

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

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

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.

FINAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Master Err in its Determination that the Mortgage Transaction between Pawleys and Kennedy was not Fraudulent?**
- II. Did the Master Err in its Determination that the Conveyance of the Property from Wheeler to Pawleys was not Fraudulent?**
- III. Do Equity and the South Carolina Recording Statute Dictate that Kennedy's Lien is Superior to Sapp's Lien?**

STATEMENT OF THE CASE

This appeal arises out of a commercial mortgage foreclosure action and involves a dispute between alleged lien holders over the existence and priority of liens. Respondent Kennedy Funding, Inc. (hereinafter "Kennedy") instituted this action by filing a Summons and Complaint on February 9, 2011, and the First Amended Complaint was filed by Respondent BNP Paribas, a successor-in-interest to Kennedy ("BNP") on September 5, 2012. The Complaint sought to foreclose on a mortgage given by Respondent Pawleys Island North, LLC ("Pawleys") on two parcels of raw land located on Pawley's Island, South Carolina, (the "Property") and collect on a promissory note given by Pawleys to secure the mortgage. The suit additionally sought to collect on personal guarantees given by Respondents Will Darwin Wheeler ("Wheeler") and Peggy Wheeler-Cribb ("Wheeler-Cribb")(collectively "Guarantors").

The Amended Complaint alleged Appellant J. Mars Sapp ("Sapp") may hold a lien arising out of a judgment he obtained against Wheeler but, if such a lien existed, it was junior to BNP's lien.

Sapp's original Answer did not assert any cross-claims or counter-claims but did request the Court find Sapp's lien to be a first lien and interest in the property. Based on this assertion of lien priority, BNP filed a motion for summary judgment requesting its lien be declared superior to Sapp's lien, if any. By Order dated March 5, 2012, Georgetown County Master-in-Equity Joe Crosby ("the Master") granted BNP's motion for summary judgment, ruling that to the extent Sapp held a lien which attached to the Property, his lien was inferior to BNP's lien. The Court's ruling did not address the merits of Sapp's alleged lien. Sapp filed a motion to reconsider and the Court held a hearing on the motion to

reconsider on August 13, 2012. The Court denied Sapp's motion to reconsider from the bench at the trial of the case on February 11, 2013.

After summary judgment was granted in BNP's favor and while Sapp's motion to reconsider was pending, Sapp responded to Plaintiff's First Amended Complaint by filing an Answer and Cross-Claim against Wheeler. Sapp asserted a lone cross-claim against Wheeler for violation of the Statute of Elizabeth, codified at S.C. Code §27-23-10(A), in which he contended that Wheeler's transfer of the Property to Pawleys constituted a fraudulent conveyance and that it and all subsequent transfers, including the mortgage given to BNP, should be voided. Sapp did not assert any counterclaim against BNP. On October 10, 2012, Pawleys, Wheeler and Wheeler-Cribb filed an Answer to Sapp's cross-claim in which they denied all material allegations set forth in Sapp's cross-claim. On October 10, 2012, BNP filed a reply to Sapp's cross-claim asserting the Court's summary judgment Order barred Sapp from re-litigating the lien priority issue and additionally asserted several affirmative defenses.

On February 11, 2013, the Master conducted a non-jury trial. The Master denied from the bench Sapp's outstanding motion to reconsider the Master's summary judgment Order. By agreement, the parties admitted in to evidence all the trial exhibits contained in the record. BNP presented testimony from Harry Nullet, a BNP Managing Director, and Kevin Wolfer, Kennedy's CEO. Sapp testified on his own behalf but did not call any other witnesses. Pawleys, Wheeler and Wheeler-Cribb did not present any witnesses but did cross-examine Sapp. The Master took the matter under advisement and issued his Order and Judgment on June 7, 2013. In his Order and Judgment, the Master found Pawleys to be in default under the terms of the Mortgage and Promissory Note, found Wheeler and

Wheeler-Cribb in default under the terms of the Guaranty, found BNP's mortgage to be a first lien on the Property, ordered the Property to be sold at a judicial sale, and ordered BNP was owed \$1,825,935.53, with interest continuing to accrue, pursuant to the terms of the Promissory Note and Guaranty. The Court denied Sapp's cross-claim finding that no fraudulent conveyance occurred and Sapp, therefore, had no lien interest in the Property.

Sapp filed a Notice of Appeal on June 27, 2013, appealing the Master's February 14, 2012 Summary Judgment Order and his June 7, 2013 Order and Judgment. Sapp filed an Amended Notice of Appeal confirming Pawleys, Wheeler and Wheeler-Cribb were also Respondents in the appeal. Judicial sale of the Property was scheduled for August 5, 2013. Prior to the sale, Sapp filed a motion to stay the sale on June 28 based on his notice of appeal being filed. The Court conducted a hearing on Sapp's motion to stay the sale and ruled that the sale would only be stayed if Sapp filed a bond in the full amount of BNP's judgment. Sapp did not file a bond and BNP was the high bidder at the sale with a bid of \$1,500,000. Subsequently, the Master entered a Final Judgment on BNP's deficiency claim against Wheeler and Wheeler-Cribb for \$382,790.61.

STATEMENT OF FACTS

I. BNP Lien

Pawleys entered into a Loan and Security Agreement with Kennedy dated April 30, 2009 (the "Loan Agreement"), evidenced by a separately executed Promissory Note dated April 30, 2009 (the "Note"), in the principal sum of Nine Hundred Sixty Thousand and 00/100 (\$960,000.00) Dollars, with interest thereon. (Compl. ¶ 10; R. p. 25). Simultaneously with the execution of the above-referenced Note, and in order to secure the payment thereof, Pawleys executed and delivered to Kennedy a Mortgage and Security

Agreement dated April 28, 2009, and recorded on May 5, 2009, in the Office of the Register of Deeds for Georgetown County, in Mortgage Book 1225 at Page 109 (the "Mortgage"), wherein and whereby Pawleys mortgaged the Property to Kennedy. (Compl. ¶ 11; R. pp. 25-26). After filing this suit, Kennedy assigned to BNP all rights, title, interests and obligations under the Note, the Mortgage and the other Loan Documents. BNP is, therefore, entitled to pursue foreclosure and the other relief stated in its Amended Complaint. (Am. Compl. ¶ 15; R. p. 66). The Property is raw land and was part of a larger tract of land previously subdivided into four parcels. During the litigation, the parties commonly referred to the Property as Lots 3 and 4. Prior to closing, an appraisal valued Lot 3 at \$1,040,000 and Lot 4 at \$880,000 for a total value of \$1,920,000. (Plaintiff's Trial Exhibit No. 2, 03.02.2009 Letter and attachment bearing Bates stamps Kennedy_00497-503; R. p. 511). Kennedy, therefore, was providing Pawleys with a cash-out loan for 50% of the value of the Property, (Kevin Wolfer Depo. Tr. 27:4-7; R. p. 192, lines 4-7), less \$300,000 to pay off a mortgage on lot 4 held by First South Bank and loan commissions and fees. (Kevin Wolfer Depo. Tr. 26:7-9; R. p. 191, lines 7-9). Pawleys retained 50% equity in the land or \$960,000. (Kevin Wolfer Depo. Tr. 27:4-16; R. p. 192, lines 4-16).

In addition to the above-referenced Loan Documents, Defendants Wheeler and Wheeler-Cribb signed a guaranty agreement dated April 30, 2009 (the "Guaranty"), whereby they individually, jointly and severally, absolutely and unconditionally guaranteed repayment under the Loan Documents to Kennedy. (Compl. ¶ 19; R. p. 28). At the trial of this case, BNP presented testimony and evidence that Pawleys had defaulted under the terms of the Mortgage and Note and that Wheeler and Wheeler-Cribb had defaulted under the terms of the Guaranty. (Trial Tr. Pages 17-20; R. p. 704, line 1-p.101,

line 25). No party contested or presented rebuttal evidence regarding these defaults. (See generally Trial Transcript; R. pp. 688-740).

II. Sapp's Alleged Lien

In preparing to file suit, Kennedy updated its title work on the Property and discovered Appellant J. Mars Sapp ("Sapp") was attempting to collect a civil judgment against Wheeler by executing against the Property. Previously on September 30, 2008, Sapp, as landlord, had filed a civil suit against a tenant corporation for breach of a commercial lease and against Wheeler for breach of a lease guaranty. (Answer to Am. Complaint and Crossclaim of Sapp. ¶ 23; R. p. 103). Fourteen months after Pawleys recorded its loan with Kennedy, Sapp obtained a verdict against Wheeler on June 4, 2010, in the amount of \$257,789.00 plus \$48,929.00 in attorney's fees. (Answer to Am. Complaint and Crossclaim of Sapp. ¶ 24; R. pp. 103-104). Wheeler appealed the verdict which was affirmed by the Court of Appeals on February 20, 2013. (See Sapp v. Wheeler, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013). As noted above, in his cross-claim, Sapp contends the transfer of the Property from Wheeler to Pawleys on April 28, 2009, was a fraudulent conveyance. (Answer to Am. Complaint and Crossclaim of Sapp. ¶ 30; R. p. 105).

III. Wheeler's Alleged Insolvency

The only evidence Sapp presented at trial regarding his efforts to collect the judgment against Wheeler was a *nulla bono* return from the Georgetown County Sheriff. (Trial Tr. 39:11-18; R. p. 726, lines 11-18). Sapp testified that he did not know if collection efforts were made in neighboring Horry County. *Id.* During litigation, Sapp did not conduct any discovery seeking to determine Wheeler's ability to satisfy a judgment at

the time Pawleys closed its loan with Kennedy or at any other time. (Trial Tr. 37:3-11; R. p. 724, lines 3-11). Sapp did not depose Wheeler or call him as a witness at trial. (Trial Tr. 36:25, 37:1-4; R. p. 723, line 25-p. 724, line 4). Further, Sapp presented no evidence that he had (i) instituted supplemental proceedings against Wheeler, (ii) instituted a suit to pierce Pawleys' corporate veil, (iii) attempted to obtain a lien on Wheeler's distributional share in Pawleys as permitted under the Limited Liability Company Act, (iv) attempted to collect on any of Wheeler's assets outside of Georgetown County, or (v) subpoenaed Wheeler's financial records or accounts to determine Wheeler's ability to pay the judgment from sources other than Lots 3 and 4. Finally, Sapp presented no evidence that Wheeler had transferred other assets out of his personal name to other entities or persons during the pendency of the litigation.

IV. Kennedy's Due Diligence

Prior to closing the loan with Pawleys, Kennedy conducted due diligence to determine Pawleys' suitability to obtain the loan and Wheeler and Wheeler-Cribb's ability to guaranty that loan. (Kevin Wolfer Depo. Tr. 34:3-5; R. p. 199, lines 3-5). Kennedy conducted a title search that revealed a \$300,000 mortgage lien held by First South Bank on Lot 3. (Kevin Wolfer Depo. Tr. 26:7-9; R. p. 191, lines 7-9). Kennedy arranged to have that lien paid at closing. (See Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_01138-1140; R. p. 228-229). No other lien appeared on the title search and no *lis pendens* attached to the property. *Id.* Kennedy paid for an appraisal which determined the value of the property to be \$1,920,000. (Kevin Wolfer Depo. Tr. 27:1-2; R. p. 192, lines 1-2). Kennedy ultimately decided to only loan Pawleys \$960,000, of which \$300,000 was used to pay off the First South mortgage, thus leaving Pawleys with \$960,000 in

equity. (Kevin Wolfer Depo. Tr. 26:7-9, 27:4-16; R. p. 191, lines 7-9, p. 192, lines 4-16). In a pre-closing search, Kennedy's counsel found the Sapp litigation against Wheeler which alleged Wheeler was liable as a lease guarantor for \$556,099. (Kevin Wolfer Depo. Tr. 34:15-19; R. p. 199, lines 15-19). Kennedy's counsel sent a pre-closing check list to Pawleys' counsel and requested an update on the Sapp litigation in an email. (Kevin Wolfer Depo. Tr. 34:20-25; R. p. 199, lines 20-25). Sapp did not depose or call as a witness at trial Wheeler, Wheeler-Cribb, their counsel, or Kennedy's counsel to ask whether or not oral updates were given on the Sapp litigation. (Trial Tr. 25:3-6; R. p. 712, lines 3-6). Sapp contends Kennedy never got a response to its email inquiry, yet counsel for Pawleys, Wheeler and Wheeler-Cribb wrote a lengthy letter prior to closing addressing the borrower and guarantors' ability to close on the mortgage, note and guaranty. (Plaintiff's Trial Exhibit No. 1 at Kennedy_01394-1398; R. pp. 485-489). In his letter, guarantors' counsel stated:

There is no action, suit, proceeding or investigation at law or in equity by or before any court, governmental instrumentality or other agency now pending or, to the best of our knowledge, threatened against the Borrower or the Guarantors or any of the Borrower's or the Guarantors' properties or rights which, if determined adversely to the Borrower or the Guarantors, would impair or materially affect (i) such entity's right to carry on its business substantially as now conducted, (ii) the value of the collateral securing the Loan Documents, (iii) such entity's ability to carry out its obligations under the Loan Documents to which it is a party, or (iv) the validity or enforceability of each of the Loan Documents executed by the Borrower or the Guarantors. Neither Borrower nor Guarantors are in default with respect to any order, judgment, writ, injunction, decree or demand of any court or governmental authority. *Id.*

Kevin Wolfer, Kennedy's CEO, testified that Kennedy would not have closed on the loan without this representation. (Kevin Wolfer Depo. Tr. 38:21-24; R. p. 203, lines 21-24). Additionally, Wheeler confirmed the following in his Guaranty Agreement:

There is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting the Guarantor or any of his properties or rights, wherein an unfavorable decision, ruling or finding would (i) to the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of the guarantor; (ii) materially or adversely effect the Guaranty; or (iii) adversely effect the validity or enforceability of the Guaranty Documents.

Borrower is a pre-existing entity actively engaged in the operation of its business and has not been created as a vehicle to obtain the Loan. The proceeds of the Loan will be used by Borrower solely to (a) discharge or release liens upon the real property encumbered by the Mortgage (the "Property") or for other business purposes directly related to the Property, and (b) pay fees and other amounts related thereto or to the making of the Loan.

On the date hereof, (i) the assets of the Guarantor exceed his liabilities, and (ii) the Guarantor is paying his debts as they become due. (Plaintiff's Trial Exhibit No. 1, Guaranty at KENNEDY_01267-1277; R. pp. 358-368).

Kennedy, therefore, did obtain a thorough response from Wheeler and his counsel confirming the Sapp litigation was not a material action which would impair the Borrower or Guarantor's financial condition, ability to perform under the Note and Guaranty, or adversely impact the Property.¹ (Plaintiff's Trial Exhibit No. 1, April 30, 2009 Letter at Kennedy_01394-01398; R. pp. 485-489).

V. Transfer from Wheeler to Pawleys

The Quitclaim Deed Wheeler gave to Pawleys for "\$5 and no other consideration" included an affidavit from Wheeler stating that the Deed was exempt from recording fees because the Property was being transferred to the LLC in order for Wheeler to increase the value of his stock or interest held in the LLC. (Defendant's Trial Exhibit No. 1, Quit Claim

¹ Appellant misquotes or misconstrues the testimony of Kennedy Funding on the due diligence issue. Appellant contends Kevin Wolfer, Kennedy's CEO, testified that Kennedy knew Wheeler did not have the income to pay back the loan and Kennedy decided a possible fraudulent conveyance did not matter if it obtained a title opinion and title insurance (Appl. Brief at p. 6). Respondent submits no such testimony can be found in Wolfer's deposition.

Deed and Affidavit; R. pp. 750-755). In addition to the appraisal on the Property for \$1,920,000, the parties also admitted in to evidence Pawleys' *Amended Articles of Organization* which state in Section 9.0 that the purpose of the business was to "own, hold, sell, assign, transfer, operate, improve, lease, mortgage, pledge and otherwise deal with certain real property pledged to Kennedy Funding, Inc. as collateral pursuant to that certain Mortgage and Security Agreement" which is identified above. (Plaintiff's Trial Exhibit no. 1, Kennedy_1305-1360, First Am. To the Art. of Org of Pawleys Island North, LLC. § 9.0(a); R. pp. 396-451).

STANDARD OF REVIEW

In South Carolina, a clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth.² See, *Oskin v. Johnson*, 400 S.C. 390 (S.C. 2012) (citing, *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) (citations omitted)). Additionally, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action. *Id.*, (citing, *Future Group, II*, 324 S.C. at 97 n. 6, 478 S.E.2d at 49 n. 6; S.C. Const. art. V, § 5.)

The Statute of Elizabeth provides:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken ... to be clearly and utterly void....

S.C. Code Ann. § 27-23-10(A) (2007). In interpreting this statute, our Courts hold conveyances shall be set aside under two conditions: First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; or,

² Appellant erroneously contends in his initial brief that a preponderance of the evidence standard applies to fraudulent conveyance claims. In *Oskin v. Johnson*, the Supreme Court unequivocally established a clear and convincing evidence standard applies to a fraudulent conveyance claim. 400 S.C 390, at FN4, (S.C. 2012).

second, where a transfer is made without actual intent to defraud but without valuable consideration. *Id.* (citing, *Future Group, II*, 324 S.C. at 96, 478 S.E.2d at 48–49; *McDaniel v. Allen*, 265 S.C. 237, 242–43, 217 S.E.2d 773, 775–76 (1975). Even where it is shown that the grantor has fraudulent intent, to “annul for fraud a deed based upon a valuable consideration [under the Statute of Elizabeth], it must not only be shown that the grantor intended thereby to hinder, delay or defraud creditors, but it must also appear that the **grantee participated in such fraudulent purpose.**” *McDaniel*, 265 S.C. at 242–43, 217 S.E.2d at 775–76 (emphasis added); *Windsor Props.*, 331 S.C. at 471, 498 S.E.2d at 860.

ARGUMENT

I. THE KENNEDY MORTGAGE TRANSACTION DID NOT VIOLATE THE STATUTE OF ELIZABETH

Appellant asserts that the mortgage transaction between Pawleys and Kennedy should be set aside because the transaction was not supported by valid consideration or, even if there was valid consideration, that Pawleys and Kennedy intended to defraud Appellant. (Appellant's Initial Brief, p. 8). First, the mortgage was supported by a \$960,000 loan to Pawleys, which is valid consideration under any construction of the transaction. Second, Appellant failed to present any evidence, much less clear and convincing evidence, that Kennedy knowingly participated in a fraudulent act.

A. The Mortgage was Given to Kennedy in Exchange for Valuable Consideration

Appellant attempts to attack the mortgage transaction between Pawleys and Kennedy on the grounds of grossly inadequate consideration. (Appellant's Initial Brief, p. 14). In doing so, Appellant bases his argument on the assumption that the mortgage was actually a conveyance of the Property from Pawleys to Kennedy for 50% of the Property's

value and was, therefore, inadequate. *Id.* It is undisputed, however, that Pawleys did not sell and convey the land to Kennedy; rather it simply borrowed money from Kennedy collateralized by the Property. This transaction cannot be set aside under the Statute of Elizabeth because no conveyance occurred. The conveyance that transferred the Property was an October 7, 2013 non-voluntary conveyance from the Master to the winning bidder after judicial sale.³ (Master's Report on Sale, Order of Disbursement Pursuant to Rule 71 (Public Sale), Order Confirming Closing Case, October 7, 2013 and Master's Foreclosure Deed; R. pp. 803-807). This conveyance from the Master via foreclosure deed is not fraudulent. Kennedy did not buy the Property for 50% of its value, it loaned \$960,000 and has not been repaid. (Kevin Wolfer Depo. Tr. 27:1-7; R. p. 192, lines 1-7). There is clearly consideration to support this mortgage transaction.

Appellant relies on *Coleman v. Daniel*, 261 S.C. 198 (1973), for the apparent proposition that anything below a 58% loan to value ratio is *per se* inadequate consideration to support a mortgage. This is a ludicrous reading of *Coleman* as such an interpretation would wipe out a significant percentage of the mortgages in South Carolina. By conflating a mortgage transaction with a sales transaction, Appellant presents an absurd argument that would eliminate cash-out, home equity, second mortgage and most primary mortgage lending in South Carolina, because no prudent lender ever loans 100% of the value of the collateral.

In *Coleman*, the debtor was proven to be insolvent when he transferred virtually his entire estate to his daughter and son-in-law for roughly 58% of the appraised value.⁴ 261 S.C. at 204. The transfer included the property where the debtor had lived his entire life

³ The Master signed a Master's Deed on October 7, 2013 but the deed has not yet been recorded.

⁴ There is considerable discussion in the opinion about the true value of the property and consideration actually paid as the daughter and son-in-law cited past and future support of their father as consideration.

and a separate agreement the debtor made with his daughter to continue living on the property rent free. 261 S.C. at 203. The property was, in essence, being held in the daughter and son-in-law's name for their father's perpetual use. Under these facts, the Court found the daughter and son-in-law's failure to inquire as to their father's indebtedness to plaintiff Coleman resulted in the knowledge of the debt imputed to them and voided the transfer as a fraudulent conveyance. 261 S.C. at 211.

This case does not involve any of the key facts which supported a fraudulent conveyance finding in *Coleman*. First, this was an arms-length loan transaction between a lender based in New Jersey and a South Carolina limited liability company with no prior relationship. (Kevin Wolfer Depo. Tr. 13:22-25, 14:1-10; R. p. 178, line 22-p.179, line 10). Second, no property was sold or transferred to Kennedy. Third, the borrower was not insolvent when the loan was executed but retained over \$1.3 million in cash and equity from this transaction alone. Fourth, the borrower was not living on the Property when the transaction closed. (Plaintiff's Trial Exhibit No. 1, R. p. 225). Finally, the borrower did not retain, via secret agreement, perpetual use of the Property rent free. The only reasonable conclusion to draw from the amount Kennedy loaned is that it was a conservative and prudent lender. Sapp's argument that a 50% loan to value ratio was grossly inadequate is not supported by *Coleman* or any other South Carolina case.

Sapp also relies on *South Carolina National Bank v. Halter*, 293 S.C. 121 (Ct. App. 1987), in support of his argument that Kennedy participated in a fraud. Like in *Coleman*, *Halter* involved a fraudulent conveyance among family members. 293 S.C. at 123. In *Halter*, Caine, the debtor, deceased at the time the case was decided, transferred certain rental properties to an alimony trust that was managed by his son-in-law, Halter, as trustee.

293 S.C. at 131-32. However, the trust was never operated separately and distinctly from Caine's other business affairs and Halter routinely failed to make the alimony payments the trust was established to make. 293 S.C. at 132. Finally, upon the death of Caine's ex-wife, the rental properties were to be transferred to a company owned by Halter and his wife, who was Caine's daughter. 293 S.C. at 131-32. The court found that the only reason to make the company the residuary beneficiary was Caine's desire to bestow upon his daughter and son-in-law an invaluable residual asset. 293 S.C. at 132. Under these facts, which clearly evidenced the debtor's intent to shelter property from his creditors, the Court voided the transfer from Caine to the trustee. 293 S.C. at 133.

More applicable to this case than the trust issue, however, was the issue in *Halter* involving a separate transaction the Court called the "Franklin Hotel Mortgage" transaction. This transaction involved Halter loaning or advancing \$35,000 to his father-in-law, Caine, in exchange for a note and mortgage on a hotel property. *Id.* Halter wore the hat of "mortgagee" in this transaction which the Court noted in stating

[t]o annul the instant mortgage, which is supported by valuable consideration, it must be shown not only that Caine intended to hinder, delay or defraud his creditors, but also that **Halter [mortgagee] participated in the fraud.**

Id. (emphasis added). The Court upheld this mortgage transaction, in part, because the Plaintiff failed to plead or prove fraud against Halter as mortgagee. See, *Halter*, 293 S.C. at 133, fn. 5 ("Technically, we need go no further since [the creditor] failed to plead actual fraud on [grantor]'s part and participation in the fraud by [grantee]"). Sapp likewise failed to plead or prove a fraud or a fraudulent conveyance claim against Kennedy or BNP which is an independent ground to affirm the Master's Order. The Court further upheld the mortgage because it found \$35,000 was valid consideration to support the mortgage and

there was not sufficient proof that Halter had participated in a fraud even though he was loaning money to his father-in-law and obtaining a lien position senior to other creditors. 293 S.C. at 134. The Kennedy mortgage should be affirmed under the *Halter* holding because \$960,000 is inarguably valid consideration to support a mortgage interest for the same amount and Sapp has not presented any evidence that Kennedy participated in a fraud. There is no evidence that the Kennedy loan and mortgage were a sham or anything other than a bona fide arms length transaction.

B. Kennedy Had No Notice of Any Fraudulent Activity

Sapp argues in his brief that Kennedy had notice of fraudulent activity on the part of Wheeler and Pawleys, and, as a result, contends that the mortgage transaction between Pawleys and Kennedy should be set aside. (Appellant's Initial Brief, p. 23-24). In support of his argument, Sapp points to a pre-closing lawsuit search in which the Sapp litigation was found and one email from Kennedy's counsel to Pawleys' counsel inquiring about the Sapp litigation. (Appellant's Initial Brief, p. 24). Sapp has presented no other evidence to support his argument that Kennedy knowingly participated in a fraud.

Sapp fails to mention that, as a condition to closing, Kennedy required Wheeler and his counsel to affirm in writing that (1) there were no suits pending or threatened against Wheeler which would impair his ability to perform under the Guaranty or other obligations; (2) no suits which would adversely impact the Property and (3) Wheeler was paying all his debt obligations as they became due. (Plaintiff's Trial Exhibit No. 1, April 30, 2009 Letter at Kennedy_01394-01398 and Guaranty at Kennedy_01267-1277; R. pp 485-489 and pp. 358-368). In addition to this evidence, the only testimony presented on the issue of Kennedy's knowledge of Wheeler's intention, or fraud for that matter, was

Kevin Wolfer's testimony that Kennedy never had any discussion with Wheeler, Wheeler-Cribb or anyone on behalf of Pawleys indicating that the transfer of the Property to Pawleys would render Wheeler insolvent or impair his ability to satisfy a Sapp judgment in the future. (Appellant's Initial Brief, p. 24). In sum, Kennedy acted reasonably and prudently in making the Pawleys loan and there is no evidence it knowingly participated in a fraud or had knowledge of a fraud.

Assuming, *arguendo*, that Kennedy had a duty to investigate the Sapp litigation beyond everything it did as recited herein, and assuming Kennedy had predicted the future and determined the Sapp litigation would result in a verdict against Wheeler for \$301,727; at the time of closing, Kennedy knew Pawleys, and Wheeler through his 99% interest, would receive \$397,438.50 in cash at closing and retain \$960,000 in equity in the Property for a total amount of \$1,357,438.50 from the Property alone. (Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_1138-1140; R. p. 228-230). Nothing about this transaction would cause a reasonable lender to be concerned that Wheeler could not satisfy a \$304,727 verdict or was engaging in fraud. Moreover, and as set forth below in Section III, Kennedy had no reason to participate in or condone a fraud because its lien position, whether it loaned to Pawleys or Wheeler, would always be superior to Sapp's later-filed judgment lien.

All of the cases Sapp cites in support of his contention that Kennedy had notice of the fraud are easily distinguishable. Although *Rilling v. Texas* is a 1902 Texas case and not binding precedent on this Court, that case involved a father and son conspiring to keep property out of the hands of the son's ex-wife by transferring it to an individual who knew the circumstances of the divorce. 95 Tex. 352, 67 S.W. 401 (1902). Similarly, *Messervy v.*

Barelli, involved a conveyance from a mother to a man supposedly engaged to her daughter and with whom the mother was on "intimate terms of friendship."⁵ 11 S.C. Eq. (2 Hill Eq.) 576 (1837). In those cases, there was undoubtedly a close personal relationship between the parties prior to the mortgage. *Brunson v. Sports* is not applicable here because it entailed the creation of a resulting trust in favor of a decedent's heirs where the administrator of an estate took property in her own name as payment for a debt that was owed to the estate. 239 S.C. 58, 121 S.E.2d 294 (1961). *Brunson* was actually decided on trust law and adverse possession grounds, not the Statute of Elizabeth, and is plainly not applicable to this case.

Ultimately, Sapp would have this Court treat the conveyance of a mortgage interest in the Property from Pawleys to Kennedy as a sham transaction similar to a conveyance between close personal friends or family to avoid a creditor. There was simply nothing about Wheeler's transfer of the Property to a limited liability company which would have put a prudent lender on notice that Wheeler was engaging in a fraud given that Wheeler's interest in the limited liability company alone was sufficient to satisfy Sapp's claim.

II. THE TRANSFER FROM WHEELER TO PAWLEYS WAS NOT A FRAUDULENT CONVEYANCE

Appellant asserts that an intra-family transfer of the Property from Wheeler to Pawleys shifts the burden of proof to Pawleys to prove the *bona fides* of the transaction. (Appellant's Initial Brief, p. 15). The transfer, however, was not "intra-family" and the burden remains on Appellant to prove by clear and convincing evidence that a fraudulent conveyance occurred. Regarding the actual conveyance, it was supported by valuable

⁵ "To [mortgagor's] mother...he familiarly applied the epithet of 'mother,' to her sisters, that of 'sister,' and to her aunts, that of 'aunt;' and was a constant visitor at the house, and took all liberties he would have done if he had been a member of the family..."

consideration, and Appellant has failed to prove Wheeler intended to defraud him and that Kennedy participated in the fraud.

A. The Transfer from Wheeler to Pawleys was not an Intra-Family Transfer, and the Burden of Proof Remains on Appellant to Prove by Clear and Convincing Evidence that the Conveyance was Fraudulent

Appellant claims that the transfer between Wheeler and Pawleys was an intra-family transfer, shifting the burden of proof from the Appellant to the Respondent. (Appellant's Initial Brief, p. 15).⁶ "Intra-family" is not a defined term under South Carolina case law. Cases do, however, provide an illustration of how South Carolina courts have applied the term. *See Coleman* (transfer of property from father to daughter and son-in-law, *Halter* (transfer of property to son), *Messervy* (transfer of property to an intimate family friend). The transfer at issue here, however, is a transfer from an individual (Wheeler) to a corporation (Pawleys). The South Carolina Limited Liability Company Act provides "[a]member is not a co-owner of, and has no transferable interest in, property of a limited liability company." S.C. Code § 33-44-501. Sapp seems to contend that Wheeler transferred the Property to Wheeler-Cribb, his mother, because she had a 1% membership interest in Pawleys. This argument fails under § 33-44-501 because Wheeler-Cribb obtained no transferable interest in the Property.

Perhaps knowing he could not prove a transfer from Wheeler to Wheeler-Cribb, Sapp next argues under *Windsor Properties, Inc.* that the corporate entity can be disregarded. (Appellant's Initial Brief, p. 15). In *Windsor*., the Court found a transfer from a corporation wholly-owned by a husband to a wife was "intra-family" citing the wife's

⁶ See, *Coleman*, 261 S.C. at 208 ("Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence.").

testimony that the corporation and husband to her "were one in the same." 331 S.C. 466, at FN 4. If Pawleys' corporate veil is to be disregarded in this case – even though Sapp did not plead or prove veil piercing at trial – the Wheeler transfer to Pawleys was nothing more than a transfer from Wheeler to himself as he owned 99% of the company. By any definition, this cannot amount to an "intra-family" transfer and the burden remains on Sapp to prove by clear and convincing evidence that either of two situations occurred – either Wheeler intended to defraud Sapp or the conveyance was not supported by consideration.

B. Wheeler Did not Transfer the Property to Pawleys with the Actual Intent to Defraud Sapp

In order to set aside a conveyance on the basis that the grantor intended to defraud its creditor, the creditor must prove that, "(1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee." *Durham v. Blackard*, 313 S.C. 432, 437–38, 438 S.E.2d 259, 262 (Ct.App.1993) (citing *Coleman*, 261 S.C. at 208, 199 S.E.2d at 79).

Sapp did not depose Wheeler, call him as a witness or present any direct evidence that Wheeler intended to defraud Sapp. (Trial Tr. 25:3-6; R. p. 712, lines 3-6). The only evidence before the Court as to Wheeler's intent was his Answer to Sapp's cross-claim in which Wheeler denied intending to defraud Sapp. (Answer of Pawleys, Wheeler, and Wheeler-Crib's Cross-Claim of Sapp, ¶ 5; R. p. 124). Sapp must, therefore, rely on circumstantial evidence to overcome Wheeler's direct denial.

In determining whether the intent to defraud exists, our Courts have studied whether "badges of fraud" are present which would support a finding of fraud. In *Coleman*, the Court stated:

Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

261 S.C. at 209.

Other than a *nulla bona* return from the Georgetown County Sheriff, Sapp presented no evidence indicating fraud.⁷ It is undisputed Wheeler retained a 99% ownership interest in Pawleys which owned Property valued at \$1,920,000. (Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_01138-1140; R. p. 228-230). It is also undisputed that \$397,438.50 was distributed to Pawleys at closing. *Id.* Wheeler's distributional interest in the amount distributed at closing alone was sufficient to satisfy the Sapp debt. The existence of pending litigation would be of no concern to a reasonable lender when it knew the Borrower or Guarantor had sufficient assets in the Property or in cash from closing to satisfy the other debt. Additionally, Sapp did not conduct any discovery or present any evidence of Wheeler's financial condition at the time he obtained his judgment against Wheeler. (Trial Tr. 25:3-6; R. p. 712, lines 3-6). Sapp also admitted at trial he did not know if his counsel had attempted a search of Wheeler's assets in Horry County or undertaken any other efforts to collect the judgment other than to attempt to attach to the Property. *Id.* Sapp presented no evidence that he had taken Wheeler through supplemental proceedings or pursued other collection avenues. Though Sapp alleged in his cross-claim that Wheeler did not retain sufficient assets to satisfy the judgment, Wheeler denied the allegation and Sapp did not challenge the denial. Additionally, Sapp presented

⁷ A *nulla bona* return is "probative" of insolvency. *S. Carolina Nat. Bank v. Halter*, 293 S.C. 121, 127, 359 S.E.2d 74, 77 (Ct. App. 1987).

no evidence Wheeler attempted to conceal the transfer in any way, departed from his normal business practices, or transferred his entire estate. Finally, there is no proof that Wheeler ever lived on or profited from the Property in any way after it was transferred to Pawleys. The badges of fraud are simply nonexistent.

Stepping back and considering the transaction in its entirety, the conveyance from Wheeler to Pawleys and subsequent mortgage to Kennedy is not the kind of "relationship" our Courts have found indicative fraud. In the cases that Sapp relies on in his brief, the grantor remained on the property and lived there despite transferring ownership to another party. *See Coleman* (grantor continued to live on property after conveyance to daughter and son-in-law), *Windsor*. (wife/grantee lived on property with husband who wholly owned corporation/grantor), *Dinkins v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942) (husband conveyed property and all machinery thereon to wife and continued to use car and machinery as his own). Here, there is no proof that Kennedy ever intended to enter into a sham mortgage to allow Wheeler to defraud Sapp or retain use of the Property without timely paying on the Note. To the contrary, Kennedy's foreclosure suit and the Court's foreclosure order conclusively prove Kennedy intended to enforce its mortgage agreement and recoup all it was due under the Note, Mortgage, and Guaranty.

C. The Transfer of the Property to Pawleys was Supported by Valuable Consideration

Sapp also argues that, even if Wheeler did not intend to fraudulently convey the Property to Pawleys, the transfer should be set aside as fraudulent because it was without consideration. (Appellant's Initial Brief, p. 13). In support of this, Sapp cites *Future Grp., II v. Nationsbank*, which held that conveyances made without consideration should be set aside where "the grantor was indebted to the plaintiff at the time of the transfer and the

grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect." 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996). "[V]aluable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Univ. v. Waller*, 124 S.C. 68, 74, 117 S.E. 356, 358 (1923).

Sapp contends there was no consideration because the Quitclaim Deed from Wheeler to Pawleys was for "\$5 and no other consideration." (Appellant's Initial Brief, p. 14-15). However, Respondents contend that this was not the only consideration Wheeler received, and that this Court may look outside of the deed for evidence of further consideration. "Since 1834, and before, it has been uniformly held that, notwithstanding the circumstances that a deed may recite consideration, it is competent to prove by parol testimony what the real consideration was." *Beckham v. Short*, 294 S.C. 415, 418, 365 S.E.2d 42, 44 (1988) (citing *Scott v. Wiggins*, 113 S.C. 88, 90, 101 S.E. 113, 114 (1919)). In *Beckham v. Short*, the South Carolina Supreme Court held that parol evidence may be admissible to show further consideration from what is stated in the deed, stating that "only the essential elements of the contract ever need protecting. Varying the consideration of a written instrument does not ordinarily affect the instrument's validity." 294 S.C. at 419, 365 S.E.2d at 44.

Wheeler received a benefit for his transfer to Pawleys in the form of an almost \$1.92 million increase in the value of his membership interest in the Pawleys and the payoff of a \$300,000 mortgage to First South Bank. Further, Wheeler benefitted from the transfer to Pawleys by protecting his financial interest in the property. In *Oskin v.*

Johnson), the Supreme Court recently held that the creation of an LLC by the wife of a part-owner of property for the purpose of securing a loan to protect that part-owner's interest was not fraudulent. 400 S.C. 390, 735 S.E.2d 459 (2012). The Supreme Court stated, "[a]s with any other wise consumers or investors, they are free to utilize a legal mechanism to protect their own financial interests." 400 S.C. at 401. The court went on to decide that no inequity of fraud had occurred because voiding the subject transfer would not have changed lien priorities. *Id.* As set forth in Section III below, the same result is dictated here. Additionally, Sapp presented no evidence that Wheeler had any intent in transferring the Property other than for the purpose of protecting his financial interests and carrying out his business. Other than the Articles of Organization which state Pawleys' business purpose, the only other evidence of Wheeler's intent is a direct denial in his Answer to Sapp's cross-claim and an affidavit Wheeler signed confirming that the transfer to Pawleys was done to increase his interest or stock ownership in the company. (Answer of Wheeler to Sapp's Cross-claim, October 10, 2012; R. pp. 123-127, and Defendant's Trial Exhibit No. 1, Quit Claim Deed and Affidavit; R. pp. 750-755).

Sapp alternatively argues that even if the transfer was supported by valuable consideration, it was grossly inadequate consideration. (Appellant's Initial Brief, p. 14). As set forth above, however, even if this Court finds that Five Dollars (\$5.00) and the benefits Wheeler received in exchange for the conveyance amounted to grossly inadequate consideration, Sapp has failed to prove by clear and convincing evidence that Wheeler intended to defraud Sapp in transferring the property to Pawleys and that Kennedy participated in the fraud. See, *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 595, 524 S.E.2d 621, 622 (1999) (citing *Jefords*, 247 S.C. at 352, 147 S.E.2d at 418)

([W]here there is gross inadequacy of consideration, an actual intent to defraud must still be shown to set aside the conveyance as fraudulent").

1. If the Court finds no consideration, Sapp has failed to prove Wheeler was insolvent or lacked resources to pay the debt at the time of judgment

If the Court finds that no consideration supported the transfer to Pawleys, Sapp has still failed to meet his proof burden. Sapp has failed to prove by clear and convincing evidence that Wheeler "failed to retain sufficient property to pay his debt" to Sapp. See, *Albertson v. Robinson*, 371 S.C. 311, 317, 638 S.E.2d 81, 84 (2006) (Court held that, in addition to a lack of valuable consideration, the creditor must also establish that "(1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness to the creditor in full..."). Appellant once again compares the instant case to *Coleman*; however, the two are distinguishable. The grantor in *Coleman* was completely insolvent at the time that he made the transfer, which the court considered to be circumstantial evidence that the conveyance was fraudulent. *Coleman*, 261 S.C. at 210. In fact, at trial, the grantor of the property admitted that he was insolvent and unable to pay his debts at the time he transferred the property to his daughter and son-in-law. 261 S.C. at 206.

Unlike *Coleman*, Wheeler was not insolvent at the time the transfer was made as it is undisputed that his 99% interest in Pawleys was worth at least \$1,620,000. (Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_01138-1140; R. pp. 228-230). At the time the Sapp judgment was entered, Sapp only produced a *nulla bono* return from Georgetown County. Absent any evidence that Wheeler did not have attachable assets in other jurisdictions, a lone *null bono* return in one county cannot rise to the level of clear

and convincing evidence of insolvency. Wheeler retained counsel to appeal the Sapp judgment through final judgment and retained counsel to defend this action through appeal, indicating that Wheeler clearly has some assets. Whether Wheeler's assets are sufficient to satisfy Sapp's judgment remains an unanswered question as Sapp has made no effort to discover Wheeler's assets or collect his judgment beyond mailing it to the Georgetown County Sherriff.

III. EQUITY AND THE RECORDING STATUTE DICTATE RESPONDENT'S LIEN IS SUPERIOR

An action to establish lien priorities is an action in equity. *Fibkins v Fibkins*, 303 S.C. 112, 399 S.E.2d 158 (Ct.App. 1990). An action to foreclose a mortgage is also an action in equity. *Id.* Pursuant to the South Carolina Recording Statute,

all...instruments...encumbering [property]...are valid so as to affect the rights of subsequent creditors...only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10. The purpose of South Carolina's recording statute is to protect subsequent creditors for value and without notice. *Epps v. McCallum Realty Co.*, 129 S.C. 481, 138 S.E. 297 (1927). Kennedy filed its mortgage fourteen months before Sapp obtained his judgment and indisputably has a superior lien. This inescapable fact reveals the folly in Sapp's entire appeal – Kennedy obtained no advantage in lending to Pawleys versus lending to Wheeler directly. If Kennedy had loaned to Wheeler, its lien would have still been superior to Sapp's judgment lien by fourteen months, thus evidencing no fraud or inequity occurred.

In *Atlas Supply Co. v. Davis*, the South Carolina Supreme Court held that a judgment lien awarded on the basis of a debt that was antecedent to the execution of a

mortgage, was not within the protection of the recording statute. 273 S.C. 392, 256 S.E.2d 859 (1979). In *Atlas*, the judgment creditor actually recorded its lien two hours before the mortgage was recorded. *Id.* However, the Court granted priority to the mortgage on the basis that the statute awards protection to subsequent creditors who extend credit in reliance on the property being unencumbered, stating

a creditor who between the date of the execution of the mortgage and the date of its record entered judgment against the mortgagor on an obligation that had been created prior to the date of the mortgage was not within the protection of the statute because his extension of credit to the mortgagor was antecedent, not subsequent, to the execution of the mortgage.

273 S.C. 392, 393, 256 S.E.2d 859, 860. There is no set of facts Sapp can argue, much less prove, which would allow his lien to pre-date Kennedy's lien. Sapp acknowledges as much as to Lot 3 to which Kennedy obtained a purchase money mortgage by paying off the First South mortgage,⁸ but the analysis is no different on Lot 4 as Sapp had no lien interest in Lot 4 when Kennedy recorded its mortgage.

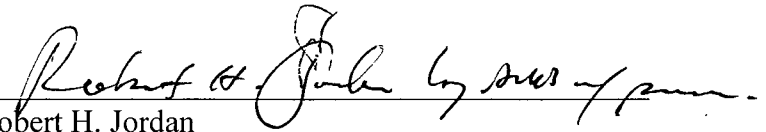
In *Oskin v. Johnson*, Justice Hearn commented that in cases alleging a fraudulent conveyance, the Court should look beyond the mere intent of the grantor and "review the transaction as a whole for whether it was designed to defraud another." 400 S.C. at 404. This broader view of the transaction, Respondent would suggest, is consistent with the Court's role in deciding any equitable claim. In this context, it is undisputed Kennedy loaned almost \$1 million in an arms-length mortgage transaction and has incurred more than \$1.8 million in damages from this transaction.⁹ It performed a proper title search,

⁸ A purchase money mortgage is given priority over all other claims or liens arising through the mortgagor although they are prior in time to the execution of the purchase money mortgage. *Hursey v. Hursey*, 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985)

⁹ Not only did Kennedy not benefit from this transaction neither did Wheeler. Wheeler lost his property in foreclosure and now has a \$382,790 deficiency judgment entered against him, more than the Sapp judgment.

paid off the one recorded lien at closing, and properly filed its mortgage with the Georgetown County RMC's office. Ultimately, Kennedy conducted and executed a legal mortgage transaction under South Carolina law and its lien should be honored. To void Kennedy's mortgage under the evidence presented would not only be an unprecedented result under South Carolina law but it would be fundamentally unjust.

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Charleston, South Carolina
January 6, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

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SC Court of Appeals

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

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.

CERTIFICATE OF COUNSEL

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

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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.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **FINAL BRIEF OF
RESPONDENTS** on Respondents and Appellant by depositing copies of it in the United
States Mail, postage prepaid, addressed to the below Counsel of Record:

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JAN 06 2014

SC Court of Appeals

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A handwritten signature in cursive script, reading "Lisa P. Whitehurst", written over a horizontal line.

Lisa P. Whitehurst
Administrative Assistant

January 6, 2014