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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-00180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas Respondents,

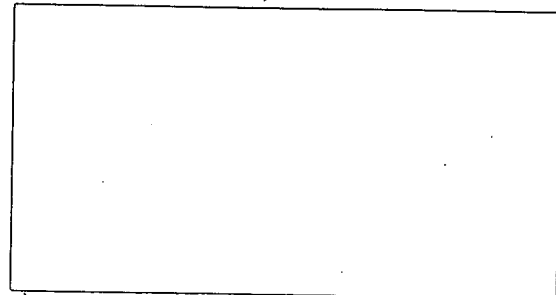
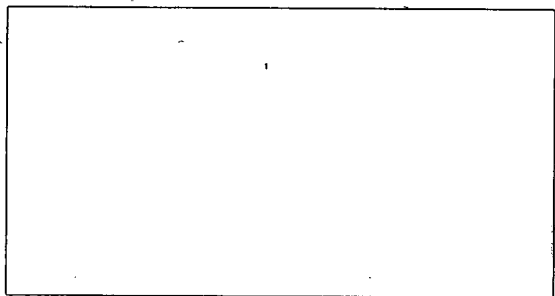
v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and
J. Mars Sapp, Defendants,
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-
Cribb are Respondents and

J. Mars Sapp is the Appellant.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

This case is before the Court on a single remaining question - whether “**the fraudulent conveyance between Will Darwin Wheeler and Pawleys Island North, LLC**, rendered the mortgage void and, therefore [Sapp’s] lien is superior to [Kennedy Funding’s] lien.” It is a compelling and important question, one which sets off the competing claims of a defrauded judgment creditor and a mortgage lender which - as a loan condition - had required the fraudulent conveyance of the mortgaged property. Appellant respectfully submits this brief reply to the supplemental brief filed by Respondents¹ on 15 August 2016.

ARGUMENT

Despite the Supreme Court’s having specified the question (the “Question”) to be addressed by the parties and this Court, the Respondent in its Supplemental Brief does not do so directly, but argues instead (1) that Kennedy was a bona fide purchaser for value, which is not applicable to the Question, and (2) that this Court should reconsider its previous holding that the pre-loan conveyance of the Property from Wheeler to Pawleys was indeed fraudulent.² Remarkably, Kennedy does not even analyze the effect of the Statute of Elizabeth, S.C. Code Ann. § 27-23-10(A), on Sapp’s priority lien position.

The contention that Kennedy, which had instigated the fraudulent conveyance after it had learned of Sapp’s pending collection action, was a *bona fide purchaser for value without notice, even if believed, is immaterial to the Question.*

¹ Sapp and this Court have previously referred to Respondents Kennedy Funding, Inc. and BNP Paribas collectively as “Kennedy” or “Respondent” and Sapp will continue that designation in this brief.

² No party requested rehearing by this Court on this correct holding and the Supreme Court adopted it in framing the question now presented.

Although Sapp will address the contention of Respondent's status as a *bona fide* purchaser without notice below, it is irrelevant under both the Statute of Elizabeth and under *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973). Under the Statute, every fraudulent conveyance is void as to the person defrauded. See, S.C. Code Ann. § 27-23-10(A) (2007). *Turner v. Washington Realty Co.*, 126 S.C. 378, 120 S.E.2d 371 (1923), held that a fraudulent conveyance is no conveyance at all. It is a nullity and title remains in the fraudulent grantor as if the deed never existed. *Id.* 126 S.C. at 403, 120 S.E.2d 371. These were clearly the premises upon which the Supreme Court in *Coleman* remanded the case to the lower court for a sale of the property to satisfy the judgment creditor's lien despite no wrongdoing by the lender which took its mortgage from the fraudulent grantee. Respondent has certainly cited no authority for the proposition that a good faith purchase for value without notice cures an actual void in the chain of title arising from a fraudulent conveyance. Therefore, even if Respondent could be considered a *bona fide* purchaser for value without notice, that contention by Respondent has no bearing on the Question.

In case this Court might deem that Respondent's alleged status as a good faith purchaser for value without notice has some relevance, Sapp reaffirms his argument "A" found at the Appendix to his brief filed 14 July 2016. Sapp further contends that the *Spence* case³ cited by Respondent actually supports Sapp's contention that Respondent was not a *bona fide* purchaser for value without notice. Under the undisputed facts of this case, Respondent was on both actual and inquiry notice of Sapp's equity in the fraudulently conveyed property, where Respondent knew of the debt owed by Wheeler⁴, instigated the

³ *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d (2006).

⁴ The inception of that debt having already established Sapp's equitable right to invoke the Statute of Elizabeth when Wheeler was made insolvent by the conveyance. See, *Matthews v. Montgomery*, 193 S.C. 118, 133 S.E.2d 841, 848 (1940).

conveyance, knew the conveyance was by quitclaim deed, and knew there was no consideration for the conveyance. As such, Respondent was at least on inquiry notice of the defect in the title of Pawleys Island North from which Respondent took its mortgage. See discussion in *Spence* regarding actual and inquiry notice, 368 S.C. at 118 – 121, 628 S.E.2d at 875 – 877.

Whether the conveyance by Wheeler to Pawleys Island North, LLC was fraudulent is no longer a question before this Court.

Despite Respondents' entreaties, this Court's ruling that the conveyance from Wheeler to Pawleys was fraudulent cannot be reconsidered at this juncture. That ruling was issued by this Court on 11 March 2015 in 2015-UP-138. Respondent did not request a rehearing. The Supreme Court adopted the holding in remanding the Question, and the request for consideration of this issue is an untimely distraction.

While disputing this Court's ruling that the conveyance was fraudulent, Respondent spends much of its argument on points that would be relevant only to that holding. For example, in purporting in Section I B to distinguish *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), Respondent lists each and every one of the badges of fraud that were found in *Coleman*, and then goes on to argue that these same ones do not apply to the matter now before this Court. But the badges of fraud in *Coleman* were enumerated and analyzed by the Supreme Court only with regard to the issue of whether the underlying conveyance was fraudulent, not to its effect on the rights of the subsequent mortgage lender.⁵ The Supreme Court having determined that the conveyance in *Coleman* was indeed fraudulent,

⁵ In its supplemental brief, Sapp refers to the badges of fraud that do pervade this case, but such reference was only as to those badges of fraud of which Kennedy had clear notice, or actual knowledge.

it remanded the case to the lower court for a sale of the fraudulently conveyed property in satisfaction of the lien of the defrauded judgment creditor.

Respondent's additional arguments, to the extent they indirectly relate to the Question, are without merit.

Another example of Respondent's persistence in "arguing around" the Question is its insistence that Wheeler could have mortgaged the Property directly, and that this Court should intervene in equity to reform the mortgage to make Wheeler the mortgagor. See Respondent's Brief, Argument II, pg. 8. In essence, Respondent seeks to invoke equity to reform the mortgage, making Wheeler the mortgagor, even though Respondent intentionally and specifically conditioned the loan on Pawleys being the mortgagor.

Putting aside the obvious futility of Respondent's argument⁶, Wheeler was not Respondent's borrower nor was he Respondent's mortgagor. Pawleys was the mortgagor and the Question is whether the fraudulent conveyance from Wheeler to Pawleys rendered the mortgage void as to the defrauded creditor Sapp, which it did under § 27-23-10(A). The Question is predicated on the facts of this case, not a theoretical loan directly to Wheeler which Respondent refused to make. To comply with Kennedy's loan conditions, Wheeler transferred the Property for \$5.00 to a controlled entity, which was to "front" the loan documents and convey the mortgage. The effect of this legally fraudulent transfer is the gravamen of the Question before this Court.

⁶ "Reformation requires clear and convincing proof of a mutual mistake between the parties to the instrument." *Harrington v. Blackston*, 319 S.C. 1, 12, 459 S.E.2d 309, 315 (Ct. App. 1995).

The Respondent summarizes other remaining contentions in four bullet points at the top of page two of its brief. Those four points will be briefly addressed, *seriatim*. Like its other contentions, these points do not bear relevance to the Question.

First, Respondent says that Sapp accuses it of fraud, which Sapp did not plead. Sapp does not, however, accuse Kennedy of common law fraud, but rather contends that Kennedy instigated a legally fraudulent conveyance which is void as to a defrauded creditor under the Statute of Elizabeth, S. C. Code Ann § 27-23-10(A).

At the second and third bullet points, Kennedy complains of the lapse of time between the filing of its mortgage and its discovery that Sapp's previously known collection action had been finalized in a judgment. But, since this case, arising under the Statute of Elizabeth, is not governed by any order of recording, the lapse of time between recordings is of no moment, especially since no claim is made that the time lapse resulted in any prejudice to Kennedy.

At its fourth bullet point, Kennedy claims that the fraudulent transfer still left Wheeler, "via his interest in Pawleys," with adequate assets out of which to satisfy Sapp's claim. This is an absurdity. Wheeler's "interest in Pawleys" was limited to Pawleys's interest in the Property, its only asset, and that same property was placed beyond Sapp's reach, not only through the fraudulent transfer, but through the subsequent mortgage from Pawleys to Kennedy. Further, this Court already determined that fraudulent transfer rendered Wheeler insolvent.

Ironically, to have its claim paid out of the value of the Property (Wheeler's interest in Pawleys) is the exact relief which Sapp seeks in this litigation, an outcome which Kennedy adamantly opposes.

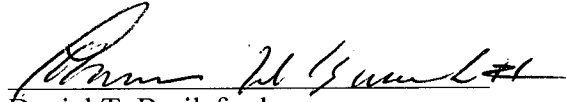
Respondent's public policy argument has no relevance to the facts of this case, or to the Question before this Court.

Respecting public policy concerns, Appellant Sapp has previously shown how a decision in his favor, limited to the facts of this case, would affect only the most egregious instances of conveyancing fraud, with no general effect on customary lending practices whatsoever. Appellant's Supplemental Brief at pp. 8, 9. Respondent's opposing public policy argument, however, must be responded to, for a remarkable reason. Respondent's Section III is devoted entirely to a doomsday prophecy about how a decision favorable to Sapp would irreparably harm commercial lending generally, constituting lenders the guarantors of all disclosed debts owed by their borrowers, in all cases. Indeed, no mention of fraudulent conveyances is made anywhere in Section III at all. In order to have the effect warned against by Respondent, this court would have to issue a broad and sweeping decision affecting properties that have never been fraudulently conveyed, cases in which the Statute of Elizabeth is not in play. Surely this Court need not fear the theoretical effects of such a sweeping decision, when the very essence of this controversy is the effect of a fraudulent conveyance. In fact, even though *Coleman v. Daniel* does not require a showing of complicity on the part of the lender, should this Court decide to grant relief to Appellant Sapp in a narrow ruling limited to the facts of this case, the resulting decision would affect only a lender with full knowledge of and complicity in a fraudulent conveyance, and would render its mortgage void only as to the interests of a defrauded creditor whose claim was known to the lender when it instigated the transfer and took the mortgage. Such a case will be rare indeed, and customary lending practices in this state will not be affected in the slightest.

CONCLUSION

Having thus replied to the new points and concerns raised in Respondent's Supplemental Brief, Appellant respectfully confirms its request for the relief set forth in its Supplemental Brief.

Respectfully submitted,



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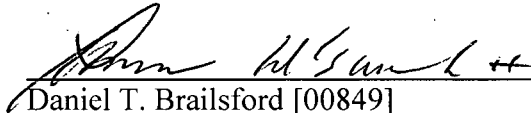
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are Respondents and

J. Mars Sapp is theAppellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Supplemental Reply Brief of Appellant
complies with Rule 211(b), SCACR.



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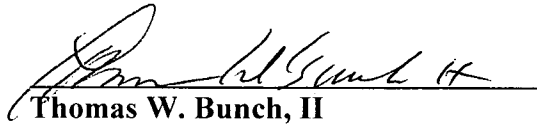
J. Mars Sapp is theAppellant.

PROOF OF SERVICE

I certify that I have served Supplemental Reply Brief of Appellant on opposing counsel by depositing a copy of it in the United States Mail, postage prepaid, on **August 25, 2016** addressed as follows:

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**Re: Kennedy Funding, Inc., as predecessor-in-interest, and BNP Paribas v. Pawleys Island North, LLC, et al of whom J. Mars Sapp is the Appellant
State Court Case No. 2011-CP-22-00180
Appellate Case No. 2013-001447
File No. 30440-0003**

Dear Ms. Kitchings:

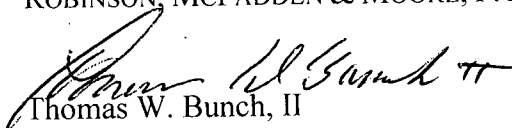
Enclosed please find the original and twenty-five copies of Supplemental Reply Brief of Appellant in the referenced matter. Please file the Briefs and return the clocked copies of with our courier.

By copy of this letter, and as indicated by the attached Proofs of Service, we are serving the same on opposing counsel.

Thank you for your attention to this matter.

Yours very truly,

ROBINSON, MCFADDEN & MOORE, P.C.


Thomas W. Bunch, II

TWB:ael

Enclosures as stated

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