THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2011-CP-42-0500

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Appellate Case No. 2019-000404

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Super Suds, LLC, Appellant,

v.

Carolina Properties Holdings, LLC, Walter W. Parker, IV, the United States of America by and through the U.S. Small Business Administration, Carolina Clean Greer I, LLC, and Community Development & Improvement Corporation, Defendants,

Of Which Carolina Properties Holdings, LLC, and Walter W. Parker, IV are the Respondents.

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# FINAL REPLY BRIEF OF APPELLANT

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## SUPPLEMENTAL STATEMENT OF FACTS

On April 18, 2011, Respondent Walt Parker ("Parker") voluntarily filed an Answer and Counterclaim on behalf of himself and Respondent Carolina Property Holdings, LLC ("CPH"), which he signed on behalf of both Respondents. (R. p. 182, line 20-p. 183, line 16; pp. 591-92.) On or around July 25, 2011, Parker signed, individually, and on behalf of CPH, a Consent to Amend the Complaint to add Defendants. (R. p. 183, line 17-p.184, line 11; pp. 593-94.)

On September 20, 2011, Parker, purportedly acting on behalf of CPH and himself, emailed Allan Hill, counsel for Appellant, stating that he was preparing to execute a Settlement Agreement and Stipulation of Dismissal as to counterclaims, and that Appellant would not pursue any deficiency judgment against CPH or Parker, with Parker further requesting that Super Suds not file a 1099 for forgiveness of debt. (R. p. 499, line 24-p. 501, line 4; pp. 612-13.) Allan Hill confirmed this understanding. (R. p. 501, lines 5-10; pp. 612-13.) After the execution of a Settlement Agreement and Stipulation of Dismissal with BB&T, which became effective as of September 19, 2011, Parker received notice that the Note with BB&T and the Mortgage were sold to Appellant. (R. p. 503, line 16-p. 504, line 13; pp. 614-19; pp. 620.) Parker executed the Purported Deed in Lieu thirty-five days after the effective date of the BB&T Settlement Agreement and Stipulation of Dismissal. (R. p. 504, line 16-p. 506, line 25; pp. 621-24; pp. 625-28.) The Deed in Lieu acknowledged the loan balance for the mortgage was $601,427.10. (R. pp. 625-28.)

As noted in Respondents' Brief, Respondents seek dismissal of the foreclosure action, largely with the hopes of eliminating exposure Respondents face to the Small Business Administration ("SBA"), resulting from Parker's personal guaranty of the SBA note. (Respondents' Initial Brief, pp. 23 – 24.) Parker has testified that CPH borrowed $133,000 from SBA in December 2007, to fund debt maintenance payments that CPH owed against the BB&T

Note and Mortgage, the money from which was used to fund construction of the car wash located at the property secured by the BB&T Note and Mortgage (the "Property"). (R. p. 472, line 21-p. 473, line 11.) CPH then modified the SBA Note, to borrow an additional $26,500, in June 2008. (R. p. 473, lines 17-24.) Parker and his wife personally guaranteed payment of the SBA loans. (R. p. 473, line 12-p. 474, line 16.) The additional borrowed funds provided CPH with additional working capital, which Parker testified was used to make debt service payments to BB&T. (R. p. 474, lines 2-13.) While borrowing money to fund loan payments, CPH hired employees to collect funds and operate the business, because Parker resided 5 hours away from the Property. (R. p. 479, line 13-p. 480, line 16.) CPH operated the car wash there through October 2010, collecting revenues; however, CPH did not pay taxes for the Property in 2009 or 2010. (R. p. 480, line 17-p.481, line 10.)

Parker had begun efforts to sell the Property in the beginning of 2009, with his asking price being "enough to cover the debt." (R. p. 486, line 5-p. 487, line 4.) At the time, the asking price was roughly one million dollars. (R. p. 487, lines 8-12.)

Parker first approached Ken Howard of Super Suds around April or May of 2011, to discuss Super Suds' purchase of the Property, with Parker telling Howard he was "up against the wall with the bank" and asking if Super Suds would make an offer for the Property. (R. p. 489, line 24-p. 490, line 25.) Parker contends that CPH "abandoned" the Property, when it turned over keys to Appellant following Parker's signing the purported Deed in Lieu. (R. p. 89, ¶ 40; p. 491, line 13-492, line 1.)

Allan Hill attended the Summary Judgment hearing as an attorney of record for Appellant, and sought to address the Court, but counsel for Respondent objected. The trial court ruled it would not allow the introduction of evidence, so it refused to allow Mr. Hill to make statements on the

record. (R. p. 655, line 23-p. 656, line 21.)

## ARGUMENT

Respondents focus on CPH's alleged intent regarding the Deed in Lieu to distract from their failure to comply with South Carolina law in multiple instances. Regardless of CPH's arguments, the Deed in Lieu is not enforceable, because it does not comply with the strictures of Rule 43(k), SCRCP.

### I. Public Policy Compels Application of Rule 43(k), SCRCP, To the Facts of This Case.

Respondent incorrectly contends that the Deed in Lieu transferred title, and that Rule 43(k), SCRCP, is inapplicable to the Deed in Lieu, despite the fact that the very title of the document indicates that it is affecting a foreclosure proceeding. South Carolina law is clear that, regardless of a grantor's intention, a deed cannot be given legal effect, if that deed is contrary to law or public policy. Because the Deed in Lieu clearly fails to comply with Rule 43(k), it cannot be of force and effect. Even if the Deed in Lieu were intended as a part of a settlement of the Foreclosure Action, several additional steps would need to be completed to effect a settlement of the Foreclosure Action, including, but not limited to, recordation of the Deed in Lieu, and execution and filing of a Stipulation of Dismissal with Prejudice, which would have required a signature from representatives for both of the Respondents.

Rule 43(k), SCRCP, constitutes well-settled public policy of this state. Respondents correctly note in their Brief that, "[i]n construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo,* 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). Stated differently, "the intention of the grantor must ascertain and effectuated **if no settled rule of law is contravened**." *Abbeville County v. Knox*, 267 S.C. 38, 40, 225 S.E.2d 863, 864 (1976) (emphasis

added).

It is settled law in South Carolina that "contracts having for their object anything that is obnoxious to the principles of the common law, or contrary to statutory enactments or constitutional provisions, or repugnant to justice or morality, are void; and the Courts of this State will not lend aid to the enforcement of contracts that are in violation of law or opposed to sound public policy." *Grant v. Butt*, 198 S.C. 298, 17 S.E.2d 689, 693 (1941). Similarly, as noted in *Knox, supra,* grantor intentions set forth in a deed will not be effectuated, if the deed violates settled law. *Knox, supra,* 267 S.C. at 40, 225 S.E.2d at 864.

**A. The Trial Court Erred By Finding Rule 43(k), SCRCP, Inapplicable Due to CPH's *Pro Se* Status, When the *Pro Se* Status Constituted Unauthorized Practice of Law.**

The trial court ruled that Rule 43(k), SCRCP, was inapplicable because "[a]llowing Plaintiff to utilize Rule 43(k), SCRCP, to avoid Defendants' defenses and counterclaims would be unjust given that Defendants were not represented by counsel and have not sought to compel a settlement agreement." (R. p. 38.)

As a preliminary matter, Respondent incorrectly contends in its brief that the issue of authorization to practice law is not preserved. At the July 18 Hearing, counsel for Appellant noted to the trial court that CPH had not been represented by counsel in the Foreclosure Action when the purported agreement was made, and that Rule 43(k) applied to CPH's actions. (R. p. 637, line 16-p. 637, line 12.) The issue was raised both by Appellant, and by Respondent, who argued that the lack of counsel barred application of Rule 43(k), SCRCP, and required the trial court to use equity to bar the application of the rule. (R. p. 639, line 17-p. 641, line 24.) The trial court was on notice of the unauthorized practice, as addressed by Appellant, and the trial court further ruled that CPH was unrepresented in the case when the Deed in Lieu was prepared, and the trial court's

consideration of CPH's lack of representation in the Foreclosure Action formed a basis for the ruling that Rule 43(k) did not apply. (R. p. 657, line 25-p. 658, line 3.) In direct response to that ruling, Appellant sought clarification in its Motion to Reconsider. In the July 17, 2018 Hearing, the trial court ruled that CPH's unlawful pro se representation in the Foreclosure Action was a complete defense to application of Rule 43(k), after being told that CPH was pro se. (R. p. 657, line 25-p. 658, line 3.) Accordingly, the issue of Parker's unauthorized practice of law on CPH's behalf is preserved for review.

South Carolina's Supreme Court has clearly stated that an individual, not licensed to practice law, cannot represent a business entity under S.C. Code Ann. § 40-5-80, with the exception of certain employees and agents representing corporate entities in Magistrate's Court. *In re Unauthorized Practice of Law Rules Proposed by S.C. Bar*, 309 S.C. 304, 305-6, 422 S.E.2d 123, 124 (1992). It is undisputed that the filing of pleadings for a limited liability company in a Circuit Court action is unauthorized practice of law. So, too, is the negotiation of resolution of a filed civil action pending in the Court of Common Pleas, which would include the negotiation of a Settlement Agreement and Release for BB&T, the execution of a Stipulation of Dismissal as to counterclaims, and execution of a Deed in Lieu, which purports to end a pending foreclosure action. The trial court knew at the hearing on the Motion for Declaration Under Rule 43(k), and the Motion for Summary Judgment that CPH was unrepresented by counsel when the purported agreements were allegedly made, and it still granted Respondents equitable relief. (R. 657, line 25-p. 658, line 3.)

Respondents incorrectly argue that the unauthorized practice of law by Parker on behalf of CPH was collateral to the issues in this case. The conduct relevant to the appeal, including the consent to transfer the Note, the negotiation of a document purporting to end the Foreclosure

Action, and the delivery of a deed, all arise from Parker's representation of CPH's interests in the Foreclosure Action. CPH owns the Property; CPH executed the purported Deed in Lieu. In fact, the very reason that the trial court ruled that Rule 43(k), SCRCP, did not govern the Deed in Lieu was that CPH was not represented by counsel at the time of its execution. (R. p. 38.) If the unauthorized practice of law by a party is not a collateral matter, the trial court must address that unauthorized practice. *See The Roof Doctor, Inc. v. Birchwood Holdings, Ltd.,* 366 S.C. 637, 642, 622 S.E.2d 746, 749 (Ct. App. 2005) (finding no obligation for court to address unauthorized practice of law if it is collateral to issues in case).

The trial court affirmatively stated that it denied Appellant's Motion for Declaration Pursuant to Rule 43(k), SCRCP, because CPH, a corporate entity, was not represented by counsel in the Foreclosure Action when it executed the Deed in Lieu. The trial court has rewarded Parker's unauthorized practice of law. This is clear error, and it requires reversal of the trial court orders.

**B. Rule 43(k), SCRCP, Is Settled Law of South Carolina For Agreements Affecting Litigation.**

The Rules of Civil Procedure, including Rule 43(k), SCRCP, "govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity." Rule 1, SCRCP. The Supreme Court is granted authority to set the Rules of Civil Procedure under the S.C. Constitution. S.C. Const. Art. V, § 4. Rule 43(k), SCRCP. Under that authority, the Supreme Court, with the assent of the General Assembly, created Rule 43(k), which, since its 2009 amendment has stated:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCP. Accordingly, at the time of Parker's signature of the Deed in Lieu, Rule

43(k), SCRCP, was the settled law of South Carolina, and no deed grantor's intent contrary to Rule 43(k), SCRCP, should be effectuated. *Knox*, *supra*, 267 S.C. at 40, 225 S.E.2d at 864.

In interpreting Rule 43(k), SCRCP, the Supreme Court of South Carolina has stated "[Rule 43(k), SCRCP,] is plainly worded: 'No agreement . . . shall be binding' unless one of the three requirements is met." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006), *quoting* Rule 43(k), SCRCP. The Court further stated that "an agreement [affecting a pending action] is non-binding until a condition [of Rule 43(k), SCRCP,] is satisfied. Until a party is bound, [the party] is entitled to withdraw [its] assent." *Id.* at 637, 627 S.E.2d at 725.

Ruling that the Deed in Lieu effected a full transfer of title, despite the lack of indicated assent of Appellant through signature or other act, would allow the Deed in Lieu to serve as an agreement affecting pending litigation, despite the failure of the document to remotely comply with the strictures of Rule 43(k), SCRCP. It would be forced implementation of a purported settlement agreement, when the document itself does not set complete terms for a settlement agreement. Such action would constitute implementing the alleged intention of the Grantor, even though the alleged intent violates settled law. Doing so would violate the well-settled law of this state. *See Gardner*, 293 S.C. at 25, 358 S.E.2d at 391.

**C. It Is Undisputed that Respondents Have Provided No Evidence That Just the Deed in Lieu Complies with Rule 43(k), SCRCP.**

In Parker's deposition, which was in entered into the record for the July 17, 2018 hearing, he admitted that there was no settlement agreement that CPH or he had with Appellant for this case. (R. p. 512, lines 17-20; p. 55.) Further, in deposition testimony which was presented to the trial court prior to the hearing on the Motion for Declaration pursuant to Rule 43(k), SCRCP,

Howard, the member and manager of Appellant, testified that he had never heard of a deed in lieu of foreclosure. (R. p. 311, lines 9-11.) Parker also testified that there is no settlement agreement he signed with Super Suds for this action. (R. p. 512, lines 17-20.) Simply stated, the trial court was provided no document which Respondents contend complied with the strictures of Rule 43(k), SCRCP.

Respondents have never contended that the Deed in Lieu, alone, complied with Rule 43(k), SCRCP. In an effort to work around Respondents' clear failure to obtain a settlement agreement in compliance with Rule 43(k), SRCRP, throughout this proceeding, Respondents have argued that the *Farnsworth* case, which first held settlement agreements in pending cases are subject to Rule 43(k), does not mean what it expressly says – "[n]o agreement [affecting pending litigation] shall be binding unless on of [the express requirements of Rule 43(k), SCRCP,] is met." *Farnsworth*, 367 S.C. at 638, 627 S.E.2d at 726. This argument serves as a tacit admission that it is contrary to settled law that mere delivery of the Deed in Lieu, without further terms or explanation, effects a dismissal or a resolution of this civil action; therefore, the trial court should not have granted Respondents' Motion for Summary Judgment, and it further should not have denied Appellant's Motion for Declaration Pursuant to Rule 43(k), SCRCP.

**D. When Parker Signed the Deed in Lieu, Respondents Knew That Appellant Was the Real Party in Interest in the Foreclosure Action, as Demonstrated By Parker's Communications with Ken Howard.**

Respondents' argument that Rule 43(k), SCRCP, is inapplicable to this matter because Appellant was not a party at the time of its execution is disingenuous at best. As a preliminary matter, Appellant was listed as Grantee of the purported Deed in Lieu; therefore, Respondents' argument that Respondents were not attempting to resolve a matter involving a pending action is

not credible. Further, to effect a settlement of the Foreclosure Action, a dismissal of that action would also have to be accomplished, and that never occurred or was sought by Respondents.

On August 9, 2011, Parker's prior counsel, unlicensed in South Carolina, received a settlement demand from BB&T wherein BB&T offered to sell BB&T's Note to an independent buyer for $200,000, subject to the condition precedent that CPH and Parker execute a Settlement Agreement and dismiss their counterclaims against BB&T with prejudice. (R. p. 492, line 5-p. 493, line 22; pp. 597-98.) On September 20, 2011, Parker, purportedly acting on behalf of CPH and himself, emailed Allan Hill, counsel for Appellant, stating that he was preparing to execute a Settlement Agreement and Stipulation of Dismissal as to counterclaims in the action to which BB&T remained the plaintiff. (R. p. 499, line 24-p. 501, line 4; pp. 612-13.) In that email, Parker sought that Appellant would not pursue any deficiency judgment against CPH or Parker, with Parker further requesting that Super Suds not file a 1099 for forgiveness of debt. (R. p. 499, line 24-p. 501, line 4; pp. 612-13.) Allan Hill confirmed this understanding. (R. p. 501, lines 5-10; pp. 612-13.) Accordingly, Parker, on behalf of CPH and himself, acknowledged that Appellant would be purchasing the Note, and he sought concessions regarding the foreclosure procedure: specifically, Appellant's agreement that it would not pursue a deficiency against CPH or him; and Appellant's agreement not to file a 1099 for forgiveness of debt. This clearly demonstrates the knowledge of Parker and CPH, thirty-five days prior to Parker's signing the Deed in Lieu on behalf of CPH, that Appellant was the real party in interest in the Foreclosure Action. (R. p. 501, lines 5-10; pp. 612-13.)

When he signed the Deed in Lieu on behalf of CPH, Parker knew that BB&T had transferred the Note to Super Suds, and he had sought concessions from Super Suds regarding the conduct of the Foreclosure Action. It is, therefore, clear that Parker, who was unlawfully acting

as CPH's attorney in fact for the Foreclosure Action, knew that Appellant was the real party in interest in the Foreclosure Action when he signed the Deed in Lieu, which he and CPH now argue extinguished Appellant's rights of foreclosure, in the very action that was pending when the document was signed. Accordingly, Respondent's arguments regarding inapplicability of Rule 43(k), due to the date of the order substituting Appellant as Plaintiff in the Foreclosure Action are meritless.

## II. Respondents' Arguments for Merger Fail, Because Appellant Received No Benefit From Being Provided the Deed in Lieu, Absent Resolution of the SBA Liens.

In *McCraney v. Morris*, 170 S.C. 250, 170 S.E. 276 (1933), the Supreme Court of South Carolina held "that in equity at least[,] merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united." *Id.* at 279. Appellant appeals a grant of summary judgment on merger, so the central question is whether there is any issue of material fact as to merger, not a weighing of the facts on the issue. Rule 56, SCRCP.

Ken Howard, Member and Manager of Appellant, testified that the purpose of purchasing the Note from BB&T was not to hold CPH or Parker liable for the purchased debt, but to obtain a clear deed. (R. p. 310, line 6-p. 311, line 17.) The Deed in Lieu, not recorded, did not provide such, because it did not foreclose the SBA liens. Prior to purchasing the Note, Howard did not intend to hold Parker "responsible" for the full amount of the Note; and Appellant's counsel agreed, prior to the transfer of the Note from BB&T to Appellant, that Appellant would not pursue a deficiency. (R. pp. 612-13.)

When Appellant purchased CPH's Note to BB&T, CPH owed the SBA a principal amount of about $150,000; and CPH's debt to the SBA was also secured by a lien on the Property. (Appx.

to R. p. 1.) CPH had already dismissed all of its counterclaims against BB&T with prejudice. (R. pp. 621-24.) CPH had no available defense to the Foreclosure Action; therefore, Appellant would have prevailed on same. Appellant received no benefit from CPH's Deed in Lieu, unless the SBA lien was released. On August 18, 2011, Parker represented to Appellant's counsel that a Loan Specialist at SBA "said they would take $2,000 to go away." (R. p. 507, line 18-p. 508, line 12; pp. 629-30.) Without that satisfaction of the SBA debt and lien, which Parker incorrectly asserted would occur, Appellant would receive no benefit from the Deed in Lieu. Accordingly, there is clear evidence in the record that a merger of title afforded Appellant no benefit, absent resolution of the SBA lien; therefore, it was inappropriate to grant summary judgment on a finding of merger of title.

Respondents rather comically argue that a finding of no merger of title would be inequitable to CPH, because "CPH would have lost eight years of enjoyment of, and the opportunity for profits from, a piece of commercial property." (Respondents Brief, p. 23.) This ignores CPH's own admission that it abandoned the Property, and it further ignores that Appellant had the right to take control of the Property under the BB&T Note as a creditor-in-possession. (R. p. 89, ¶ 40; p. 533.) Prior to its abandonment of the Property in favor of a creditor-in-possession, CPH failed for two years to pay property taxes, and CPH never achieved a profit for said Property, as proven by CPH's failure to pay down the BB&T loan principal and CPH's taking of additional loans to service debt. (R. p. 480, line 17-481, line 10.) Because it would have been to Appellant's patent detriment to have accepted title to the Property without foreclosing the SBA's lien, it was an error of law for the trial court to grant summary judgment to Respondents based on a finding of merger of title.

In his deposition, Ken Howard testified that he had never heard of a Deed in Lieu. (R. p. 311, lines 9-11.) Further, the duty to mitigate damages required Appellant to operate the Property like a creditor-in-possession. This evidence creates at least an issue of material fact as to merger. Therefore, it was error to grant Respondents' Motion for Summary Judgment on the issue of merger. Rule 56, SCRCP.

## III. Appellants' Arguments Regarding the Admissibility of Hill's Testimony Are Not Waived, Because the Court Refused a Proffer of Evidence To Create a Proper Record.

Near the conclusion of the July 17, 2018 Hearing, Hill's co-counsel, Charles LeGrand, requested leave for Hill to address for Appellant issues related to the Deed in Lieu. (R. p. 655, lines 23-24.) Respondent's counsel objected to this request, stating that Hill could not be a witness, based on an earlier trial court ruling. (R. p. 655, line 25-p. 656, line 17.) The trial court stated that it was not conducting an evidentiary hearing, and barred Hill from presenting testimony to the court, going so far as to instruct Appellant's two attorneys to leave the room to prevent discussion from being picked up by microphones. (R. p. 655, line 25-p. 656, line 17.) This placed Appellant's counsel in an untenable Catch-22 – they could not proffer the necessary evidence, because the trial court would not allow them to do so. Under Rule 12(b), SCRCP, the trial court was required to give Respondent an opportunity to supplement the record once it elected to consider a Motion for Summary Judgment; however, the trial court failed to do so. Rule 12(b), SCRCP. Furthermore, under Rule 43(k), SCRCP, all of Hill's discussions and representations between parties were relevant and admissible for the trial court's consideration.

## IV. There Are No Additional Sustaining Grounds for the Trial Court's Ruling.

### A. Respondents' Affirmative Defense of Equitable Estoppel Fails as a Matter of Law.

After Parker executed the Deed in Lieu for CPH in 2011, Parker did not request that Appellant consent to a dismissal of the Foreclosure Action. (R. p. 502, lines 6-20.) Appellant has not recorded the Deed in Lieu with the Spartanburg County Register of Deeds. In 2014, an Order of Reference was executed to transfer the matter to the Spartanburg Master in Equity. (R. pp. 10-12.) Respondents had knowledge of all of these circumstances, but they took no action.

To establish a defense of equitable estoppel, a party must show "a lack of knowledge, and the means of knowledge of the truth as to the facts in question," as well as "a prejudicial change in position in reliance on the conduct of the party being estopped." *Strickland v. Strickland*, 375 S.C. 76, 84-5, 650 S.E.2d 465, 470 (2007) (internal citations omitted).

The record above clearly demonstrates that Respondents had at least means of knowledge that Appellant did not intend to, and did not in fact, dismiss the Foreclosure Action based on the mere delivery of the Deed in Lieu, and they further had means of knowledge that Appellant did not record the Deed in Lieu. At the very least, there are issues of material fact to be determined by a trial court before equitable estoppel can be a basis for summary judgment.

Further, equitable estoppel is "to be invoked as [a shield], and not as [an] offensive [weapon]. [Its] operation in all cases should be limited to saving harmless or making whole the party in whose favor [it arises] and should not, in any case, be made the [instrument] of gain or profit." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992). Here, Respondents attempt to use equitable estoppel to avoid a personal guaranty that Parker gave to SBA when he borrowed money – money for which Appellant received no

benefit. Accordingly, Respondents are attempting to use equitable estoppel for their own profit, and such use is not allowed under South Carolina's law governing equitable estoppel.

"The essential element of estoppel is prejudice to the party raising the defense." *Parker v. Parker,* 313 S.C. 482, 487, 443 S.E.2d 388 (1994). Simply stated, there is no evidence in the record that Respondents had any prejudicial change in position – they faced no deficiency from Appellant, and the debt they owe to SBA is independent of the lien. Respondents still owe the money they borrowed and guaranteed, based on loans they took to obtain money which they used for their business benefit.

The defense of equitable estoppel is not an additional basis for the grant of summary judgment, because the defense fails as a matter of law, or at the least material issues of fact must be decided by the fact finder. Specifically, Appellant had a right to take control of the Property as a creditor-in-possession, based on Respondents' clear default of loan obligations.[1] Furthermore, Respondents' unclean hands resulting from Parker's unauthorized practice of law bar Respondents' reliance on the doctrine of equitable estoppel.

**B. Respondents' Equitable Defense of Laches Fails as a Matter of Law.**

Respondents incorrectly contend that Appellant's arguments of repudiation of the Deed in Lieu are barred by the doctrine of laches. First, there is no requirement of repudiation of the Deed in Lieu, because, as described above, it seeks an illegal act (resolution of pending litigation without compliance with Rule 43(k)). Second, as noted above, Appellant neither recorded the Deed in Lieu, nor did it dismiss the foreclosure action, and such conduct clearly demonstrates a repudiation

[1] CPH abandoned the Property. (R. p. 89, ¶ 40.) Appellant had a duty to mitigate damages associated with the Property after its abandonment; therefore, Appellant began operation of the car wash to mitigate damages. *See Chastain v. Owens Carolina, Inc.*, 310 S.C. 417, 420-21, 426 S.E.2d 834, 835-36 (Ct. App. 1993) (explaining the duty to mitigate damages). In so doing, Appellant's conduct was analogous to that of a creditor-in-possession.

of the Deed in Lieu as a resolution of the Foreclosure Action.

As noted above, Respondents have demonstrated no prejudice in this case, based on provision of the Deed in Lieu, which was held in trust. A defendant must demonstrate prejudice to obtain equitable relief in laches. *Kelley v. Kelley*, 268 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006). Respondents incurred no new debt as a result of failing to end the Foreclosure Action. They merely face liability for debt they incurred on a personal guaranty they granted. Acceptance of title under the Deed in Lieu would not have affected that debt or guaranty. Such facts cannot be assumed for a finding of prejudice.

The trial court made no finding that the doctrine of laches was applicable to this matter, and Respondents sought no such finding. Accordingly, an appellate court cannot find an additional sustaining ground of laches, because "[t]he determination of whether laches has been established is largely within the discretion of the trial court." *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001). Further:

> Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice. The question of whether laches is to be determined in light of the facts of the particular case.

*Id.* Respondents have provided no evidence of prejudice, and the trial court made no finding of same. Accordingly, there is no additional sustaining ground of laches. Additionally, Parker's unauthorized practice of law on behalf of CPH bars this provision of equitable relief.

## CONCLUSION

Appellant and Hill never agreed for Appellant to accept the Deed in Lieu to the Property subject to originally subordinate liens. It is patent error for the trial court to conclude that Appellant's attorney accepted delivery of the Deed in Lieu without conditioning the acceptance on satisfaction of the subordinate liens. Respondents admit in their Answer to the Amended

Complaint that Respondents abandoned the Property. (R. p. 89, ¶ 40.) Appellant assumed possession and operation of the car wash much like a creditor-in-possession under the terms of the BB&T Note and Mortgage for which Appellant paid $200,000.

It is incontestable that Appellant and Respondents made an agreement while the Foreclosure Action was pending that could affect the Foreclosure Action:

1. Appellant contends the agreements were as follows:
    a. If Appellant bought the BB&T Mortgage, it would not seek a deficiency judgment against Respondents, and it would not file a 1099 for forgiveness of debt based on waiving the right to seek a deficiency judgment. (Appellant has honored this agreement.)
    b. Appellant's attorney would negotiate with subordinate lienholders for a release of their liens. (This effort failed.)
    c. Appellant's attorney would draft a Deed in Lieu for CPH's execution, and would hold the Deed in Lieu in trust pending his satisfaction of subordinate liens. (Appellant's attorney prepared the Deed in Lieu, and CPH delivered the Deed in Lieu to Appellant's attorney.)
    d. If Appellant obtained satisfaction of the subordinate liens, Appellant's attorney would record the Deed in Lieu and dismiss the Foreclosure Action. (The subordinate lien has not been satisfied; so Appellant's attorney still holds the Deed in Lieu in trust and has not recorded the Deed in Lieu.)
2. Respondents contend the agreements were as follows:
    a. Same as (a.) above.
    b. Appellant's attorney would prepare a Deed in Lieu, and would accept delivery

of the Deed in Lieu as delivery of title, regardless of the status of the subordinate liens.

c. Respondent would dismiss the Foreclosure Action. (This has not occurred.)

Regardless of what a fact-finder might decide about the parties' intent with respect to these agreements, such purported agreements were made during the pendency of this civil action which is controlled by the South Carolina Rules of Civil Procedure. Rule 1, SCRCP. Rule 43(k), SCRCP, exists to eliminate disputes about purported agreements among parties affecting civil actions. The need for the required clarity and evidence of such agreements is primarily to protect the parties, and secondarily to prevent courts from having to decide cases within cases; and this need is magnified when a party is not represented by an attorney. Parker's unauthorized practice of law in this matter only exacerbates the problems that would be created by not following Rule 43(k), SCRCP. Rule 43(k), SCRCP, governs the parties' efforts to make agreements affecting this civil action, and it is indisputable that the Rule 43(k), SCRCP, requirements have not been met. Accordingly, this Action should be remanded for only a trial of Appellant's foreclosure complaint.

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Spartanburg, South Carolina
December 18, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2011-CP-42-0500

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Appellate Case No. 2019-000404

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Super Suds, LLC, Appellant,

v.

Carolina Properties Holdings, LLC, Walter W. Parker, IV, the United States of America by and through the U.S. Small Business Administration, Carolina Clean Greer I, LLC, and Community Development & Improvement Corporation, Defendants,

Of Which Carolina Properties Holdings, LLC, and Walter W. Parker, IV are the Respondents.

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the foregoing ***Final Reply Brief of Appellant*** complies with Rule 211(b), South Carolina Appellate Court Rules.

December 18, 2019

By: _____

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