was for inadequate consideration, VistaBank had no burden to show that Liles had fraudulent intentions in connection with the transfer. Leasing Enterprises, 312 S.C. at 125, 439 S.E.2d at 296. In fact, VistaBank conceded for the purposes of its summary judgment motion that the transfer was done for estate planning purposes. {Trans. p. 4:21-24; R. 345}. Liles's intent is simply irrelevant to whether the transfer can be set aside. Leasing Enterprises, 312 S.C. at 125, 439 S.E.2d at 296.

Further, the Statute of Elizabeth's requirements for transfers based on inadequate consideration are met in this case as a matter of law. As discussed above, Liles was indebted to VistaBank at the time of the transfer. See Section II(a). The note and guaranty were signed on June 20, 2008, and matured on June 21, 2010. {Liles Dep. 17:1-25 and 18:15-20; R. 123 & 124}. Second, Liles admitted that he transferred the Property on March 30, 2009, during the term of the loan. {Liles Dep. 34:5-12; 36:14-16: and 40:1-4; R. 140; 142 & 146}. Liles does not dispute that the transfer was voluntary. Finally, Liles admitted that he could not have paid the indebtedness at the time of the transfer or now without the Property. {Liles Dep. 44:12-15 and 44:8-11; R. 150}. Because the three elements are met, the circuit court's order setting aside the conveyance pursuant to the Statute of Elizabeth should be affirmed.

**III. This Court should affirm summary judgment to VistaBank on Appellants' counterclaims because Appellants have abandoned these claims on appeal.**

Appellants do not take exception to the circuit court's order regarding their counterclaims for slander of title and protection of the South Carolina appraisal statutes. {App. Brief}. Appellants have therefore abandoned these issues on appeal. Bennett, 370 S.C. at 599, 635 S.E.2d at 660 (citing Mulherin-Howell, 362 S.C. at 600, 608 S.E.2d at 593-94) (noting that an appellant abandons an issue where he fails to cite any supporting authority and makes conclusory arguments).

Appellants also abandon their counterclaims for breach of contract and breach of contract accompanied by fraudulent acts. These counterclaims are based on VistaBank's alleged failure to disburse loan proceeds in accordance with its loan agreement with Canal Place which allegedly impaired the collateral. {Ans. & Counter. p. 3-5; R. 53-55}. Appellants assert that VistaBank breached its contract with Canal Place by refusing to disburse loan funds and that their counterclaims regarding impairment of collateral created questions of fact to be determined by the circuit court. {App. Brief p. 6 and 8}. However, they fail to identify the questions of fact they allege were to be determined by the circuit court and do not specifically request this Court to reverse the circuit court's order on Appellants' counterclaims. {App. Brief p. 14-15}. Therefore, they have abandoned these issues on appeal. Bennett, 370 S.C. at 599, 635 S.E.2d at 660 (citing Mulherin-Howell, 362 S.C. at 600, 608 S.E.2d at 593-94) (noting that an appellant abandons an issue where he fails to cite any supporting authority and makes conclusory arguments).

**IV. This Court should affirm the grant of summary judgment to VistaBank on Appellants' counterclaims because they each fail as a matter of law.**

If Appellants contend they have not abandoned one or more of their counterclaims and this Court for some reason finds that Appellants did not abandon their counterclaims, the circuit court's order granting summary judgment to VistaBank should be affirmed nonetheless because Appellants arguments all fail as a matter of law.

First, Appellants cannot maintain a slander of title claim against VistaBank based on the filing of a lis pendens in this action because such action is absolutely privileged. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 32, 567 S.E.2d 881, 892, 897 (Ct. App. 2002). In Pond Place, property owners filed a declaratory judgment action and a lis pendens against other owners in the same subdivision regarding an amendment to the restrictive covenants on the property reducing the minimum lot size restriction. 351 S.C. at 7, 567 S.E.2d at 884. The other owners counterclaimed for slander of title based on the filing of the lis pendens. Id. This Court found that dismissal of the slander of title claim was appropriate as a matter of law because the filing of a lis pendens is absolutely privileged:

We find the filing of a lis pendens is **ABSOLUTELY** privileged in South Carolina. The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens **CANNOT** form the basis of an action for slander of title.

Id. at 32, 567 S.E.2d at 897 (emphasis in original). This Court specifically noted that an action to set aside a fraudulent conveyance of real property is an action "affecting the title to real property," allowing the filing of a lis pendens which cannot serve as the

basis for a slander of title action. Id. at 17, 567 S.E.2d at 889. Therefore, the circuit court correctly held that Appellants' slander of title action fails as a matter of law.

Second, Appellants' claim for protection of the South Carolina appraisal statutes fails as a matter of law because these statutes apply only in foreclosure proceedings:

**In any real estate foreclosure proceeding** a defendant against whom a personal judgment is taken or asked, whether he has theretofore appeared in the action or not, may within thirty days after the sale of the mortgaged property apply by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal.

S.C. Code Ann. § 29-3-680 (1976) (emphasis added); see also Lanford, 313 at 544, 443 S.E.2d at 551 (finding appraisal statute's application "limited to real estate foreclosure actions" and affirming summary judgment in favor of lender in action on guaranty on this defense).

Third, Appellants lack standing to assert their claims for breach of contract and breach of contract accompanied by fraudulent act are based on VistaBank's alleged failure to disburse loan funds in accordance with Canal Place's note and failure to renew Canal Place's note. {Ans. & Counter. p. 3-5; R. 53-55}. A guarantor may not maintain a cause of action on behalf of the company whose debt it guaranteed. Prof'l Bankers Corp. v. Floyd, 285 S.C. 607, 612, 331 S.E.2d 362, 364-65 (Ct. App. 1985). In Prof'l Bankers, a lender sued a guarantor of two contracts the lender had with a company of which the guarantor was president and principal shareholder. Id. at 609, 331 S.E.2d at 362. The guarantor asserted counterclaims for breach of contract and breach of contract accompanied by fraudulent acts based on the lender's breach of its contracts with the company. Id. at 612, 331 S.E.2d at 364. This Court affirmed the

dismissal of the guarantor's counterclaims on the basis that he was not a party to those contracts:

The general rule at common law is that an action on a contract must be brought by the party in whom the legal interest is vested, and this legal interest is ordinarily vested only in the promisee or promisor. Consequently, they or those in privity with them are generally the only persons who can sue on the contract. In each counterclaim [guarantor] asserted the contractual rights of [the company]. Without an assignment of those rights, he was not the proper party to bring the actions.

Id. at 612, 331 S.E.2d at 34-65; see also Lanford, 313 S.C. at 544, 443 S.E.2d at 551 (finding that the promissory note and guaranty "are two separate contracts" such that those who may be parties to the guaranty but not the note cannot assert claims for breach of the note). Because Appellants are not parties to the note, the circuit court correctly found that they cannot assert claims based upon its breach.

Appellants' counterclaims related to VistaBank's alleged failure to renew Canal Place's loan also are barred by the "lender's statute of frauds," found in S.C. Code Ann. § 37-10-107 (1976), which provides:

No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

...

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

S.C. Code Ann. § 37-10-107 (1976). In short, the statute bars claims for alleged oral promises to renew a loan in excess of \$50,000.00. Id. Liles admitted that there was not an agreement to renew Canal Place's loan in writing. {Liles Dep. 48:3-18; R. 154}. Therefore, Appellants' counterclaims based on VistaBank's alleged failure to renew Canal Place's loan are barred. For these reasons, the circuit court's order granting summary judgment to VistaBank on Appellants' counterclaims should be affirmed.

**V. The circuit court properly granted summary judgment because no novel issues of law or fact exist in this matter.**

Finally, Appellants argue that this case contains novel issues regarding the status of a guarantor under a note, the rights of a guarantor under a note, and the conveyance of property by a guarantor under a note. {App. Brief p. 14}. However, Appellants fail to identify any specific novel issues in their brief beyond these conclusory statements. Because Appellants fail to identify the issues they claim are novel, they have abandoned such argument. Bennett, 370 S.C. at 599, 635 S.E.2d at 660 (citing Mulherin-Howell, 362 S.C. at 600, 608 S.E.2d at 593-94) (noting that an appellant abandons an issue where he fails to cite any supporting authority and makes conclusory arguments). To the extent Appellants' argument is not abandoned, VistaBank asserts that there are no novel issues of law and fact involved in this matter and that all issues are clearly resolved by the authority cited in this Brief.

## CONCLUSION

For the foregoing reasons, VistaBank respectfully requests this Court affirm the circuit court's order granting it partial summary judgment on its claims against Appellants and on Appellants' affirmative defenses and counterclaims with the exception of Appellants' claim for declaratory relief.

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NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Tara C. Sullivan

John T. Moore, SC Bar No. 004056

E-Mail: john.moore@nelsonmullins.com

Erik T. Norton, SC Bar No. 73860

E-Mail: erik.norton@nelsonmullins.com

Tara C. Sullivan, SC Bar No. 79806

E-Mail: tara.sullivan@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for VistaBank

Columbia, South Carolina

August 20, 2012.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2010-CP-22-01356

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VistaBank, ..... Respondent,  
v.  
Doris N. Liles and Lloyd S. Liles, ..... Appellant.

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CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *Tara C. Sullivan*  
John T. Moore, SC Bar No. 004056  
E-Mail: john.moore@nelsonmullins.com  
Erik T. Norton, SC Bar No. 73860  
E-Mail: erik.norton@nelsonmullins.com  
Tara C. Sullivan, SC Bar No. 79806  
E-Mail: tara.sullivan@nelsonmullins.com  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Attorneys for VistaBank

Columbia, South Carolina

August 20, 2012.

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM GEORGETOWN COUNTY  
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William H. Seals, Jr., Circuit Court Judge

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Case No. 2010-CP-22-01356

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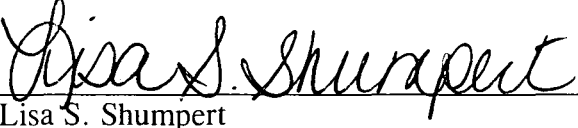
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent VistaBank, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States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

Pleadings:

**Final Brief of Respondent**

Counsel Served:

S. Jahue Moore, Esquire  
John C. Brantley, Jr. Esquire  
Moore, Taylor & Thomas, PA  
P.O. Box 5709  
West Columbia, SC 29171



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Lisa S. Shumpert  
Administrative Assistant

August 20, 2012

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.255.5904  
[www.nelsonmullins.com](http://www.nelsonmullins.com)

Erik T. Norton  
Tel: 803.255.9552  
Fax: 803.255.5904  
[erik.norton@nelsonmullins.com](mailto:erik.norton@nelsonmullins.com)

August 20, 2012

## Hand Delivered

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

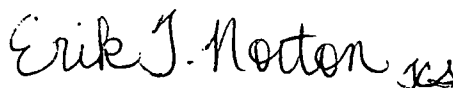
RE: VistaBank vs. Doris N. Liles and Lloyd S. Liles  
C/A No. 2010-CP-22-01356  
Our File No. 29187/09001

Dear Ms. Kitchings:

Enclosed please find the original and sixteen copies of the Final Brief of Respondent in the above-referenced matter. We would ask that you file the original and fifteen and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of same.

Very truly yours,



Erik T. Norton

ETN:ls  
Enclosures  
cc: S. Jahue Moore, Esquire

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AUG 20 2012

**SC COURT OF APPEALS**