

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

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Ralph Stroman, Special Referee  
Case No. 2011-CP-26-4556

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Carey Graham and Rodney A. Chardukian,

Respondent,

v.

Stephen Eric Robinson,

Appellant,

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**INITIAL BRIEF OF APPELLANT**

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**RECEIVED**

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**SC Court of Appeals**

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**STATEMENT OF ISSUES ON APPEAL**

- I. Did the trial court err in denying the motion for new trial when the order was defective on its face and deficient as to form?
- II. Did the trial court err when it failed to reconsider the finding that Defendant intentionally assisted his sister in defrauding the plaintiffs when the order contained conflicting factual findings and conclusions of law?
- III. Did the trial court err when it held that no consideration had passed between the Appellant and his sister when a signed contract had been executed and payments had been made in accordance therewith?
- IV. Did the Court err when order is silent as to whether the transferor retained sufficient assets with which to pay any judgment had by the plaintiffs following the damages hearing?

[Without making a finding of fact on this issue, is the Court is permitted to make a finding on the issue of fraudulent conveyance?]

## STATEMENT OF THE CASE

Respondents initiated this action with the filing of a summons and complaint on May 26, 2011. The action sought to set aside two transfers of real estate to defendant from his sister on the grounds that the transfers sought to defraud the respondents and defeat their attempts to recover monies to satisfy a judgment against her entered in civil action 2004-CP-26-3498. The complaint alleged a violation of the Statute of Elizabeth and sought to have the properties placed back in the name of the Appellant's sister, and sold in order to satisfy the judgment. Appellant denied the allegations of fraud in a pro se answer filed on July 11, 2011. On February 1, 2012, a hearing was held before the Honorable G. Edward Welmaker, Judge, to determine discovery issues. Following that hearing, Judge Welmaker, "Ordered that the within cause be referred pursuant to Rule 53, to the Honorable Ralph Stroman, Special Master, with authority to enter a final order in this action." The case came on for hearing before the Honorable Ralph P. Stroman, Special Referee for Horry County, on February 14, 2012. On March 14, 2013, Special Referee Stroman entered his order granting the respondents' requested relief holding that legal title was vested with Appellant's sister as though such deeds were never executed or recorded. On March 25, 2013, Appellant filed a motion for new trial. On May 28, 2013, Appellant's motion for a new trial was denied. Appellant filed a timely notice of appeal and this appeal follows.

## STANDARD OF REVIEW

"A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the *Statute of Elizabeth*. [ S.C. Code Ann § 27-23-10 ].<sup>1</sup> An action to set aside a conveyance under the *Statute of Elizabeth* is an equitable action, and a de novo standard of review applies." *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012)." *Judy v. Judy*, 403 S.C. 203, 208, 742 S.E.2d 672 (Ct.App. 2013)

"Subsequent creditors may have conveyances set aside when (1) the conveyance was Voluntary,' that is, without consideration, and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors." *Mathis [v. Burton]* 319 S.C. [261] at 265, 460 S.E.2d [406] at 408 [Ct. App. 1995] (citing *Gentry v. Lanneau*, 54 S.C. 514, 32 S.E. 523 (1899)). "Subsequent creditors must show 'actual moral fraud,' rather than legal fraud." *Id.* at 266, 460 S.E.2d at 409. Actual moral fraud involves "a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts." *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 409, 1 S.E.2d 797, 808 (1939). With a voluntary inter-family transfer, the burden shifts to the transferee to establish the transfer was valid. *See*

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<sup>1</sup> S.C. Code Ann. § 27-23-10 states in pertinent part.

(A) Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or 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 (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

*Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) ("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 testimony."). *Judy, supra*, 403 S.C. at 208. This court therefore has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

### Argument I

The trial court's order is defective on its face and thus deficient as to form, because it co-mingles findings of fact and conclusions of law; contains conflicting findings of fact and draws conclusions of law which are not supported by factual findings. This error shifted the burden of proof to the Defendant even though the Court found Defendant didn't know that Mrs. Babb had been in litigation for over ten years). (Questions I and II).

The order entered against the Appellant is defective on its face and thus deficient as to form. This is so because the order co-mingles findings of fact and conclusions of law;<sup>2</sup> it contains conflicting findings of fact; and it draws conclusions of law which are not supported by any factual findings. These errors cumulatively erroneously shift the burden of proof to the Defendant in this Statute of Elizabeth case even though the Court seemed to find that the Appellant didn't know that Mrs. Babb had been in litigation for

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<sup>2</sup> The order contains a heading entitled, Findings of Fact and Conclusions of Law," See Order at Page 4 of that document. R. \_\_\_\_ . Paragraphs thereafter are jumbled and the reader is left to guess at which paragraphs or portions thereof are factual findings, or legal conclusions.

over ten years. This lack of knowledge implicitly acknowledges that the Appellant lacked any intent to defraud respondents as creditors of Mrs. Babb.

### **Factual History**

On March 23, 2011, in Clarendon County, South Carolina, a damages hearing was held in a case involving Appellant's sister, Brenda R. Babb as a defendant. Following a damages hearing in that matter, on May 17, 2011, the Honorable Ferrell Cothran, Judge, entered an order entitled, *Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.* This order, *inter alia*, allowed for judgment against the Appellant's sister, [Babb] in the amount of Seven Hundred Seventy Six Thousand Six Hundred and Four and 55/100ths (\$776,604.55) Dollars in actual damages for the period beginning on July 1, 2003 through June 30, 2010, plus punitive damages in the amount of Two Hundred Thousand and no/100 (\$200,000.00) Dollars.<sup>3</sup>

Prior to the entry of that judgment, on March 26, 2011, Appellant, Eric Robinson, signed a contract for the purchase of two properties owned by his sister, Mrs. Babb. See **R. 71; Contract for Sale of Real Estate**. The purchase price called for in the contract was a total \$196,633.33, for both properties. **R. \_\_\_\_**. The real estate parcels sold pursuant to the contract were, (1) a one third undivided interest in 8.4 acres of land known as Little River Campground for \$133,333.33, **Id.**, and, (2) a parcel of land located in Riverview Heights Sub-division in Little River, South Carolina, for the sum of \$63,300.00. **Id.** The purchase price for both properties was owner financed. **Tr. 107, lines 16 – 21.**

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<sup>3</sup> The case was *Carey Graham and Rodney A. Chardukian v. Malcolm M. Babb, Brenda R. Babb, Cable Plus of Carolina, Inc., South Bay Lakes Cable Partnership, Southbridge Cable Television, LLC, Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.*, case no. 2004-CP-26-3498. Because of alleged discovery abuse, Mrs. Babb's answer and counterclaim were stricken and she was placed in default. Documents in that case show she was denied the right to testify at the damages hearing or offer evidence and she was held to be liable for both actual and punitive damages based solely on the testimony of the opposing parties in that matter. **Tr. 59, lines 2 – 10.**

Appellant paid a down payment of \$5,000.00, from cash money he had in his home from his business, and made payments of \$500.00 per month thereafter.<sup>4</sup> **Tr. 112, lines 5 – 8.** And pursuant to the terms of the contract, he has continued making monthly payments of \$500.00 each. **Tr. 104, lines 1 – 12; Tr. 82, lines 9 – 15.** Additionally, by the time of the trial in the case sub-judice, Appellant had paid real estate taxes on at least one of the properties in the amount of \$1,221.62. **Tr. 110, lines 3 - 8.** He produced receipts for each of the payments made by him which were introduced at trial. **R. \_\_\_\_.** Respondents filed this action seeking to set aside the conveyances pursuant to the Statute of Elizabeth at S.C. Code Ann § 27-23-10, (footnote 1, *surpa*).

### **Trial Testimony**

Respondents called four (4) witnesses in their attempt to establish their case against the Appellant. Those witnesses were: (1) James T. Young, Esquire, an attorney who prepared the deeds at issue in this matter; (2) Rodney Chardukian, one of the respondents; (3) Steven Eric Robinson, the Appellant in the instant appeal, and (4) Brenda R. Babb, the Appellant's sister who conveyed the properties to him.

Respondents attempted to establish through Mr. Young that the process used by Mrs. Babb in this matter was "not normal." **Tr. 24, lines 21 – 24.** He wasn't asked to do a title search, there was no money to be held in escrow or paid through his office at closing, and he didn't have a copy of the parties' contract. **Tr. 24, lines 1 – 20; Tr. 36, lines 12 – 17, respectively.**<sup>5</sup> And there was no mortgage. **Tr. 25, lines 17 – 21.** Further, one of the

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<sup>4</sup> Or until the balance could be paid off. See testimony of Mrs. Babb. **Tr. 165, Lines 13 -15.** "The five hundred a month, as long as it took, or until he had the wherewithal to pay it all off at one time." Id.

<sup>5</sup> We submit little or no credibility should be allotted to this witness because notwithstanding all of the supposed "red flags" now pointed out to him by respondents' counsel, he never saw anything unusual about the process at the time he prepared the deeds and submitted his invoice or

properties was a U.S. Marshall's deeded property which had previously been seized by the government in a drug case, **Tr. 27, lines 21 – 25**; and it was subject to shared ownership with other co-owners. **Tr. 29, lines 2 – 11**. The second property had apparently been acquired at a delinquent tax sale held by Horry County. **Tr. 29, lines 5 - 23**. These factors would have affected the marketability of the property. **Tr. 29, lines 12-14**. Yet this witness discussed these factors with no-one at that time, not his client Mrs. Babb, and not with her brother, the Appellant. **Tr. 24, lines 2 – 5**. The transaction was legitimate we submit simply because the Appellant's sister used this attorney and at the time he saw no fraud in the matter, **Tr. 36, lines 1 – 4**, nor did he see any reason to make any inquiry into the matter at the time because otherwise he would not have participated in the deed preparation. **Tr. 36, lines 5 – 7**.

Respondent Rodney Chardukian testified that Mrs. Babb has always asserted that she had the financial ability to pay any damages to the plaintiffs in the case against her in the event they were successful in that litigation. **Tr. 41, lines 13 – 16**. His request for a receiver in his case against Mrs. Babb had been denied based on her ability to pay any potential judgment. **Tr. 41, lines 16 -21**. He testified that he was confident that he was going to obtain a judgment against Mrs. Babb in the damages hearing held on March 23, 2011, in Manning, South Carolina, in front of Judge Cothran. **Tr. 42, line 7 – Tr. 44, line 15**. On cross examination, he acknowledged that he owns a portion of a cable company in Horry County, with Mrs. Babb, called South Bay Lakes Cable. **Tr. 62, lines 1 – 3**. He refused to state a value relating to South Bay Lakes Cable, but he acknowledged that, "It's not worthless." **Tr. 62, lines 4 – 12**. And it has some value, even though it was not

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the work he performed. Nor did he see any need to make any inquiry of Mrs. Babb, his client, about any particulars of this transaction. He simply filed the deeds of record as requested by his client and remained silent. **Tr. 27, lines 9 – 15**.

included in the affidavit proffered by Mrs. Babb to the Court in the hearing on the motion for receiver (in civil action number 2004-CP-26-3498). **Tr. 62, line 13 – Tr. 65, line 20.** Mr. Chardukian testified that the amount of the judgment he was still owed was approximately \$700,000.00. **Tr. 67, lines 14 – 23.** It started out at, “nine hundred and seventy-some thousand.” **Id., line 21.** Thus, when offered the opportunity to do so, the witness failed to rule out the reasonable possibility that Mrs. Babb retained assets sufficient to cover the judgment even if the sale of her properties in this case were not set aside.

The third witness called by respondents was the Appellant himself. Appellant testified that he was upset that he might lose this property as a result of the instant law suit. **Tr. 104, lines 16 – 17.** Appellant bought the property because his sister was in need of income and he wanted to help her. **Tr. 105, lines 1 – 9.** Appellant’s sister had apparently been in litigation with co-owners of the campground property for 10 years but Appellant was not aware of that litigation. **Tr. 81, lines 21 – 25.** Appellant further testified that he was unaware of litigation involving these respondents and his sister and it made him upset when he found out about it. **Tr. 85, lines 13 – 18.** Mrs. Babb testified that she did not tell her brother or her family about the litigation. **Tr. 156, lines 12 – 19; Tr. 157, line 22 – 25.** He (Appellant) thought he should have known about the litigation at the time of the contract. **Tr. 105, lines 14 – 19.** Nevertheless, he continued to make payments to his sister even after he found out about it and after he was served with the instant law suit seeking to set aside the deeds generated as a result of this transaction. **Tr. 88, lines 1 – 9, Tr. 111, lines 16 – 17.**

Appellant testified that has a normal sibling relationship with his sister. **Tr. 114,**

**lines 1 – 2.** Accordingly, he has information about the family which is private family information. For example he knows that she has a stepson who is living with her that was disabled, **Tr. 114, lines 15 – 16**, from stroke and diabetes, and who was not able to care for himself. **Id, lines 18 – 21.** Mrs. Babb's step son was paralyzed on one side and could not speak well and was incontinent. **Tr. 218, lines 17 – 23.** Her husband also had a health condition. **Tr. 115, lines 15 – 16.** He has dementia. **Tr. 128, line 23.** Therefore, based on his knowledge of health issues existing in her personal family, his sister's sale of the property to him was consistent with his understanding of her cash flow needs at that time. **Tr. 115, line 17 – Tr. 116, line 9.** Mrs. Babb corroborated this testimony. See **Tr. 128, line 17 – Tr. 131, line 8** (Mrs. Babb recounts the hardships and difficulties presented by the failing health of family members); compare her testimony at **Tr. 161, lines 5 – 21; and Tr. 199, line 16 – Tr. 200, line 18.** Appellant absolutely feels that it is unfair to impute intent to defraud to him with respect to this transaction. **Tr. 116, lines 10 – 14.**

Mrs. Babb testified as a hostile witness for the respondents. **Tr. 118.** Nevertheless, she insisted that at the time of the damages hearing in her case with these respondents, the possibility existed that respondents would owe her money as opposed to the reverse. **Tr. 126, lines 3 – 12; compare Tr. 227, lines 6 – 24.** She has interests in other cable entities in addition to South Bay Lakes Cable. She valued the cable companies in which she has an interest in Horry County at 4 and ½ million dollars. **Tr. 144, lines 5 – 13.** Her individual interests in the cable television companies equals 34.18 percent of that amount. **Tr. 144, lines 9 – 11.**<sup>6</sup> Respondents' counsel stated they would consent to a sale of the businesses for 3 and ½ million dollars, **Tr. 203, lines 1 – 3** which

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<sup>6</sup> This testimony supports the conclusion that Mrs. Babb's interests in the cable companies discussed at **Tr. 144, lines 5 – 13**, would total \$1,538,100.00. This excludes the value of the properties conveyed by her to Appellant.

he did not challenge when Appellant's counsel questioned Mrs. Babb about that valuation. **Tr. 203, lines 13 – 25.**

When Mrs. Babb sold the campground property to her brother, she thought her interest in that property was worth the \$133,333.33 sales price. **Tr. 147, lines 1 – 9.** That is because that is the value that Horry County has placed on the property. **Tr. 147, lines 6 – 7.** In her affidavit submitted to Judge Cooper in the litigation which resulted in the judgment against her, (case no. 2004-CP-26-3498) she valued the total campground property at over \$1,000,000.00 (as opposed to \$400,000.00 in the current years of 2012 - 13). She insinuates that the property is not as valuable now as in the mid 2000's. **Tr. 148, line 22 – Tr. 149, line 1.**

#### **The Special Referee's Order**

Initially, we respectfully submit the findings of fact and conclusions of law are jumbled and are not set out separately and specifically as required by S.C.R.C.P. 52(a).<sup>7</sup> It is difficult to tell whether any particular paragraph is a finding of fact, or whether it is a conclusion of law. Because of this, pursuant to S.C.R.C.P. 59(a)<sup>8</sup> Appellant asked the Special Referee to reconsider the finding that he, Appellant, intentionally assisted his sister in defrauding the plaintiffs. On this point, the order contains conflicting or at least inconsistent factual findings and / or conclusions of law. At paragraph "6" of the order it

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<sup>7</sup> S.C.R.C.P. 52, states in pertinent part, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . Requests for findings are not necessary for purposes of review. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . . ."

<sup>8</sup> This rule reads, *inter alia*, "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

states

The Defendant testified that he didn't know that Babb had been in litigation for over ten years with the co-owners of the 8.4 acres and, in fact, he did not know the name of the co-owners or the zoning of the properties. The lot was purchased by Babb at a County tax sale and the acreage was purchased from a federal Marshall's sale, both highly irregular methods of purchase. The Defendant testified he knew of neither and just trusted his sister.

However, paragraph "11" at page 9 states,

In fact, I find that the *Defendant clearly "purchased" the properties in an attempt to assist his sister in avoiding the judgment lien of the Plaintiff.*

Emphasis added. Id. The foregoing paragraphs are inconsistent. Paragraph "6" seems to recount the Appellant's testimony and adopt the same as findings of fact in this case. However, the language used in paragraph "9" of the order seemingly conflicts with paragraph "6" and creates confusion we submit. The court finds as a fact that the Appellant was attempting to "assist" his sister in "avoiding the judgment lien of the plaintiff." However, there is no specific finding that the Appellant *knew* there was a judgment lien or other claim against the property and *Appellant submits there is no evidence to suggest that Appellant even knew about any such lien.* Attorney Young testified that he didn't know about the alleged lien, **Tr. 31, lines 13 – 20**, and he has practiced real estate law in Conway, South Carolina, continuously since 1991. **Tr. 17, lines 2 – 4.**

### **The Law Generally**

The Statute of Elizabeth is codified at S.C. Code Ann § 27-23-10. In interpreting this statute, our Courts have held 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; and, second, where a transfer is made without actual intent to defraud but without valuable consideration. *Oskin v. Johnson*, supra. 400 S.C. at 397. Other phraseology has been used. "South Carolina courts have held that under the Statute of Elizabeth conveyances may be set aside under two conditions: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration." *Albertson v. Robinson*, 371 S.C. 311, 316, 638 S.E.2d 81 (Ct.App. 2006).

"It is well-settled under S.C. Code Ann. § 27-23-10(A) (Supp. 1998) that where there is valuable consideration, a transfer may be set aside as a fraudulent conveyance only if there is an actual intent to defraud creditors imputable to the grantee." *Royal Z Lanes v. Collins Holding Corp.* 337 S.C. 592, 594, 524 S.E.2d 621 (1999)." "A transfer made without valuable consideration, however, may be set aside even without an actual intent to defraud." *Id.* "A transfer made without valuable consideration has been referred to as a "voluntary conveyance." *Id.*, citing *First State Sav. & Loan Ass'n v. Nodine*, 291 S.C. 445, 354 S.E.2d 51 (Ct.App. 1987). "This term has caused some confusion in our case law and for clarity we refer here to such a conveyance as a "gratuitous" conveyance. Essentially, a conveyance may be set aside as fraudulent if (1) it is voluntary (gratuitous) or (2) there is actual intent to defraud." *Royal Z Lanes v. Collins Holding Corp.* supra, 337 S.C. at 594 - 595, 524 S.E.2d 621 (1999).

"For existing creditors, conveyances can be set aside in two instances: First, where the challenged transfer was made for a valuable consideration, it will be set aside if the

plaintiff establishes 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. Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full — not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.” *Mathis v. Burton*, 319 S.C. 261, 264-265, 460 S.E2d 406 (Ct. App. 1995).

### **Family Transfers**

“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 testimony.” *Windsor Properties, Inc. v. Dolphin Head Construction*, 331 S.C. 466, 471, 498 S.E.2d 858 (1998). Therefore, the focus of the Statute is whether the grantor has reserved sufficient assets to satisfy his obligations. “Where a conveyance is made without an actual intent to defraud but without consideration, it is said that the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors. But this means a sufficient amount of property not merely at the time of the transfer, but an amount from which in the final analysis the creditors are able to collect their indebtedness in full.” *Windsor*, supra, 331 S.C. at 473; *Leasing v. Goodwin*, 312 S.C. 122, 439 S.E.2d 294 (Ct. App. 1993).

"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 testimony." *First Union Nat. Bank of N.C. v. Smith*, 314 S.C. 459, 461, 445 S.E.2d 457 (Ct.App. 1994).

### Discussion

The sufficiency of an order is viewed through the statutory complex at issue in the case and a determination is made as to what salient facts are necessary to support application of the statute. In other words, an order has to be sufficient

to allow a reviewing court to determine from the record whether the judgment — and the legal conclusions which underlie it — represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

*Cf In Re Care and Treatment of Corley*, 365 S.C. 252, 256-257, 616 S.E.2d 441 (Ct.App. 2005)(In making a probable cause determination in an annual review under the Act [ § 44-48-110. Periodic mental examination of committed persons] the circuit court should substantially comply with Rule 52(a) and "find the facts specially and state separately its conclusions of law." There was no finding that the Appellant knew of any litigation pending involving his sister and absent any such finding there are no factual findings which support the conclusion that Appellant intended to help his sister, "avoid the judgment lien." Defendant would ask this Court to reverse this finding/conclusion and find as a fact that the Defendant did not know of his sister's pending judgment and that

he had no conscious intent to assist her in defrauding any creditor.<sup>9</sup> The court's order of May 28, 2013, denying Appellants motion for a new trial states that Appellant colluded with his sister still is silent as to whether Appellant knew of the previous litigation between the respondents and his sister. Clearly, there is no evidence to support a finding that Appellant had such knowledge. To find otherwise is to engage in pure speculation we respectfully submit.

## ARGUMENT II

The trial court erred when it held that no consideration had passed between the Appellant and his sister when a signed contract had been executed which stated the contract price and payments had been made in accordance therewith. (Question III)

In the court's order at page 3 of the order, the court "finds" that no consideration was paid for the purchase. Initially, the court stated,

Since the Defendant *paid only minimal money down* and there was no mortgage to secure the balance that may be due, the transfers are treated as voluntary and without material consideration and shifted the burden to the Defendant to establish that he was a bona fide purchaser for value, without imputed knowledge of the actions of his sister.

Emphasis added. Thereafter, the court "found"

I find that the Defendant never paid any "consideration" for the purchase of the properties, as I do not believe that the Defendant paid any funds to Babb for the purchase and certainly did not continue to pay Babb after this action was filed.

R. \_\_\_\_ . Initially, these statements are at odds and contradictory. The court admits that money was paid down on the purchase by Appellant albeit minimal. But then the Court

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<sup>9</sup> Appellant submits the court's order of May 28, 2013, denying Appellant's motion for a new trial is not helpful on this issue. It is silent on whether Appellant had knowledge of the prior litigation involving the respondents and Mrs. Babb. R. \_\_\_\_ .

says Appellant “never paid any consideration for the purchase. We respectfully submit this finding or conclusion is simply not supported by the whole of the evidence in this case. The court doesn’t discern between “consideration” and the payment of monthly payments, albeit relatively small ones. It doesn’t reference any facts which would support a failure of consideration.<sup>10</sup> Moreover, one deed itself states that the consideration is \$133,333.33, for that particular property. **Plaintiff’s Exhibit #3**. The other says the consideration is \$60,000.00. **Plaintiff’s Exhibit # 5**. The contract for the sale of real estate calls for the payment of specific sums under specific circumstances, and the Appellant and Mrs. Babb testified that the amounts stated in the contract constituted the agreed upon sales price. There was testimony that the Appellant paid his sister \$5,000.00 as a down payment. Additional testimony supported a finding that Appellant made monthly payments thereafter in the amount of \$500.00 each. Appellant presented receipts for cash payments made by him to his sister pursuant to the contract. Moreover, Mrs. Babb testified that her brother would make the \$500.00 payments “or until he had the wherewithal to pay it all off at one time.” Thus the reasonable inference is that Appellant would make minimal payments and balloon payments when possible. Recitation of valuable consideration within the deed and recording create a rebuttable presumption that the conveyance was valid.” See *Willis v. Willis*, \_\_\_ N.C. \_\_\_, 714 S.E.2d 857 (N.C.App. 2011), Calabria, J, dissenting, at p. 11. The Court went on to state the following:

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<sup>10</sup> The slightest consideration is sufficient to support the most onerous obligation. *First National Bank of South Carolina v. Wade*, 245 S.C. 426, 431, 141 S.E.2d 102, 104 (1965). Moreover, absent fraud and deception, the Court will not deprive the contract of validity.” *Dixon v. Dixon*, 362 S.C. 388, 397, 608 S.E.2d 849 (2005) *See also All v. Prillaman*, 200 S.C. 279, 292, 20 S.E.2d 741, 747 (1942) (holding that setting aside a deed is not the proper remedy for failure of consideration absent fraud or deceit).

Having found that the transfers by the seller were for the purpose of defrauding the plaintiffs as her creditors, and that the defendant failed to establish any bona fides of the transaction, it follows that the two deeds are clearly and utterly void frustrate and of no effect pursuant to S.C. Code 27-23-10, et seq.

R. \_\_\_\_ . Appellant asks this Court to reverse these findings /conclusions and find as a fact that the contract was support by valid consideration which was being paid by the Appellant.

### ARGUMENT III

The Court erred when it remained silent as to whether the transferor retained sufficient assets with which to pay any judgment had by the plaintiffs. (Question IV).

Defendant submits that the evidence showed that Defendant's sister retained sufficient assets with which to pay the judgment and Defendant would ask this Court to make such a finding. Without making a finding of fact on this issue, the Court is not permitted to make a finding on the issue of fraudulent conveyance.

As previously noted, Mrs. Babb has always asserted that she had the financial ability to pay any damages to the plaintiffs in the case against her in the event they were successful in that litigation. **Tr. 41, lines 13 – 16.** Respondents' request for a receiver in their case against Mrs. Babb had been denied based on her ability to pay any potential judgment. **Tr. 41, lines 16 -21.** Respondent, Chardukian, acknowledged that he owns a portion of a cable company in Horry County, with Mrs. Babb, called South Bay Lakes Cable. **Tr. 62, lines 1 – 3,** and even though he refused to state a value relating to South Bay Lakes Cable, he acknowledged that, "It's not worthless." **Tr. 62, lines 4 – 12.** Mr. Chardukian further testified that the amount of the judgment he was still owed was approximately \$700,000.00 **Tr. 67, lines 14 – 23,** but it started out at, "nine hundred and

seventy-some thousand.” **Id.**, **line 21**. Thus, when offered the opportunity to do so, the witness failed to rule out the reasonable possibility that Mrs. Babb retained assets sufficient to cover the judgment even if the sale of her properties in this case were not set aside.

Again, as previously noted, Mrs. Babb owns interests in other cable entities in addition to South Bay Lakes Cable. She valued those cable companies at 4 and ½ million dollars. **Tr. 144, lines 5 – 13**. Her individual interests in the cable television companies equals 34.18 percent of that amount. **Tr. 144, lines 9 – 11**. Respondents’ counsel stated they would consent to a sale of the businesses for 3 and ½ million dollars, **Tr. 203, lines 1 – 3** which he did not challenge when Appellant’s counsel questioned Mrs. Babb about that valuation. **Tr. 203, lines 13 – 25**. **Her interests therefore** would be as much as \$1,538,100.00. Yet the court made no findings on this point. We submit this was error and the case must be remanded on this issue.

Where a conveyance is made without an actual intent to defraud but without consideration, it is said that the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors. But this means a sufficient amount of property not merely at the time of the transfer, but an amount from which in the final analysis the creditors are able to collect their indebtedness in full.” *Windsor*, supra, 331 S.C. at 473; *Leasing v. Goodwin*, 312 S.C. 122, 439 S.E.2d 294 (Ct. App. 1993).

Appellant respectfully submits this issue must be addressed in this case in order to determine whether respondents are entitled to relief pursuant to the Statute of Elizabeth. As discussed above, Mrs. Babb has a stepson who is living with her that was disabled, **Tr. 114, lines 15 – 16**, from stroke and diabetes, and who was not able to care for himself. **Id, lines 18 – 21**. Mrs. Babb’s step son was paralyzed on one side and could

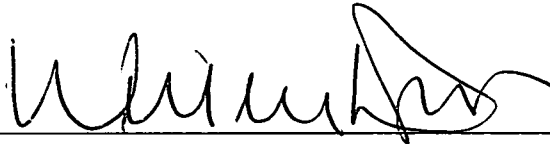
not speak well and was incontinent. **Tr. 218, lines 17 – 23.** Her husband also had a health condition, dementia. **Tr. 115, lines 15 – 16; Tr. 128, line 23.** Therefore, there is evidence to clearly support that Mrs. Babb sold her property for other than fraudulent reasons. Mrs. Babb corroborated this testimony. **Tr. 128, line 17 – Tr. 131, line 8 ; Tr. 161, lines 5 – 21; and Tr. 199, line 16 – Tr. 200, line 18.**

**CONCLUSION**

For the foregoing reasons, Appellant would respectfully submit that the lower court's order should be reversed and remanded for further findings of fact and conclusions of law.

Respectfully submitted

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This 17<sup>th</sup> day of September, 2013  
Myrtle Beach, South Carolina