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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Equity

Circuit Court Case No. 2015-CP-07-02722
Appellate Case No. 2020-001309

Colleton River Plantation Club, Inc.,…….Respondent-Appellant,

v.

Joel S. Lee,……Appellant-Respondent.

APPELLANT-RESPONDENT'S INITIAL RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

COUNTER-STATEMENT OF THE ISSUE ON APPEAL

I. Should this appellate court upend the trial court's factual determinations, after it correctly decided that there was not clear and convincing evidence of fraud?

SUGGESTED ANSWER: No.

INTRODUCTION

The Master-in-Equity, in the best position to adjudge the credibility of the witnesses at trial and to weigh the evidence, was right to find that the facts were not clear and convincing on fraud. Indeed, the evidence that Colleton Club wants to paint as nefarious is the ordinary stuff of real property conveyances, which legitimately occur all day, every day here in South Carolina.

It is important for this Court to understand, particularly because Colleton Club's brief is unclear, that the Master did not find facts that established fraud. **Instead, the Master specifically found that the facts did not establish fraud**. The Club is asking this Court to (1) deny deference to the Master's factual findings; and (2) go beyond the facts to make inferences that are unreasonable, unsupported by the record, and contrary to the Master's findings.

Respectfully, not only is the Club wrong on the facts, but what it is asking is beyond the scope of review in this case.

COUNTER-STATEMENT OF THE CASE AND FACTS

Colleton Club's appeal is on the facts, and not on the law. The Master-in-Equity found that the facts did not support the Club's allegations of fraud, but the Club would have this Court re-try the case to find the facts differently from the Master. For this reason, the facts are particularly important. Also important is the procedural posture of the case—which was a trial on the facts, in a law action before the Master-in-Equity.

In short, the facts surround a real estate transfer, which was conducted in conformance with South Carolina's statutory requirements for conveyance of title. The litigation is between two parties: Plaintiff Colleton River Plantation Club, Inc. ("Colleton Club" or the "Club") and Defendant Joel Lee. Lee once owned a lot within the Colleton River Plantation development, which was subject to covenants that also bound the Club.[1] Lee legitimately transferred his lot, but the Club continues to pursue him for dues and fees, which will presumably accumulate into perpetuity.

Both parties put up evidence and testimony in support of their respective positions. Critically, as the plaintiff and architect of this lawsuit, Colleton Club chose to sue only Joel Lee, and to bring only two causes of action against him. The causes of action that Colleton Club did not bring, and the parties that it chose not to include, are as significant as those that it did. At the end of the trial, the Master correctly found that the facts did not support the Club's theory of the case.

[1] The Club's covenants, and the validity of certain portions of them, are the subject of Lee's own appeal in this case, and Lee incorporates herein his appellate briefs by reference.

I. Statement of the Facts

In 1993, Joel Lee paid $129,000 for Lot A02, which is a small and now nearly-worthless parcel of land[2] within the Colleton River Plantation development, in Beaufort County, South Carolina. (Trial Ex. 3) (R. p.). Twenty years after buying Lot A02, Lee conveyed it to an entity called Bluffton Properties, LLC ("Bluffton Properties") by a general warranty deed. (Order ¶ 27; Trial Ex. 2) (R. p.). The conveyance was made subject to instruments of record, including the Declaration of Covenants for Colleton Club. (*Id.*). The deed from Lee to Bluffton Properties was witnessed, notarized, and duly recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on May 28, 2013. (Order, ¶ 23; Trial Ex. 2) (R. p.).

Joel Lee testified at trial that he conveyed the property based on advice of his attorney, for estate planning purposes. Lee lives in Wisconsin, and he is over 80 years old. If he were to die while owning property in another state, his Wisconsin estate administrator would need to open ancillary proceedings in the probate court of South Carolina to dispense with his out-of-state land. The trial testimony shows that Lee was advised by his estate planner to transfer title to Lot A02 in order to get it out of his estate and avoid ancillary proceedings. (Tr. trans. pp. 85-86, 95, 104) (R. pp.).

Lee used an attorney in his home state of Wisconsin, Thomas Burke, to handle the details advised by his estate planner. Attorney Burke set up and incorporated Bluffton Properties and arranged for the conveyance from Lee to that entity. (R. p.) (*See, e. g.* Tr.

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[2] Similar lots (of which there are many) typically sit on the market untouched, even when listed for as low as $10,000. The testimony indicated that lots like Lot A02 have a negative value, and people literally cannot give them away. (Tr. trans. p. 86) (Tr. Ex. 14, p. 13, line 22- p. 14, line 19) (R. pp.).

trans. pp. 64-65) (the Club's representative testified "The LLC that his attorney in Wisconsin set up for him, which I believe in his deposition he agreed he had set up by his attorney.").

Attorney Burke drafted up a very vanilla, utterly boilerplate general warranty deed for the transfer of Lot A02 from Lee to Bluffton Properties. (R. p.) (Trial Ex. 2). The deed is completely in compliance with South Carolina law for the transfer of title to real property, as well as with South Carolina's Recording Act.[3] The conveyance deed was recorded by Attorney Burke with the Beaufort County Register of Deeds, in May of 2013.[4] (R. p.) (Ex. 2).

Colleton Club knew that Lee transferred the title, and that Bluffton Properties was now the owner of Lot A02. Indeed, in 2014, the Club filed a lawsuit against Bluffton Properties for unpaid dues related to Lot A02. The Club told the court in those pleadings that "[Bluffton Properties], at all material times hereto, was the owner of Lot A02, Colleton River Plantation, Bluffton, South Carolina, as evidenced by a deed dated December 31, 2012 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina . . . ." (Tr. Ex. 6, ¶ 8) (R. p.); (*see also* Tr. Ex. 2) (R. p.). The Club ultimately got a judgment against Bluffton Properties. (Tr. Ex. 6) (R. p.).

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[3] *See*, *e.g.*, S.C. Code § 30-5-30 "Prerequisites to Recording" (requiring affidavit of subscribing witness, signature of notary, seal, etc.); S.C. Code § 30-5-35 (derivation clause required in instrument conveying an interest in real property); S.C. Code § 30-7-10 ("Recordation Essential to Validity") ("All . . . instruments in writing . . . encumbering [an estate in real property] . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds").

[4] Burke died while this lawsuit was ongoing. Colleton Club attempted at trial to retroactively call into question numerous decisions made by Burke in the course of incorporating Bluffton Properties, preparing the conveyance deed, and transferring title.

After getting a judgment against Bluffton Properties, Colleton Club then turned around and filed the subject lawsuit against Joel Lee, seeking to recover the same unpaid dues (and more). Much discovery was conducted, and the Club had the opportunity to amend its complaint. But despite its knowledge of the ownership of the lot and the circumstances of its transfer:

The Club chose not to make Bluffton Properties a defendant in the lawsuit.

The Club did not seek to pierce Bluffton Properties' corporate veil.

The Club did not seek to set aside the deed to Bluffton Properties.

The Club did not bring a Statute of Elizabeth Claim against Lee.

Instead, the Club—as the architect of the lawsuit—elected to pursue Joel Lee alone. Joel Lee defended against the lawsuit, which sought to hold him personally liable in perpetuity, for dues related to a property in which he no longer has any interest.

II. Procedural History

On November 15, 2015, Colleton Club filed a debt-collection Complaint against Joel Lee. (R. p.). Lee filed his responsive pleading on February 9, 2016, moving to dismiss the Complaint because he was not a proper party, and raising other affirmative defenses. (R. p.). On July 29, 2016, Colleton Club filed an Amended Complaint, alleging causes of action for: (1) breach of covenants; and (2) breach of covenants accompanied by fraud. (R. p.). The matter was referred by consent to the Master-in-Equity for Beaufort County on September 8, 2016. Lee filed his Answer to the Amended Complaint on October 4, 2016, asserting numerous affirmative defenses, including Accord and Satisfaction, Void

Covenants and Contracts, Estoppel, Set-off and/or Limitation on Damages, and Violation of the Nonprofit Corporation Act. (R. p.).

The case proceeded to trial before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County, on December 5, 2018. The parties filed a Joint Stipulation of Exhibits. (R. p.). The Master heard testimony of several witnesses, including a representative of Colleton Club, and Joel Lee. Lee's attorney Thomas Burke, who had effectuated the transfer to Bluffton Properties by drafting and recording the deed, *inter alia*, had passed away in the midst of this litigation, and so portions of Burke's deposition transcript were read into the record at trial.

On February 13, 2020, the Master filed a Trial Order, after giving the parties opportunity to comment on a proposed draft order. (Order; Comments) (R. p. , R. p.). Both sides filed Motions to Alter or Amend the Judgment. (R. p. , R. p.). The Master denied both Motions on September 1, 2020. (R. p.).

STANDARD OF REVIEW

Colleton River Plantation Club's appeal solely concerns the Master-in-Equity's decision on the Club's cause of action against Joel Lee for Breach of Contract Accompanied by a Fraudulent Act. More particularly, the Club's only issue on appeal is the question of whether the Master-in-Equity was right or wrong when he weighed the evidence and decided that it was not clear and convincing on the question of fraud. Although Colleton Club couches this as an "error of law" by the trial court, this is a mischaracterization; what the Club is truly contending is that the Master made errors of fact.

The standard of review is especially important in this appeal. This was an action at law, tried before the Master. *See RV Resort & Yacht Club Owners' Association, Inc. v. Billy Bob's Marina, Inc*., 386 S.C. 313, 688 S.E.2d 555 (2010) (an action for breach of restrictive covenants that seeks monetary damages is an action at law); *see also Mosely v. All Things Possible, Inc.*, 395 S.C. 492, 719 S.E.2d 656, 658 (2011) ("An action for fraud is an action at law."). In an action at law referred to a master for final judgment, appellate courts will correct errors of law but must affirm the master's factual findings unless no evidence reasonably supports those findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

"An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing evidence, is limited to determining **whether there is <u>any evidence</u>** reasonably supporting the circuit court's findings." *Kiriakides v. Atlas Food Systems & Serv.*, 343 S.C. 587, 541 S.E.2d 257 (2001) (emphasis added); *see also Moseley*, 395

S.C. 492, 719 S.E.2d 656. "It is not for the appellate court to weigh the evidence to determine whether it is sufficient to meet the burden of proof." *Kiriakides,* 343 S.C. at 594 *citing* 5A C.J.S. Appeal & Error § 1656(2) n. 71 at 447 (1958). In an action at law tried without a jury before a master in equity, questions going to the weight of evidence and the credibility of witnesses are exclusively for the master. *In re Est. of Anderson*, 381 S.C. 568, 573, 674 S.E.2d 176, 179 (Ct. App. 2009).

In this case, there are exhibits and testimony that support the master's finding that there was not clear and convincing evidence of fraud. This Court should therefore affirm.

ARGUMENT

This Court should affirm the trial court's determination that the facts of this case do not support Colleton Club's cause of action for breach of contract accompanied by fraud.

In order to prevail in its appeal, Colleton Club must show that the Master-in-Equity based his ruling on an error of law, or that his factual conclusions were unsupported by any evidence. *S.C. Farm Bureau Mut. Ins. v. Secure*, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2000). Colleton Club superficially says that the Master "committed an error of law," but it does not actually identify an authentic legal error. For example, the Club does not argue that the Master misapprehended the elements of the Club's cause of action, or that it erred in interpreting the contract.

Instead of arguing the law, on which there is no question, the Club argues the facts. Under this Court's standard of review, if the Club is going to argue the facts, then it must show that the trial court's factual conclusions are without evidentiary support. *Id*. Put another way, the Club must show that there is no evidence in the Record that supports the trial court's finding of lack of fraud. The Club fails to do this.

I. Evidence in the Record supports the Master-in-Equity's factual determination that there was not clear and convincing evidence of fraud.

This Court should affirm the portion of the trial court's order which declined to find fraud by Joel Lee. This is because, quite simply, there was evidence in the record that Joel Lee conveyed the property for a legitimate, non-fraudulent purpose, on the advice of his attorney. Because this Court is to review the Master's decision on this factual

question under an "any evidence" standard, the evidence of a legitimate purpose is sufficient to compel affirmance of this decision.

Colleton Club acknowledges in its brief that there are several essential elements on a cause of action for breach of contract accompanied by fraudulent act. Importantly, the failure to prove any one of the essential elements is fatal to the Club's claim.

A. As to the first element, breach of contract.

The question of whether the Master erred in finding that Lee breached the covenants is on cross-appeal by Lee. Lee incorporates herein his arguments on appeal and urges this Court to find that he did not breach the covenants, for the numerous reasons stated in his brief in that appeal. If this Court reverses the Master on the breach of covenants claim, then its analysis should stop here.

B. The Master correctly found that the Club did not prove fraudulent intention.

Colleton Club cherry-picks findings by the Master-in-Equity, which it wrongly urges this Court to weigh, and which it suggests are nefarious. But the Master was in the best position to judge the credibility of the witnesses, and he found that the Club failed to meet its burden to prove fraudulent intention. *Sheek v. Crimestoppers Alarm Systems, Div. of Glen Curt Consultants*, 297 S.C. 375, 378, 377 S.E.2d 132, (Ct. App. 1988) ("Such a consideration must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity.").

In cases of fraud, the proof must be by clear, cogent and convincing evidence. *Kiriakides,* 343 S.C. 587, 541 S.E.2d 257, *citing Burns v. Wannamaker*, 286 S.C. 336, 333 S.E.2d 358 (Ct.App. 1985) *aff'd as modified* 288 S.C. 398, 343 S.E.2d 27 (1986). In a law case tried

without a jury, questions regarding the weight of evidence and the credibility of witnesses are exclusively for the trial judge. *Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, and Thompson*, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987).

The items Club points to as evidence of fraudulent intention could reasonably be construed as perfectly rational and benign. The Master's finding that they were not fraudulent is entitled to deference. *Townes Associates, Ltd.*, 266 S.C. 81, 221 S.E.2d 773 (Appellate courts will uphold a master's factual findings if there is **any evidence** to support the decision.).

i. The facts do not clearly and convincingly demonstrate fraud.

For the sake of argument, Lee will walk with this Court through the facts cited by Colleton Club on pages 6 and 7 of its Brief, which the Master properly found do not rise to the level of clear and convincing evidence of fraud:

- The Club argues: "Lee is a former practicing lawyer with decades of experience in commercial real estate . . . in his home state of Wisconsin . . . " (R. p.).

But the Master was correct to adjudge that there is nothing fraudulent about being a lawyer.

- The Club argues: "Lee, for decades, has invested in, owned, used, bought, and sold residential properties in private, gated, golf course communities in southern Beaufort County." (R. p.)

But the Master was correct to adjudge that there is nothing fraudulent about investing in real estate. Also, the record reflects that Lee owned a total of 3 properties in Beaufort County. (R. p.).

- The Club argues: "The consideration for the Conveyance was only One and No/100's Dollar, at best nominal consideration." (R. p.).

But the Master was correct to adjudge that there is nothing fraudulent about a conveyance for consideration of one dollar. Indeed, property is conveyed every day in South Carolina for similar recitations of consideration. The testimony at trial indicated that Lot A02 was either worth nothing, or it was a negative liability, which denotes that the consideration was on par with the property's value. (R. p.) (Tr. trans. p. 86, lines 1-7). Moreover, the Record reflects that the conveyance was made for estate planning purposes, therefore making the dollar consideration even more mundane and typical.

- The Club argues: "The address for Nevada Bluffton Properties, LLC, as it was listed on the Deed involved in the Conveyance, as the preparer of the deed, is the same address for Thomas B. Burke, the preparer of the deed, and an attorney at law in the State of Wisconsin, but never an attorney at law in the State of South Carolina and is also the same address for Lee."

But the Master was correct to adjudge that there is nothing fraudulent about trusting your lawyer, even if he is a friend of yours, to prepare a deed for you and to advise you on estate planning and tax implications. And there is nothing fraudulent about your lawyer using his address on a deed.

- The Club argues: "Burke functioned as the attorney for both Lee and Nevada Bluffton Properties, LLC, and maintained his office with Lee."

But the Master was correct to adjudge that Attorney Burke's actions in this regard were just that . . . Burke's actions. Apparently, Attorney Burke did not perceive a conflict in

his joint representation. And that Attorney Burke had an office in the same commercial office building as Lee is equally normal and not indicia of fraud. (R. p.). Moreover, Colleton Club did not sue Attorney Burke or Bluffton Properties, and neither was present at trial to testify or explain these actions.

- The Club argues: "The Conveyance Deed, just like the Deed to Lee in 1993 for Lot A02, made the Conveyance to Bluffton Properties, LLC subject to the Covenants, etc. as amended."

But there is nothing fraudulent about conveying property subject to other instruments of record—which is important for proper indexing and recording in South Carolina. *See*, *e.g.*, S.C. Code § 30-9-30 (requiring register of deeds to enter "in the record the names of the grantor and grantee, mortgagor and mortgagee, obligor and obligee, or other parties to the written instruments, date of filing, and nature of the instrument immediately upon its lodgment for record. The filing is notice to all persons, sufficient to put them upon inquiry of the purport of the filed instrument and the property affected by the instrument.").

- The Club argues: "The Conveyance, lacked both the required written notice to Colleton and the proffer of a Designated User."

But the testimony shows that neither Attorney Burke nor Joel Lee were aware of this requirement. (Tr. trans. pp. 92-95; p. 116, lines 17-22) (R. p.). In other words, the evidence

supports the inference that it was by mistake, and not with fraudulent intent, that the notice was not given. (Tr. trans. p. 94, lines 13-22).[5]

ii. Colleton Club's "other evidence" is dubious, and the Master correctly found it was not clear and convincing.

Going on, on pages 7 through 9 of its opening Brief, Colleton Club lists other items within quotation marks. **Very importantly, although the points on these pages of the Club's brief are within quotation marks, the undersigned counsel is unable to discern exactly what is being quoted; it does not seem to be testimony.** *See,* Club's *Initial Brief*, pp. 7-9. This Court should disregard these unsupported assertions by the Club.

The Club makes these unsupported claims, seeking for this Court to re-try the case. Its claims are largely based on the way that Attorney Burke chose to organize Bluffton Properties, and to transfer the property, as well as the actions of the entity itself, rather than on any act by Joel Lee.

This portion of the Club's argument is problematic, first because the Club did not bring any causes of action against the entity or the attorney; but now it wants to argue that Lee should be held liable for their actions. The second reason the Club's argument fails is because the Master ***already heard*** the same arguments the Club now makes to this

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[5] Without going too far off into the weeds on this, the covenants are drafted such that the "proffer of designated user" would be the express responsibility of Bluffton Properties. (*See* Covenants, § 14.2) ("In the event any Lot is owned by . . . a legal entity, the collective owners of such Lot shall unanimously designate one of the Owners of at least 25% interest in the Lot or entity as the Designated User, who shall have the right, privilege, easement of access to, and use and enjoyment of, the Recreational Facilities, for a minimum of 12 months.") (R. p.). Lee cannot be held accountable for the acts or omissions of an entity **of which he is not a member** (and, even if he were a member, Colleton Club did not seek to pierce the corporate veil, which would be necessary to any attempt to hold Lee personally liable for Bluffton Properties' actions); *see also, e.g., Wayne Smith Const. Co., Inc.*, 294 S.C. 140, 363 S.E.2d 115 (individuals not personally liable for actions of entity).

Court, and the Master already evaluated and weighed the evidence . . . and the Master ultimately concluded that the facts did not support fraud. This Court must affirm, if there is any evidence to support the Master's factual decision—which there indisputably is. *Townes Associates, Ltd.*, 266 S.C. 81, 221 S.E.2d 773 (appellate courts will correct errors of law but must affirm the master's factual findings unless no evidence reasonably supports those findings).

In a lot of ways, defending against Colleton Club's appeal requires Lee to prove a negative: The trial court found that there was not sufficient evidence of fraud because. . . . . there was not sufficient evidence of fraud. For every item the Club wants to depict as fraudulent, there is a rational and reasonable explanation—which the trial court evidently found compelling when it heard the testimony and weighed the evidence.

Out of an abundance of caution, Lee brings to this Court's attention the following testimony, which weighs against the Club's allegations of fraud and demonstrates legitimate, reasonable motives for the actions that the Club argues are dishonest:

- Attorney Burke's testimony: "The reason Bluffton Properties was organized in Nevada is because Nevada unlike Wisconsin had series LLCs . . . how a series works is that instead of starting three separate LLCs, you can have one single LLC with separate compartments . . . [the benefit of a series] is that they amount to separate entities under one umbrella." (Tr. trans. p. 83, line 22-p. 84, line 15) (R. p.).
- Attorney Burke's testimony: "I believe the impetus for—one of the impetuses in creating Bluffton Properties and transferring those titles was for estate planning

purposes for Mr. Lee . . . so that ancillary probates would not have to be commenced. The problem as I understand it is that these—those properties, Colleton and the other properties, are essentially worthless or have a negative value." (Tr. trans. p. 85, line 20-p. 86, line 7) (R. p.).

- Attorney Burke's testimony: "At the time the deeds were prepared, it is fair to say that at the time the deeds were prepared, the idea was to take these properties out of Mr. Lee's name and put them in another entity so that for—basically estate planning purposes." (Tr. Trans. p. 95) (R. p.).
- Joel Lee's testimony: "I was doing estate planning in late 2012. When I showed the estate planning attorney what assets I have and so forth, he said we should get those lots in South Carolina out of—[hearsay objection]—I was doing estate planning." (Tr. trans. p. 104) (R. p.).
- Joel Lee's testimony: "Well, at the end of '12, I was doing the estate planning. I said, Tom, you're 20 years younger than me. These lots are valueless. Someday they may be worth something. I'm going to transfer them and they're yours. The theory was someday they might be worth something again." (Tr. tran. p. 105).

In sum, evidence in the record **does exist** which supports the Master's factual finding of no fraudulent intent. This Court should affirm under the standard of review and the law of South Carolina. *Kiriakides*, 343 S.C. 587, 541 S.E.2d 257 ("An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing

evidence, is limited to determining **whether there is <u>any</u> <u>evidence</u>** reasonably supporting the circuit court's findings.") (emphasis added).

C. The Master correctly found that the Club did not prove a fraudulent act.

The Club loads this portion of its brief with incendiary descriptions, which the record unequivocally does not support, which were not proven at trial, and after the Master found the opposite as fact. This Court should give deference to the Master's factual finding that there was no fraud, for all the reasons discussed above. Probably the best method to illustrate that the Master's finding is absolutely supported by evidence in the Record is to take Colleton Club's inflammatory statements in turn, and illustrate the evidence to the contrary.

1. Colleton Club wrongly describes Bluffton Properties as "his" [i.e. Lee's] "shell company." (*Brief*, p. 9). This is nonsense. There was no evidence that Joel Lee was even a member of Bluffton Properties. (*See* Tr. trans. p. 48) (R. p.). It was therefore unequivocally not "his" company. Moreover, Bluffton Properties was not a party to this lawsuit, and no evidence was offered to show that it was a "shell," or that its veil should be pierced to make its members liable.
2. Colleton Club claims "Lee transferred the Lot for his fraudulent purpose of avoiding his debts to Colleton . . . ". (*Brief*, p. 10). This is nothing more than conjecture by the Club, **which was never proven**. The evidence shows something very different: Lee's purpose in transferring the lots was for estate planning, to avoid ancillary probate proceedings which otherwise would be required for the disposition of his out-of-State property upon his death.

3. Colleton Club claims that Bluffton Properties was not capitalized; but this is a bald claim without any evidentiary support. The Master was correct to disregard it.
4. Colleton Club characterizes Lee's fraudulent act as transferring the lot to Bluffton Properties "for the sole purpose of avoiding his contractual obligations." (*Br.* p. 10). Again, this was not proven at trial and it is nothing more than the Club's theory of the case. The evidence supports that Lee transferred the property for estate planning purposes. The Master's finding on this question should be affirmed.

The bottom line is that Colleton Club's arguments in this section of its brief are just that: unproven arguments and allegations. This Court should not give any weight to the Club's arguments, which are not supported by the record, for which the Club does not give appropriate citations, and which the trial court properly disregarded. It is well established that assertions or arguments of counsel are not evidence. *See, McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E.2d 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Bowers v. Bowers*, 304 S.C.65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."). Moreover, this Court should not disregard the findings of fact by the trial judge, "who saw and heard the witnesses and was in a better position to evaluate their credibility." *Tiger, Inc. v. Fisher-Agro, Inc.*, 301 S.C. 229, 237, 311 S.E.2d 538, 53 (1989). Again, the Master-in-Equity weighed the evidence and found that it was not clear and convincing on the existence of a fraudulent act. This Court should affirm.

CONCLUSION

This Court should affirm the Master-in-Equity's factual determination that there was no fraud, because the Master was in the best position to adjudge the credibility of the witnesses and the evidence at trial.

Respectfully submitted,

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