THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell R. Scarborough, Master-in-Equity

Trial Court Case No. 2010-CP-10-8732

Lashanda Ravenel and Henry Lee Ravenel, II.....Appellants,

v.

Equivest Financial, LLC.....Respondent.

INITIAL BRIEF OF APPELLANTS

Barry I. Baker
One Carriage Lane, Bldg. H
Charleston, South Carolina 29407
(843) 766-9007
-and-
Benjamin Goldberg
One Carriage Lane, Bldg. H
Charleston, SC 29407
(843) 769-4595

Attorneys for Appellants

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STATEMENT OF THE CASE

Appellants filed their Complaint against the Respondent, Equivest Financial, LLC on October 20, 2010 to void a tax sale held on November 3, 2008 on the grounds the Delinquent Tax Collector ("DTC") of Charleston County did not pursue due diligence and the high bid was so grossly inadequate as to shock the conscience of the Court.

The Appellants do not appeal the latter cause of action.

The high bidder at the sale for $130,000.00, Equifunding, Inc., received a tax deed from the County on July 23, 2010.

The Respondent ("Equivest") received a deed from Equifunding, Inc., dated September 23, 2010 recorded October 5, 2010. (Exhibit 41.)

Equivest filed a general denial on November 3, 2010 and alleged the DTC properly performed her statutory duties, therefore, the sale should not be set aside. There were no affirmative defenses.

Equivest also cross-claimed against the County of Charleston and the DTC - both of whom Answered on June 22, 2011 and were subsequently dismissed as parties.

Equivest also cross-claimed against record judgment creditors and tax liens.

The Order of Dismissal as to the County of Charleston and the DTC was signed on February 8, 2012, filed on February 15, 2012 and later amended by Order dated April 20, 2012 to include a provision that if Appellants were successful, the County would pay to Equivest the bid amount of $130,000.00 plus interest and the amount paid for taxes.

A hearing was held before the Master-in-Equity for Charleston County on March 29, 2012 pursuant to an Order of Reference dated March 15, 2011, at which time counsel for Respondents and Appellants appeared. Although two judgment creditors answered,

their judgments were against a Henry Ravenel not the Appellant Henry Ravenel, II[1] and no creditor appeared at the hearing.

An Order was signed by the Master on May 30, 2012 and filed on June 5, 2012, ruling for Equivest.

A form Order was also signed by the Court on July 10, 2012 and filed July 12, 2012 ruling for Equivest, which held "This Order ends this case."

Appellants timely filed a Rule 59(e) SCRCP Motion dated June 19, 2012, filed on June 20, 2012.

The Court issued a form Order dated July 12, 2012 and filed July 16, 2012 denying the Motion.

The Notice of Appeal was served upon Equivest's counsel on August 14, 2012.

All documents above set forth will be included in the Record on Appeal.

STATEMENT OF THE FACTS

On the 22nd day of October, 2001, Mary Brooks Ravenel ("Mrs. Ravenel") purchased in her name four parcels of land and on November 9, 2001 Mrs. Ravenel purchased one more parcel. (Exhibit 24.)

Mrs. Ravenel built a home on one parcel in 2004. (Tr. 93, ll 11-13.) The correct address of the residence was and is 8164 Mary Ravenel Road, Adams Run, South Carolina 29426. (Tr. pg. 90, ll 22-24.)

Mrs. Ravenel has lived in the home continuously from its construction in 2004 with her children, Lashanda and Henry, Jr., and subsequently, with her aunt, Betty McKinley. (Tr. pp. 93; 94, lines 7-15.)

[1] The Appellant's correct name is Henry Lee Ravenel, Jr.

Lashanda moved out on February 27, 2008 and purchased her own home at 3531 Galaxy Road, Ladson, Charleston County, South Carolina 29456-3944, where she has lived since the purchase. (Tr. pg. 93, ll 15-24; Exhibit 33.) (Tr. pp. 40 ll 3-17; 134 ll 19-21.)

Lashanda had previously bought another parcel of land in Charleston County, which showed her address to be 8164 Mary Ravenel Road, her mother's residence. (Tr. pp. 135, ll 1-4; 138, ll 16-25; 139, ll 1-18; Exhibit 49.)

Henry, Jr. continued to live with his mother except when he resided with his father. (Tr. pg. 121, ll 1-24.)

Mrs. Ravenel, though not a party, is important, for if you find Mrs. Ravenel, you find the delinquent taxpayers, her children.

There was a building on one parcel of land in which Mrs. Ravenel operated a business. The correct post office box, 263, is shown on the Charleston County Online Tax System for 2009 as hereafter discussed. (Tr. pg. 88, ll 10-24; Exhibit 32.)

In November, 2007, Mrs. Ravenel encountered financial difficulties and sought the advice of an attorney. (Tr. pg. 97; ll 7-12.)

She was advised by the attorney to convey the five parcels of land including her home to her children, Lashanda and Henry, Jr. for $5.00, love and affection, and to declare bankruptcy. (Exhibit 24.) She followed the advice of the attorney, conveyed the five parcels to the children on November 6, 2007 and declared bankruptcy. (Tr. pg. 97, ll 21-24; Exhibit 24.)

Mrs. Ravenel advised the Bankruptcy Court of the deed to the children which was in violation of the Bankruptcy Court Code, but not then known to Mrs. Ravenel. (Tr. pg. 116, ll 5-24.)

Mrs. Ravenel did not tell her children of the conveyance or the bankruptcy until this action was commenced. (Order pp. 3 and 6, paragraphs 6 and 9; Tr. pp. 98, ll 16-25; 99 ll 1-3; 137 ll 22-25; 138 ll 1-6.)

It is acknowledged that the DTC began the tax sale procedure and did in fact send out the required statutory notices; those that were sent certified mail, return receipt requested, and those that were sent by regular mail.

It is further acknowledged that all notices were sent to Lashanda and Henry, Jr. at Post Office Box 455, which was the address of the grantees on the deed from Mrs. Ravenel to her children and no such notices were received by them.

Post Office Box 455 was the post office box of Mrs. Ravenel's mother who looked after Mrs. Ravenel's mail as she then traveled extensively. That post office box was closed and a second box opened by her mother - Post Office Box 263. (Tr. pg. 86, ll 1-24).

All of the certified mail receipts were returned to the DTC by the Post Office unsigned as acknowledged by the deed from the County to the high bidder. (Exhibit 23.)

The DTC acknowledged she could have found Lashanda and Henry, Jr.'s correct address but did not do so. (Exhibits 25, 47, 48, 33, 35.)

Initially, all five parcels were involved in the tax sale procedure, however only Mrs. Ravenel's home was sold. (Tr. pg. 68, ll 22-24.)

The first notice sent by certified mail, return receipt requested was the Notice of Levy, which was mailed to the delinquent taxpayers at Post Office Box 455 on May 22, 2008. The unsigned receipts were returned to the DTC by the Post Office on June 20, 2008 and the envelope stated "Return to Sender. Unable to Forward." (Exhibits 2, 3 and 4.)

It is acknowledged the Notice of Publication of the Tax Sale was published on August 15, August 22 and August 29, 2008, listing all five parcels.

It is acknowledged the tax sale occurred on November 3, 2008 at which time Mrs. Ravenel's home was the only parcel sold.

The DTC acknowledged that when certified mail receipts are returned unsigned, she is required to pursue due diligence. (Tr. pp. 62, ll 21-25; 63, ll 1-5.)

The DTC stated she had a procedure for due diligence in place to look in the white pages, the county tax records and the internet (Tr. pg. 34, ll 4-8.) She also stated she would search the automobile tax statements (ATS) and check out real estate in the RMC office of Charleston County for any other properties in the names of Lashanda and Henry, Jr. (Tr. pg. 47, ll 2-11.)

The DTC agreed that had she followed her own due diligence procedure, she would have discovered Henry's address at PO Box 263 and his mother's residence at 8164 Mary Ravenel Road and Lashanda's address at 3571 Galaxy Road, Ladson. (Tr. pp. 35, ll 3-21; 36; 37, ll 1-11; 40, ll 3-25; 41, ll 1-21; 49, ll 18-24; 50 ll 6-10.)

On May 26, 2009, the DTC received a title examination (Exhibit 43) which included a number of South Carolina tax liens against a Henry Ravenel, and five judgments, one against Mrs. Ravenel by AAA Plumbing (AAA) dated October 9, 2006

and filed in the office of the Clerk of Court of Charleston County on October 13, 2006 in the amount of $3,599.45. (Exhibits 22 and 45.) The other judgments and tax liens were against a Henry Ravenel, not involved.

The AAA judgment against Mrs. Ravenel showed the correct Post Office Box 263 and the correct street address of the residence, 8164 Mary Ravenel Road, Hollywood, SC 29449. (Exhibits 22 and 45.)

There appears in the public tax records for Charleston County dated 2009, one of the five parcels, conveyed to Lashanda and Henry, Jr. at 7164 Highway 162, which shows the correct post office box, 263. (Exhibit 35.)

It is acknowledged on October 14, 2009, the Final Notice of Property Redemption was sent again to Post Office Box 455, certified mail, return receipt requested, one to Lashanda, one to Henry, Jr., and one to the two of them. (Exhibits 10, 11, 12 and 13.)

It is acknowledged the Post Office sent back to the DTC the unsigned receipts and the envelopes with the message of the correct forwarding post office box number 263. This was received by the DTC on October 26, 2009. The DTC states this was the first time she had actual knowledge of the correct PO Box 263. (Tr. pg. 74, ll 10-13.)

It is acknowledged on October 27, 2009, a courtesy copy of the Final Notice of Property Redemption was again sent, this time by regular mail to Post Office Box 455. (Exhibit 14 and 15.)

No statutory notices sent by the DTC were ever received by Lashanda or Henry, Jr.

The Master issued his Order on July 10, 2012 in which he made no mention of due diligence.

STANDARD ON APPEAL

In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995). The appellate court may review the record and make its own finding of whether clear and convincing evidence supports the trial court's ruling. *Richland County Dep't of Social Servs. v. Earles*, 330 S.C. 24, 496 S.E.2d 864 (1998); *South Carolina Dep't of Social Servs. v. Broome*, 307 S.C. 48, 413 S.E.2d 835 (1992).

ARGUMENTS

I. THE TRIAL COURT ERRED WHEN IT FAILED TO RULE THAT THE DELINQUENT TAX COLLECTOR ("DTC") OF CHARLESTON COUNTY DID NOT EXERCISE DUE DILIGENCE WHEN CERTIFIED MAIL RECEIPTS WERE RETURNED UNSIGNED IN ORDER TO FIND THE BEST OR CORRECT ADDRESS FOR APPELLANTS

The Trial Court in its Order of May 30, 2012 made no mention of the major issue before the Court: the requirement that the DTC use due diligence to find the best or correct address of the delinquent taxpayers when certified mail receipts were returned unsigned.

The DTC acknowledged that she was required to use due diligence and had in effect a procedure for due diligence. (Tr. pp. 35, ll 1-10; 48, ll 24-25; 49, ll 1-8; 34, ll 4-8; 47, ll 2-11.)

A considerable portion of the testimony was that of the DTC who was questioned at length on her efforts, if any, to pursue due diligence.

No mention of the DTC's due diligence testimony appears in the Trial Court's Order. It does not state she pursued a course of due diligence.

It must be recalled that all requisite statutory notices were sent by the DTC to Post Office Box 455 which were not received by Lashanda and Henry, Jr. and no signed receipts were returned.

The DTC acknowledged she made no effort to check for the correct addresses of the five parcels of land conveyed by Mrs. Ravenel to Lashanda and Henry, Jr. (Tr. pg. 44, ll 3-9.)

The Trial Court also failed to consider and made no mention of the many public documents produced by Lashanda and Henry, Jr. which revealed the best or correct post office box 263, the best or correct address for Mrs. Ravenel's home, 8164 Mary Ravenel Drive and the best or correct address for Lashanda, 3521 Galaxy Drive, Ladson, SC.

Lashanda and Henry, Jr. resided with Mrs. Ravenel upon the completion of her residence. (Tr. pg. 93, ll 11-16.) Henry, Jr. continues to live there when not residing with his father. (Order pg. 3.) Lashanda moved into her home on February 28, 2008. (Tr. pg. 136, ll 9-24; Exhibit 33.)

The DTC testified her procedure for due diligence was as follows:

> Q Did you not tell me at the time we took your deposition that your procedure for doing due diligence was to look into the white pages, the county tax records and the internet?
>
> A Yes. (Tr. pg. 34, ll 4-8.)

She further testified that part of her procedure for due diligence was to examine ATS and deeds of other properties owned by the delinquent taxpayers found in the RMC Office of Charleston County. (Tr. pg. 47, ll 2-11.)

A number of these documents were available to the DTC prior to April 7, 2008, the date the tax sale procedure was started by sending the Execution Notice to Lashanda and Henry, Jr. at P.O. Box 455. (Exhibit 1).

It is apparent that the DTC failed to follow her own procedure, for had she done so, she would have found the following public documents provided by Lashanda and Henry, Jr. as follows:

One:	Charleston County ATS for the tax year 2006 for Henry Jr.'s 1998 Ford automobile giving the correct post office box of 263 and also the correct street address of 8164 Mary Ravenel Road, Adams Run, SC 29426 (the residence). (Exhibit 25.)
Two:	AAA Plumbing ("AAA") judgment against Mary Ravenel dated October 9, 2006 showing both the correct Post Office Box 263 and the correct street address, 8164 Mary Ravenel Road, Adams Run, SC 29426 (the residence). (Exhibits 22 and 45.)
Three:	Charleston County ATS created January 25, 2008 for Henry Jr.'s 1998 Ford showing the correct post office box 263 and street address of 8164 Mary Ravenel Road, Adams Run, South Carolina 29426 (the residence). (Exhibit 47.)
Four:	Charleston County ATS created January 25, 2008 for Henry Jr.'s 2000 Lincoln showing the correct post office box 263 and street address of 8164 Mary Ravenel Road, Adams Run, South Carolina 29426 (the residence). (Exhibit 48.)

Five:	Deed to Lashanda dated February 27, 2008 recorded March 18, 2008 showing her correct address as 3531 Galaxy Road, Ladson, SC 29456. (Exhibit 33.) (Note: The Tax Sale was on November 3, 2008).
Six:	Charleston County Tax bill from January 2009 for one of the parcels in the name of Lashanda and Henry Lee Ravenel, showing the correct Post Office Box 263. (Exhibit 35.)
Seven:	The DTC received from the Post Office the envelope by which she sent the Final Notice of Property Redemption on October 26, 2009 which listed the new Post Office Box 263. (Exhibit 13.)

The posting of notice at a conspicuous place on the property as required by §12-51-40(c) was defective as shown by the photographs of such notice (Exhibits 6, 7 and 8.) The notice was posted on a tree on the property (Exhibits 7 and 8) on August 10, 2008 which notice was not seen by Henry, Jr., Mrs. Ravenel or her aunt Betty (Tr. pp. 133, ll 15-25; 105, ll 20-25; 122, ll 19-25; 123, line 1.) Lashanda had moved from her mother's home on February 27, 2008.

Exhibit 8 shows two automobiles parked in the driveway of the residence. The DTC representative who posted the notice did not check the license plates of the automobiles. Had he done so, he would have discovered one belonged to Henry Jr. and his address of PO Box 263 and street address of 8164 Mary Ravenel Drive. (Exhibits 25, 47 and 48.)

The DTC's representative should have gone up to the front door of the residence, placed the notice there and also knocked on the door to determine if anyone was present, since vehicles were parked in the driveway. *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1208 (2006).

On October 2, 2009, according to the records of the DTC, her office received a telephone call from Henry, Jr. requesting information about the sale and he was given the amount necessary to be paid prior to November 4, 2009 in the amount of $27,849.06. The record shows Henry, Jr.'s correct telephone number, (843) 302-2000. Henry, Jr.'s address was not requested or obtained and no written confirmation was sent to Henry, Jr. It was the practice of the DTC's predecessor to confirm the delinquent amount by confirmation in writing to the inquirer, which was not done. He cannot recall such a conversation. (Exhibit 9; Tr. p. 130, ll 4-10.)

Henry Jr. testified that a realtor came to his mother's residence and asked if he was Henry Ravenel. The realtor told him some delinquent taxes were due in his name, but did not discuss what piece of property was involved. (Tr. p. 129, ll 2-24.)

The only property known to Henry, Jr. was a parcel of land his father said he was going to give him and he was unaware that his father had done so. (Tr. 129, ll 8-20).

Henry, Jr. called a county office and was told there was no property in his name. (Tr. p. 129, ll 26-24.) Henry, Jr. was not asked for his address, but his cell phone number is shown on the DTC's record, (843) 302-2000. (Exhibit 9.)

Henry, Jr. heard nothing, nor did he receive anything in writing from the DTC's office.

Mrs. Ravenel received a courtesy copy of the Final Notice of Property Redemption notice on October 28, 2009 from her mother, which notified her that the sum of $27,849.06 was due and payable on or before November 4, 2009. (Tr. p. 99, ll 4-25.)

Mrs. Ravenel called the DTC's office on several occasions and on one occasion spoke to the DTC herself. Mrs. Ravenel was advised that the time to pay the $27,849.06

could not be extended and despite Mrs. Ravenel's endeavors, she was unable to come up with that sum of money by November 4, 2009. (Tr. pp. 100; 101; 102, ll l-10)

The DTC states that she had no actual knowledge of the new address until October 26, 2009 when the redemption notice was returned with the post office notification of P.O. Box 263. (Tr. pg. 74, ll 5-17.)

The Trial Court's emphasis on actual knowledge is misplaced.

The Court initially relies on §12-51-40(a) which provides the execution notice be sent by the DTC to the address shown on the deed or at an address in the "actual knowledge" of the DTC.

While this statement is correct, §12-51-40(b) requires that the Notice of Levy be sent by the DTC to the delinquent taxpayers "at the address shown on the tax receipt or to an address which the officer has actual knowledge." (Emphasis added.)

"§12-51-40 *[sic.]* provides that the required notice of redemption must be sent by the DTC "to the best address available" to which the Court agrees. (Order pg. 4.) The Court is actually referring to §12-51-120. (Emphasis added.)

The DTC admitted that she received her title examination on May 26, 2009, more than five months prior to the end of the redemption period. (Tr. pg. 32, ll 13-15; Exhibit 42.) The title examination included Exhibit 45 (AAA judgment versus Mrs. Ravenel) which reveals the correct address of Mary Ravenel's residence, 8146 Mary Ravenel Road and the second post office address, Post Office Box 263.

Had the DTC performed due diligence, she would have found the tax receipts for Henry, Jr. and deed into Lashanda showing the best or correct addresses prior to the tax sale. (Exhibits 25, 47, 48, 33, 35 and 49.)

The best or correct addresses were available long prior to the time the redemption period expired on November 4, 2009. (Exhibit 10.)

The Trial Court then endeavors to bolster its position with the statement, "This code section (12-51-41 *[sic.]* does not require the delinquent tax collector to comb through all public filings to determine the defaulting taxpayer's address." (Order page 4.) The Court is actually referring to §12-51-120.

Furthermore, counsel for Equifax questioned the DTC as follows: (Tr. pg. 70, ll 11-16)

> Q Is there anything within 12-51 that requires you to go through the RMC Office looking for deeds?
>
> A Only for the property that I sold.
>
> Q Anything in 12-51 that requires you to pull down all of the various automobile tax records?
>
> A No.

The DTC stated that her procedure for due diligence did in fact, require her to "comb through public filings." It also required her to go through the records of the RMC Office looking for deeds of other properties owned by the delinquent taxpayers and to "pull down all of the various automobile tax records." (Tr. pg. 47, ll 2-11.)

The DTC stated that these were two County repositories of information for due diligence.

The Trial Court ignored the cases of *Good v. Kennedy*, 291 S.C. 204, 352 S.E.2d 708 (Ct. App. 1987) and *Benton v. Logan*, 323 S.C. 338, 474 S.E.2d 446 (Ct. App. 1996),

which provide that when the certified mail receipts are returned unsigned, the DTC is required to use due diligence to determine the delinquent taxpayer's best address.

The DTC agrees. (Tr. pp. 48, ll 24-25; 49, ll 1, 2.)

The Order further provides that "it was not until October 26, 2009 that the Delinquent Tax Collector received actual notice" of the new post office box 263 and she did not file a new redemption notice since it would be in violation of §12-51-120. (Tr. pg. 74, ll 5-17, Order pg. 5.)

The DTC had or should have had knowledge of the best and correct addresses long prior to the termination of the redemption period. Yet, the DTC never mailed any required statutory notice to PO Box 263 or 8164 Mary Ravenel Road, or 3521 Galaxy Road.

To further bolster Equivest's position, its attorney asked the DTC the following questions:

> Q Hypothetically, if someone had come forward and said I want to pay the taxes and you said, well, you had your opportunity, we sent all these notice to you at PO Box 455, and if they had said I don't live at 455, I live at 263, would that have been sufficient for you to have upset the tax sale?
>
> . . .
>
> A Yes, if it had been brought to my attention that would have been reason for me to void the tax sale.

Q And it was not brought to your attention. Nor did anybody?

A Not that I can remember.

(Tr. pp. 54, ll 20-25 and 55, ll 4-5.)

The attorney for Equivest questioned the DTC:

Q Whose duty and obligation is it to keep the county aware and up to date as to the taxpayer's address?

A The tax payer is supposed to notify the auditor if they have a change of address. (Tr. pg. 56, ll 21-24.)

The position taken by Equivest and the Court is belied by the case of *Jones v. Flowers, supra.*

> "Jones should have been more diligent with respect to his property no question."
>
> "Notice was sent to an address that Jones provided and had a legal obligation to keep updated. . ."
>
> "The Commissioner does not argue that Jones' failure to comply with the statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree."

Therefore, the failure of Lashanda and Henry, Jr. to provide the best or correct address did not exempt the DTC from the requirement of due diligence to find the best or correct address and to send all notices to Lashanda and Henry, Jr. to those correct addresses which she had or should have had.

Rather than addressing the major issue of due diligence, the Trial Court elected at attack Mrs. Ravenel, who was not a party, and without the jurisdiction of the Trial Court.

The deed from the County to the high bidder is dated July 28, 2010 some eight months from the end of the redemption period, November 3, 2009. (Exhibit 10.)

Pursuant to §12-51-150, the DTC had the ability to void the sale at any time prior to the delivery of the deed to the high bidder. (§12-51-130.)

The DTC had ample notice of the failure of actions required to be properly performed long before the deed to the high bidder.

We conclude the analysis of Argument I with a summary of the requirement of the DTC's pursuit of due diligence.

The DTC admitted that she was required to use due diligence.

She also stated she had in effect a procedure for due diligence.

It is evident the DTC failed to follow her own procedure for due diligence, nor did she pursue due diligence at all.

Had she done so, she would have discovered Henry, Jr.'s address at his mother's residence, the correct P.O. Box 263, and Lashanda's address prior to the initiation of the tax sale procedure on April 7, 2008.

It is ironic that the DTC did not examine the County ATS's or search the Register of Mesne Conveyance's Office for deeds in the name of the delinquent taxpayers which the DTC stated are a part of her due diligence procedure.

II. THE TRIAL COURT ERRED WHEN IT, SUA SPONTE, INTERJECTED ISSUES NOT PLED OR ARGUED AND AFTER THE PARTIES HAD RESTED WITHOUT GIVING APPELLANTS THE OPPORTUNITY TO OFFER TESTIMONY IN REBUTTAL.

At the conclusion of the trial and after the parties had rested, the trial judge stated (Tr. pp. 141, ll 18-25; 142, ll 1-13):

THE COURT: I've give *[sic.]* you 45 days, and I'm going to add to that. I'm going to recommend you-all look at the cases – I've been doing research up here. Haynes *[sic]* Federal Credit Union versus Bailey. Look at that case and submit information relative to the issues raised therein as it relates to the facts of this case.

MR. ANDERSON: Judicial estoppel?

THE COURT: It's a judicial estoppel case, and it's also a resulting trust case and a defrauding of creditors. The cite on the case is 327 S.C. 242; Southeastern cite is 489 Southeast 2d 472. (Emphasis added.)

MR. GOLDBERG: That's Haynes Federal Credit Union versus Bailey.

MR. BAKER: I'm familiar with that case.

MR. GOLDBERG: Yup.

THE COURT: And it stands for the proposition that he who seeks equity must do equity. All right? So I'm going to look for you-all to address that case. And it was subsequently cited in case of Bowen versus Bowen, B-O-W-E-N, which is 345 S.C. 243; Southeast 547 Southeast 2d 877. (Emphasis added.)

In *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012), the Complaint failed to flesh out the requisite facts to support a conversion claim. The parties only

discussed breach of contract during trial and closing arguments. The Court nonetheless charged the jury on conversion.

The *Hennes* Court stated:

> In conclusion, the circuit court's sua sponte jury charge prejudiced Mr. Shaw because he was deprived of the opportunity to prepare for the issue of conversion and to raise the appropriate affirmative defenses at trial. ("In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised.") Because this was Ms. Hennes' only cause of action against Mr. Shaw, and the jury returned a verdict against Mr. Shaw, the jury undoubtedly was influenced by this flawed jury instruction.

(Internal citations omitted.)

See also State v. DICAPUA, 383 S.C. 394, 680 S.E.2d 292 (2009). (A trial court may not in a criminal case sua sponte order a new trial on a ground not raised.)

III. THE TRIAL COURT ERRED FOR IT HAD NO JURISDICTION TO RULE THAT MARY BROOKS RAVENEL, NOT A PARTY, HAD COMMITTED A FRAUD UPON HER CREDITORS, UNCLEAN HANDS AND JUDICIAL ESTOPPEL.

Stephens, et al. v. Ringling, et al., 102 S.C. 333, 86 S.E. 683 (1915) states:

> It is fundamental that a defendant is not bound by the procedure and judgments of a court and the rules of law thereabout, unless he is actually or in contemplation of law before the court, or, to use the technical expression, unless the court has secured jurisdiction of his person.

See also Marshall v. Drayton, et al., 2 Nott & McC. 25, 11 S.C.L. 25 (S.C. Const. App.).

> No person can be made a defendant in a cause, *except by the process of law or by his own consent.* It is equally true, that no one can be directly affected by the judgment of the court, except those who are parties.

(Emphasis included.)

This brief will nonetheless address the three rulings to show there is no legal or factual foundation therefor.

The three rulings, fraud on creditors, unclean hands and judicial estoppel derive from *Hayne Federal Credit Union v. Bailey, et al.*, 327 S.C. 242, 489 S.E.2d 472 (1997).

The Case of *Bowen v. Bowen*, 345 S.C. 243, 547 S.E.2d 877 (Ct. App. 2001) also cited by the Trial Court is simply a reiteration of the elements of a resulting trust.

To understand the three rulings, an analysis of the facts of the *Hayne* case is necessary. In *Hayne*, father purchased the property at issue with his funds, lived there and paid all costs. However, he put title in son's name who paid nothing and never lived in the house.

Father stated "he did not want his wife to get a hold of that property."

Son died, devising all of his property to wife. Father made no claim against the estate.

Wife mortgaged the house to Hayne.

Wife then filed in bankruptcy. Father filed claim asserting his ownership of the house. He paid $12,000.00 and obtained a trustee's deed subject to the Hayne mortgage.

Hayne foreclosed. Father answered and counterclaimed asserting that he owned the house by virtue of the resulting trust. The trial court found for father on the basis of a resulting trust.

The Supreme Court reversed.

Although the Supreme Court found a resulting trust, it ruled that such a trust can be defeated by fraud.

> The existence of the resulting trust could be rebutted by a showing of fraud on the part of Father. Thus, Father could only make out a resulting trust if he did not engage in fraudulent acts in effecting the trust. The well-known maxim, 'He who seeks equity must do equity,' is applicable here. Accordingly, Credit Union was not required to affirmatively plead the defense of fraud. (Citation omitted.)

"This Court finds that the resulting trust is negated by father's fraudulent actions."

In the instant case, unclean hands or he who seeks equity must do equity was not pled by Equivest or argued, nor did Mrs. Ravenel admit to perpetuating a fraud upon her creditors.

Mrs. Ravenel's actions do not satisfy the requirements of a fraud on creditors. *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993).

> . . . where 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.

Equivest is not a creditor of Mrs. Ravenel.

Mrs. Ravenel owned property valued at over $169,000.00 at the time of the conveyance which she purchased in 1997. (Exhibit 32, Tr. pg. 94, ll 16-23.)

The only judgment against Mrs. Ravenel was that of AAA in the amount of $3,599.45, which could have been paid in full at the time of the transfer and AAA has yet sought to collect the debt.

There was no conveyance in the fraud of creditors by Mrs. Ravenel.

The last issue is judicial estoppel.

The trial court's finding is based on factual inaccuracies.

At page four of the Court's Order, the following appears: "Shortly after the conveyance, Ms. Ravenel filed for bankruptcy and on her sworn schedules she did not denote that she had recently conveyed the property to her children."

At pages 7 and 8, paragraph 17 of the Order, the Court cites *Southmark Corp. v. Trotter*, 212 Ga. App. 454, 442 S.E.2d 265 (1994). *Southmark Corp.* is a Georgia case and the Order recites that case as stating, "In bankruptcy proceedings a Plaintiff failed to include in its schedules a potential malpractice claim against its attorneys. The Court threw out the malpractice claim as it swore on the bankruptcy schedules it had no such claim."

Paragraph 18 page 8 of the Order, the Court stated, "In her bankruptcy filings, Ms. Mary Ravenel asserted she owned no real estate."

The contention that Mrs. Ravenel failed to advise the Bankruptcy Court of her conveyance to Lashanda and Henry, Jr. lacks evidentiary support as the following testimony attests.

Equivest's counsel cross-examined Mrs. Ravenel.

> Q When you filed for bankruptcy you had to fill out a whole bunch of schedules; right?
>
> A Yes, sir.
>
> Q One of the schedules had on it that to list all of the properties that you have owned and conveyed away within

the last three years prior to filing bankruptcy. Do you remember that schedule?

A Yes, sir.

Q What did you put down with regard to these properties?

A I had to tell the truth, that my attorney advised me to transfer the property into my children's name.

Q But on the schedules, the Bankruptcy schedules, did you advise the Court that you had conveyed them to your children?

A Yes, and the Court was upset because of the timeframe. According to them it shouldn't have happened that way.

(Tr. pp. 106, ll 23-25; 107 ll 1-15.) No bankruptcy schedules were introduced into evidence as appears from Exhibit 50, the Court Reporter's Exhibit List.

"While these are correct statements of law, we cannot under the facts of this case determine the applicability of Curtiss-Wright. The text of the Curtiss-Wright decision was neither introduced into the trial record, nor included in the record on appeal. Therefore, no competent evidence exists from which [we] can glean the full implications of the decision." *Middleborough Horizontal Property Regime v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

The Court then examined Mrs. Ravenel:

THE COURT: You had a bankruptcy hearing the next day?

A Yes, Sir.

THE COURT: Tell me what happened there.

A When I went to the bankruptcy hearing they called me up and asked me the general name, address and all of that. They told me what lead me to bankruptcy and all of that. I told them I had a job that was making real good money and I lost my job and all of that. Then they started asking, if I can remember correctly, you know, if you had any property or anything that you recently changed over within the year or the last couple of years, and I said yes. And then I told them – I had to give them the name, the property, the location and then they actually – it was something they dismissed because they needed my attorney to do something else because – anyway, that shouldn't have been done according to them. So my attorney had to do something else saying during the bankruptcy time, if I'm correct that they would be able to sell any of the property or something like that.

THE COURT: Did you get – did you go through the bankruptcy process? Did you get a discharge in bankruptcy?

A: Yes, I was unable – between the bankruptcy and – and that it went over to like 40-something hundred dollars a month and that – just was unable to do. I was not able.

THE COURT: They set you up on a payment plan?

A: Yes, sir. It, really, it was worse than what I was paying.

THE COURT: Right. So you were unable to make that payment plan?

A: Yes.

THE COURT: And you were not – your debts were not discharged in bankruptcy, you were put out of bankruptcy?

A: Yes, sir; correct.

(Tr. pp. 116, ll 5-24; 117, ll 1-15.)

The *Hayne* case states: "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."

That is not the case here.

In the instant case, Mrs. Ravenel's position has remained consistent, in that she has always testified before this Court that she conveyed her property to her children as she did in the bankruptcy proceeding.

It should be recalled that Mrs. Ravenel conveyed her five parcels including the residence at issue and filed in bankruptcy on the advice of an attorney (Tr. 97, ll 12-24; 116, ll 5-24.)

Acting upon the advice of Counsel is a defense. *In Re: Steve Ayers*, 25 B.R. 762 (Bkrtcy. M.D. Tenn. 1982):

> The rule is that when a bankrupt acts on the advice of counsel after a full disclosure of the facts to him, fraudulent intent may be presumed to be absent.

See also Abusamhadaneh v. Taylor, 2012 WL 2046125 (E.D. Va.).

While there is no case on advice of counsel that could be found in South Carolina, there is a case which is analogous, *Melton v. Williams*, 281 S.C. 182, 314 S.E.2d (Ct. App. 1984), an action for malicious prosecution. The defendant swore out a warrant for plaintiff's arrest for grand larceny upon the advice of counsel. The court held:

> Good faith reliance upon advice of fully informed counsel may establish probable cause. (Citation omitted).

In a similar vein, the Order accuses Mrs. Ravenel of unlawful action by citing *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010).[2] (Order pg. 7, paragraph 13.)

Wachovia was a mortgage foreclosure action wherein Mrs. Coffee counterclaimed on the ground of unclean hands for Wachovia committed the unauthorized practice of law by closing the loan without an attorney.

The Trial Court sets forth the following principle from *Wachovia*:

> . . .no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act."

However, the following language from *Wachovia* precedes this principle.

> We therefore reach the inescapable conclusion that Wachovia has come to court with unclean hands and is

[2] Appellants are informed and believe that certiorari has been granted and this case is scheduled to be heard by the S.C. Supreme Court on October 31, 2012.

> barred from seeking equitable relief. . . . Wachovia's legal causes of action are barred as well.

Wachovia thereafter states:

> This is consistent with South Carolina precedent asserting that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act. *See Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 68, 170-71 (Ct. App. 1993) (applying this policy to a contract secured and maintained by bribery).

The Plaintiffs in *Jackson* sued on a contract but were denied relief based on bribery.

These citations are inapposite because Mrs. Ravenel is not a party here and does not seek to "acquire a cause of action," nor is she guilty of "unlawful action."

IV. THE TRIAL COURT ERRED WHEN IT RULED THAT MARY RAVENEL'S PURPORTED FRAUD UPON CREDITORS WAS IMPUTED TO APPELLANTS WITHOUT CITATION OF AUTHORITY AND WHEN THE PREVALENT AUTHORITY IS TO THE CONTRARY.

The Trial Court in its Order discusses the fact that Mrs. Ravenel's "purported wrongdoings" are imputable to Lashanda and Henry, Jr. without citation of authority.

"To allow the Plaintiffs to void the tax sale would validate the conduct of Ms. Mary Ravenel; that same conduct is imputed on the Plaintiffs." (Order pg. 8, paragraph 20).

"When the Plaintiffs became aware that their mother intended to defraud her creditors they then elected to participate in her fraud by bringing the present action. They should not now be granted the relief they seek as the actions of their mother are imputed to them." (Order pg. 7, paragraph 14.)

The assertion by the Trial Court is contrary to the law.

> Actual knowledge of, or participation in, the debtor's fraudulent intention on the part of the transferee need not be established in order to justify a conclusion that the transaction was illegal. The transaction is subject to attack if at the time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker.

Coleman v. Daniel, 261 S.C. 198, 199 S.E.2d 74 (1973).

The assertion that when Lashanda and Henry, Jr. were aware that their mother intended to defraud her creditors "they then elected to participate in her fraud by bringing the present action" is without substance.

The Trial Court's Order at page 3 states "Although the subject real property was titled in her children's names, Mrs. Ravenel had never delivered the deed to them, nor had she even told them about the conveyance. The Plaintiffs stated that they only learned the deed and their ownership of the property when this law suit was commenced."

At paragraphs 6 and 9 of Page 6 of the Order, there appears the following:

> 6. The Plaintiffs were never made aware of the deed unto them, nor was the deed ever delivered to them.
>
> 9. The Plaintiffs had no knowledge or any concern with regard to the property until this action was commenced.

This testimony is further supplemented by the testimony of Mrs. Ravenel, Lashanda and Henry, Jr. (Tr. pp. 98, ll 16-25; 99, ll 1-3; 121, ll 25; 122, ll 1-11; 137, ll 22-25; 138, ll 1-6.)

If Lashanda and Henry, Jr. were not aware of their mother's deed to them in November 2007 until November 20, 2010, the initiation of this action, how could they

have been aware that their mother intended to defraud her creditors in 2007 and "elect to perpetrate in her fraud by bringing the present action."

CONCLUSION

There is no clear and convincing evidence to support the trial court's rulings.

To the contrary, the evidence is clear and convincing that the DTC did not pursue due diligence when the receipts were returned unsigned.

> "[A]ll requirements of law leading up to tax sales which are intended for the protection of the tax payer [sic] against surprise or the sacrifice of his property are to be regarded as mandatory and are strictly enforced." *Rives v. Bulsa*, 325 S.C. 287, 292-93, 478 S.E.2d 878 (Ct. App. 1996).
>
> "In this case, the State is exerting extraordinary power against a property owner-taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Jones v. Flowers, supra.*

Lashanda and Henry, Jr. request the Court to reverse the Orders of the Trial Court.

Respectfully submitted,

Barry I. Baker
Post Office Box 31265
Charleston, South Carolina 29417
(843) 766-9007

Benjamin Goldberg
One Carriage Lane, Bldg. H
Charleston, South Carolina 29407
(843) 769-4595

Attorneys for Appellants

October 19th, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell R. Scarborough, Master-in-Equity

Trial Court Case No. 2010-CP-10-8732

Lashanda Ravenel and Henry Lee Ravenel, II.....Appellants,

v.

Equivest Financial, LLC.....Respondent.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Appellants'** and **Appellants' Designation of Matter to be included in the Record on Appeal,** on Equivest Financial, LLC by sending a copy of it, postage prepaid, on October 19th, 2012, addressed to its attorney of record, S.R. Anderson, Esquire, Law Office of Steven R. Anderson, Post Office Box 12188, Columbia, SC 29211.

October 19, 2012

Gayle Millage, Legal Assistant to
Benjamin Goldberg
One Carriage Lane, Bldg. H
Charleston, SC 29417
(843) 769-4595

Attorney for the Appellants

BENJAMIN GOLDBERG
ATTORNEY & COUNSELOR AT LAW

ONE CARRIAGE LANE, BUILDING H
CHARLESTON, S.C. 29407
TELEPHONE (843) 769-4595
FAX (843) 769-4597

October 19, 2012

Via Certified Mail, Return Receipt Requested
The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Lashanda Ravenel and Henry Lee Ravenel, II, Appellants v.
Equivest Financial, LLC, Respondent
Appellate Case No. 2012-212772
C/A No. 2010-CP-10-8732

Dear Ms. Kitchings:

Enclosed for filing in the above case please find the following:

1. Original and two (2) copies of the Initial Brief of Appellants;
2. Original and two (2) copies of Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service for the above documents.

I would appreciate you filing the originals and returning stamped copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your courtesies in this matter, and should you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Benjamin Goldberg
Enclosures
cc: S.R. Anderson, Esquire (w/enclosures) *(via Certified Mail, Return Receipt Requested)*
Barry I. Baker, Esquire (w/enclosures)

BG/gm