IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

William C. Tindal, Special Referee

Appellate Case No. 2013-002370

Ned Gregory, Jr., Respondent,
v.
Howell Jackson Gregory, The Gregory Company, Inc. and The City of Lancaster, Defendants,

Of whom Howell Jackson Gregory and The Gregory Company, Inc. are the Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

The case at bar is an outgrowth of the original partition action commenced by Respondent in 2000 in Lancaster County to force the sale of the real estate assets of the father of the parties who died testate in 1985 and after their mother's life estate ended in 1990. In 2001 the partition action was moved to Horry County (R. p. 1) to be heard by the Master in Equity J. Stanton Cross, Jr., as the real estate consisted of two tracts: Horry tract – a beach house in the city of Myrtle Beach and Lancaster tract - three vacant commercial buildings on South Main Street in the city of Lancaster. That following the Order of Partition by Master in Equity Cross in 2005 both tracts were sold at public auction.

The Horry tract was sold in May, 2005 to Appellant and closed with a deed of conveyance from Master in Equity Cross that year. The Lancaster tract was sold in June, 2005 to The Gregory Company, Inc. and closed with a deed of conveyance from Master in Equity Cross in 2006. (R. pp. 130-133) Appellant as owner of The Gregory Company, Inc. attended the sale in Lancaster and was the highest bidder (R. p. 137) and subsequently assigned the bid to his corporation (R. p. 133) and the corporation paid the required bid amount to the Horry County Master in Equity on April 28, 2006. (R. pp. 43-44) The deed (R. p. 130) and a plat (R. p. 149) were recorded in June, 2008.

Also in June, 2008 Respondent obtained a transcript of judgment (R. p. 33) from the Horry County Clerk of Court that was in error as it omitted certain setoffs awarded to Appellant by Master in Equity Cross in his orders of April 25, 2006 (R. pp. 2-4) and the Nunc Pro Tunc Order of August 10, 2006 for April 25, 2006. (R. p. 5) The error

amounted to $25,517.99, plus two checks (R. p. 37) that were later conceded by Respondent and his counsel in May, 2013 before the successor Master in Equity Cynthia Graham Howe amounting to $7,595.03. (R. p. 21)

The two orders of Master in Equity Cross in 2006 were not appealed and are the law of the partition case and contain a conceded sum of $7,940.00 that is still omitted.

The current action was brought by Respondent in 2008 with the filing of a third lis pendens (R. p. 86) alleging fraud in the Cross deed of the Lancaster tract to The Gregory Company, Inc. which was later amended to a violation of the statute of Elizabeth claim on February 7, 2012 at a pre-trial hearing when the transcript of judgment was first presented to Appellants and which was not attached to the complaint as an exhibit.

A hearing in the matter resulted in the special referee adopting the judgment amount set by the successor Master in Equity Cynthia Graham Howe of Horry County which was in May, 2013 reduced by the conceded two checks to the sum of $37,490.44. The hearing consisted of no witness testimony, but discussions with the special referee.

Following the hearing in the matter an order was issued by the special referee, William C. Tindal on April 30, 2013 (R. pp. 7-15) calling for the sale of the Lancaster tract at public auction holding that it violated the statute of Elizabeth. A Rule 59(e) motion was filed and later on October 31, 2013 (R. pp. 16-17) the denial of that motion was made and the $37,490.44 was adopted as the judgment amount and the date of December 2, 2013 was set for the sales date. Subsequently, a petition for supercedeas was filed initially in The South Carolina Court of Appeals by Appellants that was denied and referred back to the special referee and after an expedited emergency hearing a stay of the sale was ordered.

That on December 6, 2013 Appellants filed a Motion for Consolidation of the case at bar with the appeal of the partition case as the judgment amount there is relied on here.

The Notice of Appeal was served and filed in this case on November 7, 2013 in The South Carolina Court of Appeals.

ARGUMENT

A. DOES RESPONDENT"S CONCEALMENT OF THE JUNE 10, 2008 FAULTY TRANSCRIPT OF JUDGMENT AND HIS FAILING TO ATTACH A COPY TO THE COMPLAINT, AS IT OMITS HIS CONCEDED SUM AT TRIAL OF $7,940.00 THAT APPELLANT PAID FOR THE REMOVAL OF THE GAS TANKS FROM THE LANCASTER TRACT, FROM BEING IMPLEMENTED THEREFROM, AS STATED IN THE CROSS ORDERS OF APRIL 25, 2006, THE LAW OF THE CASE, CREATE A NON FINAL JUDGMENT THAT THE SPECIAL REFEREE RELIES UPON IN ORDERING THE SALE OF THE LANCSTER TRACT PREMATURELY TO PAY A NON FINAL JUDGMENT AND FAILS TO COMPLY WITH SC CODE ANN. 15-35-810 PROVIDING THAT A FINAL JUDGMENT IS NEEDED TO CREATE A LIEN?

The Horry County Clerk of Court on June 10, 2008 created an omission error in transcribing the judgment in the 2000 partition case and thereby failed to include the awards to Appellant for $25,517.99 that Master in Equity J. Stanton Cross, Jr. ordered in 2006 and credit from two checks presented to the Horry County Master in Equity on August 9, 2006 from Appellant and Respondent's counsel, Clifford L. Welsh. Appellants did not know of the omission error until February 7, 2012 (R. p. 128, lines 1-25 – p. 129,

lines 1-11) at a pre-trial conference in Lancaster with William C. Tindal, Special Referee who was appointed in 2009 (R. p. 6) to hear this new case bought by Respondent against Appellants asking the court to declare the Master in Equity deed of conveyance of the Lancaster tract to The Gregory Company, Inc. fraudulent on the basis that Appellant, the highest bidder at the public sale in 2005 assigned the bid to his corporation that paid one-half the bid to the Horry County Master in Equity on April 28, 2006 as he required, plus costs in the amount of $93,925.00. (R. pp. 43-44)

At the time of the sale of the Lancaster tract in 2005 all three commercial buildings were vacant. That Appellant in 2004 hired Tod Snipes to put a new roof on the corner building to have that building removed from the city's condemned list and to avoid a one thousand dollar a day penalty. (R. p. 53, lines 1-3) The city of Lancaster condemned the building in 2003 (R. p. 52) and during 2004 an appeal of the condemnation was attempted to be scheduled by Richard Bowers, Lancaster Building Official with six letters (R. pp. 54-59) to counsel and the owners, but to no avail. Finally, Appellant after trying to work with Respondent in July, 2004 (R. pp. 134-135) and again in January, 2005 (R. p. 136) with faxed memos advising of a banker who would finance the work, but the two memos were totally ignored by Respondent, as Respondent remained silent, hired Tod Snipes to do the roof job per his two estimates. (R. pp. 50-51) Appellant in an effort to avoid waste of the family assets and proposed penalties from the city then got the work done and the Tod Snipes bill was paid in full in September, 2005 amounting to $13,500.00 by The Gregory Company, Inc. and that payment was part of the omitted $25,517.99 by the Horry Clerk. This payment was proved to Master in Equity Cross in a hearing on August 9, 2006 by a cancelled check dated 9-12-2005 from The Gregory

Company, Inc. to Dan D'Agostino, Esq. in the amount of $15,500.00 with bank clearing date of 9-15-2005. (R. p. 49) Master in Equity Cross would not allow the extra $2,000.00 for attorney's fees to be a part of Appellant's setoff award, but did approve and ordered the $13,500.00 cost paid. (R. p. 5)

Also, during the five year period from 2005 to 2010 Appellants spent time and money rehabilitating the three buildings as the second building was condemned (R. p. 31) in 2008 and a new roof was installed to remove it also in 2009. Finally, the first tenant was housed in 2010 and the second in 2012 and now all three buildings are rented with long term leases of thirty years each and the two tenants have spent over $35,000.00 each in making improvements to ensure their long term commitments. Appellants have polished this diamond in the rough from a liability to a cash generating asset and have garnered the praises of the city fathers for their efforts. The intersection of South Main Street and Chesterfield Avenue now is alive and vibrant and not the eyesore of the past decade.

Another omission from the erred transcript was the removal of the gas tanks by Appellant from the Lancaster tract that Respondent and his counsel, Clifford L. Welsh conceded at the trial of the partition case amounting to $7,940.00. (R. p. 3) Respondent knew of this conceded sum and upon receipt of the faulty transcript from the Horry County Clerk of Court he hid it and did not attach a copy of it to his complaint on purpose alleging fraud in 2008 and secretly kept it out of sight until the pre-trial conference on February 7, 2012, (R. p. 42) nearly four years after receiving it in June, 2008. One can only imagine why this document was kept by Respondent under wraps for over forty-three months as he probably drooled over the interest he would be making at

11.25% on the escalated judgment amount. As an officer of the court Respondent should have known better and alerted the Horry County Clerk of Court of the error, but Respondent again remained silent and should be bound by his actions or better non-actions as he violated the equitable maxims that equity is as equity does or one who seeks equity must do equity. Respondent fails miserably under both counts.

A third omission from the Horry Clerk's transcript of judgment was Appellant's payment of the 2002, 2003 and 2004 Horry County real estate taxes on the Horry tract. This was proved to Master in Equity J. Stanton Cross, Jr. in May, 2006 at a hearing in chambers with counsel present and three cancelled checks were presented payable to the Horry County treasurer totaling $4,077.99 and reflecting their bank clearing dates. (R. p. 63) Respondent's counsel Welsh even prepared two statements (Myrtle Beach Money per Order (R. p. 61) and Lancaster Property Sale (R. p. 62)) acknowledging the payments that were presented at the hearing and he later documented the event with a letter to all dated May 22, 2006. (R. p. 60)

The continuation of this faulty transcript of judgment lingers on and during 2013 an amendment (R. p. 36) on November 2, 2012 from the Horry Clerk was denied by successor Master in Equity Cynthia Graham Howe (R. pp. 18-20), even though Howe stated in open court on October 14, 2013 that she takes judicial notice that the June 10, 2008 transcript of judgment is in error. (R. p. 124, lines 13-17) All of this points to the fact that the current amount of the Horry judgment that the Lancaster special referee relies upon to base his ruling is nothing more than a non-final judgment and does not meet the standard set forth in SC Code Ann. 15-35-810 that requires a final judgment is needed to create a lien. Therefore, the non final judgment of $37,490.44 is not a lien and

cannot be used to force the sale of real estate.

Also, Respondent creates a double standard in his use of a conceded sum when he and counsel during the trial of the partition case concede (R. p. 3) the gas tank removal sum of $7,940.00 and during the April 25, 2013 hearing in Horry County he and counsel concede (R. p. 21) the sum of the two checks paid to the Horry County Master in Equity on August 9, 2006 totaling $7,597.03; however, only one of those conceded sums have been credited for the benefit of Appellant when both are conceded. This double standard issue of conceded (R. p. 65) was presented to Howe in Appellant's Rule 59(e) motion of July 1, 2013 that was heard on October 14, 2013 (R. p. 117) (R. p. 126, line 22 – p. 129, line 25) and denied in her order dated October 17, 2013 (R. pp. 22-24) and is on appeal. Therefore, until all omitted sums are credited to Appellant then the judgment professed by successor Master in Equity Cynthia Graham Howe as $37,490.44 is a non final judgment and presents a premature state of affairs as if falls short of creating a lien.

In the case of Freeman v. Colwell Mortgage Corp. 297 S.C. 335, 377 S.E.2d 108 (S.C. App. 1989) the Court states that under SC law, a judgment represents a judicial declaration that a judgment debtor is personally indebted to a judgment creditor for a sum of money citing Ducker v. Standard Supply Co., Inc., 280 S.C. 157, 311 S.E.2d 728 (1984). In the Freeman case the trial court found the "Order for Judgment" did not become a final monetary judgment because the mobile home was repossessed.

In the case at bar the non final judgment is the byproduct of the Horry Clerk's omission on the June 10, 2008 transcript of judgment and the continued denial of a correction by the successor Master in Equity Cynthia Graham Howe by her actions in failing to implement the Appellant's setoffs from the orders of the partition case that were

not appealed and are the law of the case in 2006 as she is violating Rule 63, SCRCP by changing the orders of the prior Master in Equity after his retirement through her non implementation. (R. p. 120, lines 1-21) (R. pp. 77-81) "Rule 63 gives a successor judge no discretion to reweigh the evidence where the trial judge has made findings of fact supported by evidence in the record."

Also, "there is a long standing rule in this state that one judge of the same court cannot overrule another...[A] successor judge may not substitute his own judgment for that of The trial judge..." Charleston County DSS v. Father, et al., 317 S.C. 283, 454 S.E.2d 307 at 312 and 310 (1995). If successor Master in Equity Howe had implemented the omitted setoffs in favor of Appellant then the non final judgment of $37,490.44 would be reduced by $25, 517.99 to the sum of $11,972.45 which would result in a final judgment amount As established by the 2006 Cross orders which are the law of the partition case as neither were appealed. But, she fails to do so and Special Referee Tindal has been dealt with nothing more than a non final judgment which restricts his decision and makes it void.

Since Lancaster Special Referee, William C. Tindal relies upon the orders of the Horry County Master in Equity Court they must be visited in this appeal.

Master in Equity J. Stanton Cross, Jr. was fair and equitable in his two orders of 2006 by weighing the claims of the parties and he approved some, but not all of Respondents claims for rent and accounting $42,959.47 and after a conceded sum by Respondent and his counsel at trial Appellant was awarded a setoff for the $7,940.00 amount he spent for the removal of the gas tanks from the Lancaster tract (R. p. 3) and given the opportunity to prove, which he did, any additional amounts that Appellant paid for that Respondent did not contribute towards and those items were the new roof for the

Lancaster tract building in 2005 in amount of $13,500.00 (R. pp. 49-51) (R. pp. 75-76) and the 2002, 2003 and 2004 Horry County real estate taxes totaling $4,077.99 (R. pp. 63-73) for Appellants setoff amount of $25,517.99. (R. p. 46) Obviously, the removal of the gas tanks and the erection of a new roof on the Lancaster tract were an improvement that prevented waste and helped to preserve the property.

In the case of Ackerman v. Heard 287 S.C. 626, 340 S.E.2d 560 (S.C. App. 1986) the Court held that a joint tenant who at his own expense, places permanent improvements upon common property is entitled in partition suit to compensation for improvements regardless of whether his cotenants assented thereto in order to prevent unjust enrichment. The Ackerman case said further that "compensation is allowed not as a matter of legal right, but purely from the desire of a court of equity to do justice..."

Such was the case in 2006 when Master in Equity Cross following the trial of the partition case executed the two 2006 orders that are now the law of the case as neither of the two orders were appealed. This standard was addressed in the case of Judy v. Martin, a South Carolina Supreme Court Opinion No. 26604, 674 S.E.2d 151 (2009) wherein it held "that Appellant may not seek relief from the prior unappealed order of the circuit court because the order has become the law of the case." This is known as the law of the case doctrine and it applies with regard to the two 2006 Master in Equity Cross Orders.

At the public sale of the Lancaster tract in June, 2005 the high bid was $170,000.00 after several bids were made. (R. p. 137) This was after the above mentioned improvements and at the time of the sale no buildings were under condemnation by the city of Lancaster. This effort was the result of Appellants taking action and doing what was necessary to make the Lancaster tract worth as much as it could be worth under the

circumstances then. One can imagine what the liability factor would have been if the gas tanks were still in the ground and the corner building was still under condemnation at the time of the sale.

Appellants improvements not only enhanced the value of the Lancaster tract at the public sale in 2005, but helped prevent the waster of the assets that are now producing an income. These positive actions by Appellants are not proof of fraud that Respondent claims in his lawsuit to have the now valuable property sold to pay his non final judgment that is the result of his silence and inaction and as an officer of the court his failure to help find the truth of the matter, but instead by hiding a faulty transcript of judgment nearly four years that is in error and the error is in his favor due to the omission by the clerk of court who is allowed to correct her error under Rule 60(a), SCRCP, but has been denied by an arbitrary (R. p. 123) successor Master in Equity (R. p. 121, lines 5-24) who violates Rule 63, SCRCP (R. pp. 80-81) even though she denies that she is violating Rule 63, SCRCP on October 14, 2013. (R. p. 147, lines 2-25)

Conceded is defined in Webster's Dictionary as "1. to admit as true, valid, certain, etc. 2. to grant as a right." For Special Referee Tindal in his two Lancaster orders to hold that a non final judgment amount from the Horry partition case of $37,490.44 is final is his failure to utilize the applicable SC law in the case.

There have been several cases that have dealt with the term "conceded" in SC. The TNS Mills, Inc. v. S.C. Dept. of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) Case held that "an issue conceded in a lower court may not be argued on appeal." This view has been quoted in recent cases of Historic Charleston Holdings, LLC v. Mallon, 365 S.C. 524, 617 S.E.2d 388 (S.C. App. 2005) and in Austin v. Stokes-Craven Holding

Corp. dba Stokes Craven Ford, 387 S.C. 22, 691 S.E.2d 135 (S.C. 2010).

In the case of Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (S.C. App. 2012) the Court equates conceded with a defaulting party in a lawsuit. By defaulting the Court says a defendant forfeits his "right to answer or otherwise plead to the complaint." "In essence , the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability."

Other recent SC cases dealing with 'conceded' are: City of Greer v. Humble, 402 S.C. 609, 742 S.E.2d 15 (S.C. App. 2013) wherein the City 'conceded' the affidavit is deficient on its face and under prior law could not argue otherwise on appeal. In Curry v. Curry, 402 S.C. 388, 741 S.E.2d 558 (S.C. App. 2013) the wife 'conceded' Husband's drinking did not prevent him from getting up and preparing her coffee and toast each morning, participating in housework and earning an income that supported their comfortable lifestyle. In Kiriakides v. Atlas Food Systems & Services, Inc., 338 S.C. 572, 527 S.E.2d 371 (S.C. App. 2000) when Atlas incorporated, te division of the shares of stock was handled and after George died his shares were split up, but Alex gave away his ten percent to the family. On cross examination however, Alex 'conceded' he had to go along with records showing John originally had 2360 shares and he had 2370 shares. In a statute of Elizabeth case Sumner v. Janicare, Inc., 294 S.C. 483, 366 S.E.2d 20 (S.C. App. 1988) Sumner 'conceded' the transfer was for valuable consideration.

The Special Referee's two orders (April 30, 2013 (R. pp. 7-15) and October 31, 2013 (R. pp. 16-17)) for sale are premature of this valuable asset, the Lancaster tract, that has been enhanced, not by Respondent who claims fraud, but by Appellants who have expended time and money to transform the vacant and dilapidated Lancaster tract from a

non performing liability into an asset producing income during the five years following the purchase in 2005. The 2008 Respondent claim that a fraudulent transfer by Master in Equity Cross occurred is ludicrous with Respondent knowing that the 2006 orders of Cross (R. pp. 2-5) contain a conceded sum of $7,940.00 that he and his counsel Welsh made at trial (R. p. 3) (R. p. 118, line 6 – p. 119, line 19) that was omitted from the faulty transcript of judgment that Respondent hid for nearly four years should be crystal clear evidence that the judgment amount from the Horry court is non final and a sale of the Lancaster tract is premature until a final judgment be determined.

From the case of Bone v. U.S. Food Service, 404 S.C. 67, 78, 744 S.E.2d 552, 558-9 (S.C. 2013) the SC Supreme Court said this Court's jurisprudence is in accord with the definition of a final judgment found in Black's Law Dictionary. It defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs...and enforcement of the judgment." Black's Law Dictionary 919 (9th ed. 2009).

In the case at bar the issue of the amount of the judgment is not final as the omitted amount from the June 10, 2008 transcript of judgment is still unsettled to say the least. The two orders of Master in Equity Cross in 2006 that grant the setoff to Appellant and are the law of the partition case have not yet been implemented. All subsequent orders (R. pp. 18-24) appear to be in violation of Rule 63, SCRCP in denial of the efforts of the clerk of court under Rule 60(a), SCRCP and Appellant under Rule 60(b)(1) to correct the faulty document (R. p. 33) in an effort for equity to prevail.

B. MAY RESPONDENT USE A DEAD LIS PENDENS CLOTHED WITH FRAUD TO LITIGATE IN 2008 WITH A THIRD LIS PENDENS IN LANCASTER IN AN EFFORT TO BOOTSTRAP HIS PARTITION ACTION IN HORRY AFTER SECOND LIS PENDENS FILED 2002 AND IN VIOLATION OF THE STRICT COMPLIANCE OF SC CODE ANN. 15-11-50 PROHIBITING REFILING AFTER FIVE YEARS?

When Respondent filed his 2008 complaint for fraud he also filed a third lis pendens. (R. p. 86) The second lis pendens (R. pp. 84-85) was filed in 2002 in Horry County when the partition case was moved from Lancaster County where the first lis pendens was filed in 2000. (R. pp. 82-83)

Under specific language of SC Code Ann. 15-11-50 Respondent's third lis pendens is a dead lis pendens as it was filed six years after the second lis pendens and the statute is specific in stating that after five years it cannot be refilled. Here six years passed and therefore a dead lis pendens. It is obvious that Respondent was intent on bootstrapping his new fraud action onto his partition action, but his timing was off by a year. A dead lis pendens clothed with fraud cannot be valid under SC law since the filing of a lis pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. See Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (S.C. App. 2002) rehearing denied, certiorari denied.

From the facts that existed at the time of the sale of the Lancaster tract in 2005 the property was in dire need of repair as all three commercial buildings were vacant and no income was being generated and at the time of the sale one building was given a new roof to remove it from the cities condemned list (R. pp. 52-59) and within a couple of years

another building was condemned in 2008 and a new roof was added in 2009 all during the five year period that no tenants were there. Appellants filed an emergency motion in January, 2009 (R. p. 31) to seek relief from the circuit court that week in two areas: one- cancel the third lis pendens and two – obtain a continuance in city court for code violation due to need for a new roof. It was not until the special referee hearing in September, 2012 that the third lis pendens motion was heard, but not ruled on until the April 30, 2013 Order of Tindal.

When Appellant, The Gregory Company, Inc. purchased the Lancaster tract no mortgage or lien was placed on the property as it was the intent of the purchaser to hold the property, fix it up, rent it out and derive income for the family as it was the old family home place over one hundred years ago where Appellant's grandfather raised thirteen children and sent them all to college and served as the mayor of Lancaster at the turn of the century from 1890's forward. Then in the late 1940's Appellant's father bought the Lancaster tract from his siblings.

A look at all of the lis pendens cases alleging fraud it is the thrust of the filings that the owner of the property is about to encumber or transfer the property and a lis pendens is needed to notify the world that a claim is pending, but the claim must be based upon the facts that exist at the time. In the case at bar in 2008 there is no evidence that The Gregory Company, Inc. was holding the property to sell or mortgage as no such acts existed. If The Gregory Company, Inc. had any intent or desire to sell or mortgage the Lancaster tract then it could have done so after getting the deed from the Horry County Master in Equity by rushing to the Lancaster Courthouse and recording the deed with mortgage liens thereon; however, no such thought or action was taken and the deed was

recorded (R. p. 130) when a plat was being obtained to record simultaneously and did so in June, 2008. (R. p. 149) Therefore, there is no fraud in the transaction from J. Stanton Cross, Jr. as Master in Equity to The Gregory Company, Inc., as the required one-half the bid amount was paid, plus costs, as Appellant owned an undivided one-half interest in the Lancaster tract and The Gregory Company, Inc. has diligently over a five year period fixed up the property from when it couldn't attract a tenant and was condemned by the city to now fully occupied and making money with long term quality leases. There was none then and is no intent now to sell the property. The Lancaster tract should be worth twice what was paid for it in 2005 taking into consideration the improvements that have been made and with no mortgage or lien thereon, except for Respondent's dead third lis pendens.

C. DOES A STATUTE OF ELIZABETH VIOLATION OCCUR WITH A DEED OF CONVEYANCE FROM HORRY COUNTY MASTER IN EQUITY, J. STANTON CROSS, JR., AS GRANTOR TO THE GREGORY COMPANY, INC., AS GRANTEE AFTER ORDER OF PARTITION, PUBLIC SALE AND HIGHEST BIDDER WAS APPELLANT WHO OWNED AN UNDIVIDED ONE-HALF INTEREST THEREIN AND WHO ASSIGNED BID TO HIS CORPORATION AND IT PAYS MASTER IN EQUITY HIS REQUIREMENT OF ONE-HALF THE BID AMOUNT PLUS COSTS WHEN RESPONDENT SUBSEQUENTLY OBTAINS A FAULTY TRANSCRIPT OF JUDGMENT WITH FAVORABLE ERROR, SECRETES IT AND LITIGATES AGAINST APPELLANTS' FOR THE EXTORTED SUM?

The standard of review as outlined in the recent SC case of Judy v. Judy, 403 S.C. 203, 742 S.E.2d 672 (S.C. App. 2013) states "A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. [403 S.C. 208] 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).

Section 27-23-10(A) of the South Carolina Code (2007) is commonly known as the Statute of Elizabeth. From the Oskin case the Court has held in interpreting the statute that "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."

In the case at bar the grantor was J. Stanton Cross, Jr., Horry County Master in Equity following a partition case and an Order for Partition with a public sale of the Lancaster tract and the highest bidder was The Gregory Company, Inc. through its agent and owner, Appellant who owned an undivided one-half interest in the property (R. p. 7) just prior to the June, 2005 sale.

Special Referee William C. Tindal buys into the Respondent's argument that since Appellant bid the property at the sale then, when he assigned the bid to the corporation that Appellant falls under the second condition as no consideration was paid for the assignment of the bid. (R. p. 11) If that be the case then the assignment of the bid is made without actual intent to defraud. Without actual intent to defraud then Appellant has not participated in a fraudulent transfer and the statute of Elizabeth does not apply.

On the other hand The Gregory Company, Inc. paid the required one-half the bid amount to the Horry County Master in Equity plus costs (R. pp. 43-44) which represented the full amount required by the court to be granted the Lancaster tract for $170,000.00. The Master in Equity has wide discretion to operate his court as he deems equitable and he did not require either Appellant to pay down 5% and pay off the bid in 30 days as the Special Referee Order of April 20, 2013 attempts to use in painting a broad brush of fraud on behalf of Appellants when none existed. (R. p. 12) Special referee is attempting to limit the authority of the Horry County Master in Equity J. Stanton Cross, Jr. by holding that no equitable discretion applies in the Cross court and that Cross has no flexibility.

A second dig by Special Referee Tindal was that Appellant did not identify himself as agent to Robert Folks, the agent for Horry County Master in Equity at the Lancaster sale. (R. p. 11) This is merely an assumption on the part of the court as Folks did not require any registration prior to or after the sale and Folks has known Appellant for over fifty years. The actual sale was handled quite informally. Also, Folks was acting for the Master in Equity and merely sold the property and reported the sale to the Horry County Master in Equity afterwards. (R. p. 137) In order for a corporation to attend and bid at a sale since it is not a person and only an entity then an agent would have to act in that capacity. Appellant was the perfect person to so act as he was the sole owner of The Gregory Company, Inc. (R. p. 12) So, the faxed report by Folks to Clifford L. Welsh on June 6, 2005 was correct in stating "Mr. Jack Gregory bid in the Lancaster County property at the sale conducted this day as ordered for the sum of $170,000.00. There was competitive bidding from four bidders, including Mr. Ned Gregory who submitted only

one bid." However, this is not how Special Referee Tindal stated it in his April 30, 2013 Order page 5 (R.p.11) in describing the bidding as "Folk's report of the sale states that Jack Gregory individually bid for the property." This is a total misconception by special referee of the facts. It leads one to believe that special referee pre-decided the case and is shaping the facts to suit his needs.

The third dig by the special referee was to assume that the Horry County Master in Equity would not apply equity and not offer flexibility to the sale agenda of the Lancaster tract. In doing so the special referee on page 6 (R.p.12) of his April 30, 2013 Order he holds The Gregory Company, Inc. to a strict 30 day pay and 5% down rule; however, special referee is not the Master in Equity for Horry County and did not order the sale and so he cannot use his standards to get the result he desires when the person in charge, J. Stanton Cross, Jr. allows The Gregory Company, Inc. ten months to pay for the bid on the Lancaster tract. (R. pp. 43-44) It is wrong for special referee to hold that against Appellants as Appellants were in their rights under the man who ordered the sale not special referee who merely views the facts in the light that he creates as it appears he is making a case for Appellants violation of the statute of Elizabeth when no such violation occurred.

The fourth dig by the special referee on page 6 talks about the use of a company check to pay for the bid. Well, yes as all payments with regard to the Lancaster tract were by company check as the property was bought and paid for by the corporation. In addition to the purchase check the check for the payment of the new roof in 2005 was by corporate check in the amount of $15,500.00 (R. p. 49) (R. p. 75) to the attorney for

roofer Tod Snipes and the corporate check on August 9, 2006 to the Horry County Master in Equity was for $5,097.03 (R. p. 37) along with the Welsh check for $2,500.00 concluded the Lancaster tract sale.

The fifth dig was to attack the deed which was executed by the man who ordered the sale and who allowed ten months to pay for the bid and who still had the right to either not sign or sign and since the Master in Equity was satisfied in October, 2006 that the partition case was history he signed the deed (R. p. 131) to end the matter. It was his court and it was his call in dealing out equity to the parties and the deed to him obviously was credible and acceptable.

Also, special referee makes a slight remark about the fact that the deed was not recorded for three years after the auction (R. p. 12) as if that is important. Even though South Carolina is a race notice state it still is the law that a deed does not have to be recorded to be valid and there is no time limit as to when a deed must be recorded. It was explained to special referee that the plat was being prepared and the deed and plat were to be recorded simultaneously and as it occurred the plat was recorded a few days after the deed with deed being recorded on June 4, 2008 (R. p. 130) and the plat being recorded June 10, 2008. (R. p. 149) The main objective during this five year period from sale to the first tenant was getting the property in shape physically not recording a deed. The property had been in the Gregory family for well over one hundred years and Appellants were not planning on changing that historic accomplishment.

Finally, special referee states that this conveyance was an attempt to defeat creditor(s) on page 6 (R. p. 12) of his April 30, 2013 Order. The only known creditor was Respondent and finally with his presentment of the faulty transcript of judgment dated

June 10, 2008 (R. p. 33) on February 7, 2012 (R. p. 128, line 16 – p. 129, line 2) at the pre-trial that did not include the conceded (R. p. 3) sum of $7,940.00 that Respondent and his counsel at trial did so concede for the removal of gas tanks from the Lancaster tract by Appellant then the creditor was defrauding the court and Appellant.

As an officer of the court Respondent should have done something to correct the error of omission by the Horry Clerk of Court, but he remained silent and in hopes that no one would notice. Now Respondent will allow the special referee to use the faulty document to punish Appellant and accuse him of trying to defeat creditor(s) when there is only one and that one is using the faulty document that Respondent knows to be faulty and by making his exorbitant claim for money in this court of equity he turns that faulty transcript of judgment into a fraudulent document.

This is a classic case of extortion without the use of a dangerous weapon, only manipulated paper.

CONCLUSION

Had Respondent done the right thing and notified the Horry County Clerk of Court that she had made an error on the June 10, 2008 transcript of judgment when he received it in the mail instead of hiding it for nearly four years in hopes that he would receive a windfall by selling the Lancaster tract in a fraudulent deed action that was later modified to a violation of the statute of Elizabeth he would already have the correct amount of money that he is entitled to have as the properties over the five years from 2005 to 2010 were rehabbed and finally rented with quality tenants on long term leases and the Lancaster tract is now in shape to be used as an asset to borrow against and pay the lone

creditor only the correct sum he is entitled to once a final judgment amount is determined by the appellate court. Appellants are caught in a catch 22 scenario here and are being extorted by Respondent who is using the court system in hopes of forcing a big payday that Respondent really knows does not exist. But, as long as the faulty document and rulings are going his way Respondent still remains silent and offers no equity whatsoever. As an officer of the court Respondent knows better, but it appears that greed is the victor.

As a court of equity, reverse the special referee orders and halt the sale orders as there is no violation of the statute of Elizabeth by weighing the equities in the matter. Also, reach a final judgment amount as all that exists is a non final judgment which is not a lien, but the lower courts are treating the $37,490.44 as a lien. The correct final judgment figure is $25,517.99 less than that amount or $11,972.45.

Respectfully submitted,

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August 28, 2014
Myrtle Beach, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

William C. Tindal, Special Referee

Consolidated Court of Appeals Case No. 2013-002370

Ned Gregory, Jr., ...Plaintiff/Respondent,

v.

Howell Jackson Gregory
and the Gregory Company,
Inc.,.....Defendants/Appellants.

PROOF OF SERVICE

I certify that I have served three (3) copies of the Record on Appeal, Appellant's Final Brief and Appellant's Final Reply Brief on Palmer Freeman by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2014, addressed to Palmer Freeman, P.O. Box 8024, Columbia, SC 29201, attorney for Respondent. The original and fifteen (15) copies are served by U.S. Mail to The Honorable Jenny Abbott Kitchings Clerk, SC Court of Appeals, at 1015 Sumter Street, Columbia, SC, 29201 on September 9, 2014.

September 9, 2014

Kathi Cuff, Paralegal to the Irvin Law Firm