STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096
And 2011-CP-10-8840

Frank Gordon, Jr., Individually and as Trustee
of the Dorothy S. Gordon (Deceased) Trust,

Respondent.

v.

Donald W. Lancaster,

Appellant.

Respondent's Initial Brief

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STATEMENT OF THE CASE

On November 2, 2010, Respondent, Frank Gordon, as Trustee of the Dorothy S. Gordon (Deceased) Trust ("Respondent"),[1] filed this action against Appellant Donald Lancaster ("Appellant") to collect on judgments obtained in 2001 and 2002, and costs awarded in 2005 against Appellant's then-deceased uncle, Rudolph Robert Drews ("Drews"). In the initial and amended complaint, Respondent asserted claims of fraudulent conveyance, constructive trust, civil conspiracy and negligence/aiding and abetting. 2nd Am. Compl. June 12, 2013. Appellant denied the allegations and asserted various affirmative defenses, including statute of limitations and adequate consideration. Answ. to 2nd Am. Compl. June 12, 2013.

Respondent also filed this suit against Shirrese Brockington as Special Administrator of the Estate of Rudolf Robert Drews ("Ms. Brockington") and Jessie B. Atkinson, Individually, and as Personal Representative of the Estate of Effie D. Drews ("Ms. Atkinson"). In November 2011, Respondent settled with both Drews' estate and Effie Drews' Estate. Both Estates assigned to Respondent their rights of recovery against Appellant (Pl. Ex. 58 & 59). In his Second Amended Complaint, paragraph 3, Respondent included the Estates' rights that were assigned to him in enforcing these judgments.

On June 13 and 14, 2013, this matter was tried, non-jury, before The Honorable J.C. Nicholson, Jr. After the close of Respondent's case, the Court denied Appellant's Motion for Directed Verdict Pursuant to Rule 50(a), SCRCP. At the close of all evidence, the Trial Court ruled from the Bench in favor of Respondent and expressly instructed

[1] At the time this action was first filed, Frank Gordon was acting by power of attorney for Dorothy S. Gordon. By the time it progressed to trial, he was acting as Trustee of her post mortem trust.

Respondent's counsel on various findings to be included in the Order, including his finding that the Appellant lacked credibility. (Tr., p. 289, lines 2-6; Tr., p. 291, line 11 – p. 292, line 5.)

On August 19, 2013, the Trial Court issued its written Order and Judgment ("Order"[2]), which found for Respondent on the fraudulent conveyance claim and awarded him judgment in the amount of $211,677.30[3]. The Trial Court found against Respondent on his claims of constructive trust, civil conspiracy, and negligent aiding and abetting.

In September 2013, Appellant filed Motions for Reconsideration to Amend the Court's Findings pursuant to Rule 52(b) and to Alter or Amend the Court's Judgment pursuant to Rule 59(e), (S.C.R.C.P. Rule 52(b) and 59(e)), which were denied by Orders dated May 6, 2014 and May 19, 2014.

On June 6, 2014, Appellant filed his Notice of Appeal.

STATEMENT OF THE FACTS

A.) The Underlying Judgments

The underlying Judgments that give rise to this case stem from Drew's promotion of a new enterprise known as Builders Station, a hardware store. In 1996, Drews marketed and sold stock in this company to the Respondent. (Pl. Ex. 81.) In 1997, the company failed. On April 16, 1999, Respondent filed suit against Drews in the Charleston County Court of Common Pleas for the illegal sale of stock under S.C. Code Section 35-1-1490, alleging violation of the South Carolina securities laws. *Gordon v. Drews, et al.* (Case No. 1999-CP-1001407). In December 2001, a three-day non-jury trial was held in *Gordon v.*

[2] Throughout this Brief, "Order" will refer to the August 19, 2013 Order & Judgment that is being appealed. Any other Order will be set forth with specificity as to name and date.
[3] The amount of the judgment has not been appealed, only certain findings.

Drews, which culminated in a $50,000 Judgment against Drews, plus $15,782.12 in interest. By Order dated March 15, 2002, Respondent was also awarded $42,693.50 in attorney fees, for a total Judgment of $108,482.62.

From April 2002 until September 2005, Drews appealed the Judgment. The Court of Appeals affirmed the Judgment, and the Supreme Court ultimately denied Drews' Petition for Writ of Certiorari. On September 28, 2005, Respondent was additionally awarded $1,467.21 in appellate fees and expenses.

In August 2006, the Circuit Court entered an Order for Supplemental Proceedings to be opened to aid Respondent in satisfaction of the Judgments. On September 26, 2006, a hearing was held in the supplemental proceedings, which were left open due to Drews' failure to produce financial records, in contravention of the Order for Supplemental Proceedings.

On September 25, 2007, Drews died, and his estate was opened on or about October 26, 2007, Case No. 2007-ES-10-1518. On February 8, 2010, the estate's inventory and appraisement was filed, which indicated the Estate had no assets. (Pl. Ex. 53.) Various contested proceedings took place over who would serve as the Administrator of the Estate.

On February 26, 2010, the Appellant (Drews' nephew) was deposed in the supplemental proceedings. During the Appellant's deposition, Respondent became aware of fraudulent transfers between Drews and the Appellant that rendered Drews insolvent and allowed the Appellant to financially benefit to the detriment of the Respondent.

On February 27, 2010, Drews' wife, Effie D. Drews ("Mrs. Drews"), also died, several days before her deposition, and on March 30, 2010, her estate was opened. On

June 29, 2010, the estate's inventory and appraisement was filed, which indicated a net worth of $55,460.04. (Pl. Ex. 56.)

B.) Drews' $100,000 Payment to Appellant and Related Conveyances

1.) Drews' $100,000 Transfer to Appellant

In the early 1990s, Mr. and Mrs. Drews were in financial trouble. Mr. Drews had a failed business, was suffering from creditor claims, and was living off of his credit cards – which he could not pay. (Pl. Ex. 60, p. 2, para. 4 & p. 3, para. 6.) By early 1992, the IRS was closing in on collecting tax debt from Mr. Drews. (Pl. Ex. 60, p. 2, para. 4.) Despite these debts that Drews couldn't pay, in early 1992, Drews transferred $100,000 to Appellant. (Tr. p. 25, lines 17-19; Pl. Ex. 74.) In 2010, Appellant testified in his pre-suit deposition that the $100,000 was a gift with which he could do anything he wanted, including buying stocks. (Tr. p. 119, lines 6-19.) After Appellant conferred with his new counsel in defense of this suit, he claimed *for the first time at trial* that the $100,000 was not a gift (Tr. p. 41, lines 10-24), but rather was given to him on the condition that he purchase a house in which the Drews could live for the remainder of their lives. (Tr. p. 26, lines 5-8.) The $100,000 transfer was substantially all of Drews' assets at the time. (Pl. Ex. 60, p. 2, para. 5.)

2.) Appellant's Purchase of Bainbridge Property for the Drews

On May 22, 1992, Appellant invested Drews' $100,000 and $60,000 of his own money in the purchase of 17 Bainbridge Drive in Charleston, South Carolina (hereinafter "Bainbridge Property"). (Pl. Ex. 60, p. 3, para. 6; Pl. Ex. 45.) Soon thereafter, Appellant executed an agreement whereby he purportedly gave the Drews a life estate in the Bainbridge Property. (Pl. Ex. 22.) Appellant did not create the alleged life estate by deed,

and neither the life estate nor the $100,000 transfer was recorded in public records to give proper notice. (Pl. Ex. 22; Tr. p. 211, line 22 – p. 212, line 3.) The "Agreement" conveying the life estate stated that the consideration for the transaction was "the sum of TEN ($10.00) AND NO/100S DOLLARS and love and affection for my uncle." (Pl. Ex. 22.) Notably, the "agreement" does not mention the $100,000 conveyance that Appellant alleged was the consideration for this conveyance.

3.) Appellant's $40,000 In Payments to Drews from Bainbridge Equity Line of Credit

On June 12, 1992, Appellant obtained a $40,000 open-end mortgage on the Bainbridge Property from South Carolina National Bank ("SC National Equity Line of Credit"). (Pl. Ex. 41.) From 1993 to 1995, Appellant gave the Drews several checks totaling $40,000, which were drawn from South Carolina National Bank. (Tr. p. 27, lines 20-23; Pl. Ex. 28, p.1.) This $40,000 was allegedly paid to Drews so that he could pay his living expenses. (Tr. p. 31, lines 9-10.) Appellant did not have Drews sign notes of indebtedness, or even "IOUs" for any of these payments. (Tr. p. 28, lines 5-11.) Appellant was using the equity line of credit on the house, largely paid for by Drews, to return to Drews part of the $100,000 transfer from Drews to Appellant. (Tr. p. 47, lines 18-21.) The Drews, and not the Appellant, paid the interest incurred on the SC National Equity Line of Credit. (Tr. p. 47, line 22 – p. 48, line 3.) Appellant did not charge Drews for any additional interest for these alleged loans. (Tr. p. 153, line 19 – p. 154, line 18.)

Appellant testified that he tracked all the activities relating to the $40,000 of "loans" in a spreadsheet, including any interest Drews paid. He further testified that the spreadsheet entries were made contemporaneously. (Tr. p. 91, lines 9-22.) However, at trial, two versions of the spreadsheet, both dated "February 3, 1997," were admitted which

contained material differences.[4] (Pl. Ex. 28 & Def. Ex. 6; Tr. p. 170, line 4 – 171, line 20.) One of the principal differences is that the one produced at trial showed Appellant being owed approximately $6,000 more than the one that had been produced at his deposition. (Tr. p. 171, lines 16-20.) Appellant was unable to explain this discrepancy. The discrepancy in these two identically dated documents indicated that the accounting records were not contemporaneously kept, contrary to Appellant's testimony.

4.) Bainbridge Property Is Exchanged for Nuffield Property

In 1995, Drews and Appellant allegedly agreed that they would substitute a one-story house of the Drews' choice for the two-story Bainbridge house because Drews was having medical issues with his knees. (Tr. p. 63, lines 13-15; Tr. p. 82, line 18 – p. 83, line 6.) Although Appellant claims he gave Drews power of attorney to find and buy a house, Appellant was unable to produce for the Trial Court a Power of Attorney evidencing the same. (Tr. p. 63, line 13 – p. 64, line 11.) On April 27, 1995, Drews, allegedly acting as Appellant's Power of Attorney, signed an agreement to purchase the replacement residence located at 2 Nuffield Road in Charleston, South Carolina (hereinafter "Nuffield Property"). (Pl. Ex . 24.) Mrs. Drews (not Appellant) made a $1,000 down payment on the house. (Tr. p. 65, lines 3-11.) On May 15, 1995, Appellant increased the $40,000 SC National Equity Line of Credit to $79,250 (further drawing out Drew's original transfer). (Pl. Ex. 41 & Pl. Ex. 43.) The very next day, on May 16, 1995, Appellant purchased the Nuffield property for $125,000. (Pl. Ex. 23.)

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[4] One version of Appellant's amortization schedule indicated a balance forward of $44,211.20 and the other indicated a balance forward of $50,292.80, resulting in a 1996 balance-forward discrepancy of $6,081.60. (Pl. Ex. 28; Def. Ex. 6.) Appellant's amortization schedules contained contradictory information regarding interest paid in 1995.

On May 17, 1995, Appellant executed a "Memorandum of Lease and Subordination Agreement" for the Nuffield Property. (Pl. Ex. 25.) However, this document was not a "lease" as entitled, but rather a document that purported to give the Drews a life estate in the Nuffield Property, allegedly in substitution for the purported Bainbridge Property Life Estate. (Pl. Ex. 25.) This document was recorded but did not give meaningful notice of Drews' interest in the property since it was mistitled a "Lease." The Memorandum cites the consideration for the life estate as "Ten and No/Hundreds Dollars ($10.00) and other good and valuable consideration." (Id.) Appellant again did not create and record a deed for this life estate.

5.) Appellant Sells Nuffield Property After Mr. and Mrs. Drews' Deaths

From 1992 until Mr. and Mrs. Drews' deaths in 2007 and 2010 respectively, Appellant held their alleged residence(s) in his name while allowing them full use, control, and enjoyment of the residence(s). Following their deaths, on April 29, 2010, Appellant sold the Nuffield Property for $246,000 (Tr. p. 62, lines 21-23, Pl. Ex. 55), and received $121,000 in profit from its sale (Pl Ex. 79).[5]

C.) <u>Conveyances Relating to Mortgages on Drews' Meeting Street Property</u>

1.) The $40,000 Meeting Street Mortgage

In March 1995, Drews granted Appellant a $40,000 mortgage on Drews' property located at 1705 Meeting Street in Charleston, South Carolina (hereinafter "$40,000 Meeting Street Mortgage"). (Pl. Ex. 3.) Appellant did not provide Drews any

[5] Respondent presented the Trial Court with evidence of the present value of the monies Drews transferred to Appellant that were used to purchase the property. Specifically, the $100,000 transfer from Drews to Lancaster constituted 80% of the monies used to purchase the property, which amounted to $96,800 of Appellant's $121,000 profit on its sale. (Tr. p. 181, line 17 - p. 182, line 5.)

contemporaneous consideration for the $40,000 Meeting Street Mortgage. (Tr. p. 157, lines 4-10.) No note was ever executed on this mortgage, and this mortgage was not recorded until November 1995, approximately eight (8) months after it was executed. (Pl. Ex. 3; Tr. p. 36, lines 9-22, p. 49, line 25 – p. 50, line 6.) Drews allegedly paid the interest Appellant incurred for this line of equity. (Tr. p. 47, line 22 – p. 48, line 3.) Drews did not pay any additional amounts to Appellant for allegedly loaning him the money. (Tr. p. 154, lines 9-18.)

2.) In 1996, Respondent's Cause of Action Accrued Against Drews

In 1996, Drews marketed and sold stock in Builders Station hardware to many investors, including the Respondent (Pl. Ex. 81). In 1997, the company failed, and on April 16, 1999, Respondent filed suit against Drews in the Charleston County Court of Common Pleas for the illegal sale of stock under S.C. Code § 35-1-1490, alleging violation of the South Carolina securities laws. *Gordon v. Drews, et al.* (Case No. 1999-CP-1001407).

3.) The $100,000 Meeting Street Mortgage

On April 15, 1998, after Respondent's cause of action had accrued, Drews granted Appellant an additional $100,000 Mortgage on Drews' 1705 Meeting Street property (hereinafter "$100,000 Meeting Street Mortgage"). (Pl. Ex. 6.) Once again, Appellant did not give Drews any contemporaneous consideration for the $100,000 Meeting Street Mortgage (Tr. p. 52, line 25 – p. 53, line 8; Tr. p. 157, lines 4-10), and no note was ever executed on this mortgage (Tr. p. 27, line 20 – p. 28, line 11; Tr. p. 36, lines 9-22). Even though Appellant testified that the $100,000 mortgage was to replace the $40,000 mortgage, the $40,000 mortgage was not contemporaneously satisfied when the $100,000

mortgage was executed. (Tr. p. 53, lines 9-14; Tr. p. 53, line 25 - p. 54, line 13.) Therefore, the public record showed $140,000 of debt on this property.

4.) The $20,000 Meeting Street Mortgage

In July 1999, three months after Respondent filed suit against Drews, Drews granted Appellant a third mortgage on the property, this time for $20,000 property (hereinafter "$20,000 Meeting Street Mortgage"). (Pl. Ex. 7.) Drews gave Appellant this mortgage even though he already had at least $60,000 to $100,000 in unused security provided by the $100,000 mortgage Appellant already had. (Tr. p. 34, lines 15-18.) Once again, Appellant did not give Drews any contemporaneous consideration for the $20,000 Meeting Street Mortgage. (Tr. p. 42, line 19 – p. 43, line 3.) As with the previous two mortgages, no note was ever executed on this mortgage. (Tr. p. 27, line 20 – p. 28, line 11; Tr. p. 36, lines 9-22.) And no prior mortgages were contemporaneously satisfied.

D.) <u>The Assignment of a $190,000 Meeting Street Mortgage to Appellant</u>

In November, 2001, *one month* before commencement of the trial in the *Gordon* action, which resulted in the Judgments that are the subject of this suit (Order, p. 12, para. 59), the following transactions occurred:

- On November 5 and 6, 2001, Appellant executed satisfactions for the three existing Meeting Street Mortgages ($40,000, $100,000, $20,000) (Pl. Ex. 2, 5 & 7; Order, p. 11, para. 50);
- The next day, Drews sold the Meeting Street Property and received a $190,000 Note and Mortgage from a third-party purchaser (Charleston Antiques) as consideration for the purchase (Pl. Ex. 48; Order, p. 11, para. 51);

- Simultaneously, Drews allegedly assigned the $190,000 Meeting Street Note and Mortgage to Mrs. Drews (Pl. Ex. 9 & 10; Tr. p. 67, lines 8-17; Order, p. 11, para. 52);
- Mrs. Drews then allegedly gave Appellant a $50,912 Note on the Proceeds of the Sale of Meeting Street Property (Pl. Ex. 14; Order, p. 11, para. 53); and
- Mrs. Drews then purportedly assigned the $190,000 Meeting Street Mortgage to Appellant (hereinafter "$190,000 Meeting Street Assignment") in full, allegedly as security for the $50,912 Meeting Street Note (Pl. Ex. 11).

Importantly, Appellant was not assigned the $190,000 Meeting Street Note. (Order, p. 12, para. 58.) Moreover, no evidence was presented that Appellant gave any contemporaneous consideration for either the $50,912 Meeting Street Note, or the $190,000 Meeting Street Assignment. (Order, p. 12, paras. 54 & 57.) Further, Appellant testified that he was not contemporaneously aware of the $190,000 Meeting Street Assignment at the time it was executed on his behalf. (Order, p. 12, para. 56.)

In 2001 and 2002, Gordon obtained Judgments against Drews.

From 2001 to 2005, Drews (by way of Mrs. Drews) received payments on the $190,000 Meeting Street Note and Mortgage for the joint benefit of Mr. and Mrs. Drews, and passed a portion of these payments on to Appellant for the alleged $50,912 Meeting Street Note. (Order, p. 12, para. 61.)

In August, 2005, the South Carolina Supreme Court denied Drews' petition for writ of certiorari. On September 28, 2005, Respondent was awarded $1,467.21 in appellate fees and expenses.

In September 2005, the Drews received approximately $130,000 as final payment on the $190,000 Meeting Street Note (Pl. Ex. 49) and paid to the Appellant the remaining amount on his $50,912 Meeting Street Note.[6] (Order, p. 12, paras. 62 & 63.) In 2005, Appellant received more than $40,000 related to this transaction. (Order, p. 13, paras. 64-65.) Notably, the Trial Court found that Appellant and Drews failed to report the alleged $50,912 Meeting Street Note's interest as either income or interest expense on their respective tax returns (Pl. Ex. 63 - Ex. 68); and that failure evidences that they did not actually treat this Note as a legitimate loan and continued to hide evidence of the transaction from the public, creditors included. (Order, p. 13, paras. 65-67.) As Appellant has not challenged this or any other findings related to the $190,000 Meeting Street transaction, the Trial Court's rulings related to these transactions are the law of this case. *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Envt'l Control*, 363 S.C. 67, 610 S.E.2d 482 (2005).

E.) Expert Testimony of Richard Livingston, C.P.A.

At trial, Respondent presented testimony of certified public accountant Richard Livingston, who was duly qualified as an expert in forensic accounting. (Tr. p. 149, lines 24-25.) Based on his detailed review of extensive financial records relating to all of the above transactions, Mr. Livingston testified to a reasonable degree of certainty in his expertise, that in looking at the transactions in their entirety between Appellant and Drews, they did not make economic or financial sense. (Tr. p. 150, line 24 – p. 151, line 2.) Mr. Livingston explained that not only did Appellant's and Drews' transactions deviate from

[6] Appellant issues a satisfaction for the $50,912 Meeting Street Note (Pl. Ex. 14) and assigned back to Mrs. Drews the $190,000 Meeting Street Property Mortgage (Pl. Ex. 12).

normal business and accounting principles, but they also did not make family or favor sense either, as the parties had consistently chosen to accomplish the transactions in multiple, convoluted steps instead of in one or two simple steps. (Order, p. 16, para. 78.) He further testified that the transactions created a situation whereby Drews was able to maintain control over and benefit from his assets while keeping them in someone else's name. (Tr. p. 151, lines 3-5.) Based upon his analysis, Mr. Livingston further opined that the only consistent purpose of these transactions was to shelter and hide them from creditors. (Tr. p. 151, lines 7-9; Order, p. 16, para. 79.) The Trial Court found Mr. Livingston to be both knowledgeable and credible. (Order, p. 16, para 80.)

F.) <u>The Trial Court Found that Appellant was Not a Credible Witness</u>

The Trial Court found that Appellant's:

> testimony at trial regarding these transfers lacked credibility and evidenced that the transfers in question were indeed interfamily transfers for no consideration that were made in furtherance of Drews' scheme to conceal his assets from present and subsequent creditors.

(Order, p. 15, para 74.) The Trial Court based its assessment of Appellant, in part, on his evasiveness in answering Respondent's counsel's questions (as compared to his very direct and knowledgeable answers to his own counsel), his contradictory testimony regarding his transactions with Mr. and Mrs. Drews, and his claimed lack of knowledge regarding these transactions as well as typical business practices. (Order, p. 15-16, para. 74.) The trial judge made the following observations on the record at the end of the trial before entering its Order:

> And the court does not find it believable on direct examination[7] the defendant appeared to not understand anything about notes and mortgages

[7] The Trial Court refers to his "direct examination" as Plaintiff called Mr. Lancaster as an adverse witness in Plaintiff's case in chief.

> or anything else. However, on direct he was very knowledgeable about basis about any question that his defense counsel asked him and even knew the cap on the gift tax at the time of the transfer of the 100,000 dollars, I believe 1.2 million dollars; he was very knowledgeable.

(Tr., p. 291, lines 11-18.)

Appellant's feigned lack of knowledge is in stark contrast to Appellant's testimony that he is a very experienced corporate internal auditor who has worked for two and a half decades auditing businesses (Tr. p. 23, lines 2-15; Order, p. 16, para 74); and to his testimony that he understands financial investments and has handled them all his life. (Tr. p. 23, lines 18-21.) Appellant's detailed records and amortization schedules (Def. Ex. 6), as well as his complicated, self-prepared tax returns (Pl. Ex. 68), also show Appellant to be a very knowledgeable and sophisticated businessman when it comes to financial matters.

The Trial Court also made specific findings as to Appellant's credibility when it came to testifying about his role in assisting Drews in defrauding creditors by hiding assets:

> The court finds that his failure to testify that he was not aware of any of this and didn't know anything about notes and mortgages and how this functions, the court does not find believable. The issue about ....neither party showing any payment of interest by the Drews on the tax return, the '05 tax return, the defendant didn't show any return of interest. The court finds it was a concerted effort by both parties to hide all these transactions from any view of the public either by recording in the Register Mesne Conveyance, tax return, or any other methods to avoid any finding those assets by any creditor.

(Tr., p. 291, line 19 - p. 292, line 5.)

STANDARD OF REVIEW

This appeal involves certain monetary conveyances, made between family members, deemed fraudulent by the Trial Court pursuant to the Statute of Elizabeth. S.C. Code § 27–23–10, *et. seq.* Clear and convincing evidence is the evidentiary standard which governs fraudulent conveyance claims brought under the Statute of Elizabeth. *Oskin v.*

Johnson, 400 S.C. 390, 396-397, 735 S.E.2d 459, 463 (2012). These claims are ones in equity, and a de novo standard of review applies. *Id.* at 397, 735 S.E.2d at 463 (citing *Future Group, II v. Nationsbank*, 324 S.C. 89, 97 n. 6, 478 S.E.2d 45, 49, n. 6 (1996)) The *de novo* standard does not relieve an appellant of his burden to demonstrate error in the trial court's findings of fact. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (citing *Pinckney v. Warren*, 344 S.C. 382, 387-388, 544 S.E.2d 620, 623 (2001)); *Eldridge v. Eldridge*, 398 S.C. 113, 728 S.E.2d 24 (2012). Consequently, this Court should affirm the Trial Court's factual findings unless appellant satisfies his burden in establishing that the preponderance of the evidence is contrary to these findings. *Lewin v. Lewin*, 96 S.C. 349, 355, 721 S.E.2d 1, 4 (Ct. App. 2011) ("[W]e will affirm the decision of the trial court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court.") (citing *Lewis v. Lewis,* 392 S.C. 381, 390, 709 S.E.2d 650, 654-655, (2011)).

Moreover, while this court reviews such equitable matters under a *de novo* standard, the *de novo* standard "does not require this court to disregard the factual findings of the trial court nor ignore the fact that the court is in the better position to assess the credibility of the witnesses." *Lewis v. Lewis,* 392 S.C. at 390, 709 S.E.2d at 654–55; *Pinckney v. Warren*, 344 S.C. at 387, 544 S.E.2d at 623. The trial judge's credibility determinations are to be given great deference on appeal. *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.,* 353 S.C. 327, 338, 577 S.E.2d 468, 474 (2003) (citations omitted). "The credibility of testimony is a matter for the finder of fact to judge....Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to

the trial court findings." *South Carolina Dept. of Soc. Serv. v. Forrester,* 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) (citations omitted).

ARGUMENT

I. THIS COURT MUST AFFIRM THE TRIAL COURT'S RULING THAT APPELLANT FAILED TO MEET HIS BURDEN OF PROOF SINCE APPELLANT DID NOT CHALLENGE THIS RULING.

The Trial Court ruled:

> (viii) Not only has Plaintiff proved the fraudulent nature of these transfers, Defendant Lancaster had failed to meet his burden. Given the familial relationship between the transferor and transferee, and the lack of or inadequate consideration for the transfers, the burden shifted to the transferee to establish that the transfers from Drews were bona fide and for valuable consideration. Defendant Lancaster failed to meet this burden;

(Order, pp. 17-18). The Trial Court relied on two, independent grounds which supported its ultimate conclusion that the transfers at issue constituted fraudulent conveyances under the Statute of Elizabeth: 1) Respondent proved violations of the Statute of Elizabeth by clear and convincing evidence; and 2) Appellant failed his burden to prove the bona fides of the voluntary inter-familial transfers by clear and convincing evidence. Appellant's issues on appeal relating to the fraudulent conveyances only challenge the first finding and fail to challenge the second finding. (Appellant's Initial Br., p. 1.)

A.) The Appellant Neither Appealed the Trial Court's Finding That These Were Interfamilial Conveyances Nor The Finding That the Appellant Thus Failed His Burden, and Therefore, This Ruling Is the Law of the Case.

It is undisputed that Drews was the Appellant's uncle and had a very close, familial relationship with him, and that the interfamilial analysis applies as set forth under prevailing South Carolina precedent, and as recognized by the Trial Court in its Order. (Order, pp. 3-4, 17-18, para. (viii)). Appellant's Brief is entirely void of any challenge to

the Trial Court's finding that Appellant failed to satisfy his burden under the interfamilial analysis.[8] "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). The rule is well-established:

> Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.

Id. (emphasis added); *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 692 (2010) ("Fund failed to appeal the single commissioner's finding to the full commission; thus, it is the law of the case."); *Robinson v. Estate of Harris*, 388 S.C. 630, 641 n.8, 698 S.E.2d 222, 228 n.8 (2010) ("Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis.").

In his Initial Brief, Appellant neither addresses the applicability of the interfamilial analysis nor the controlling Supreme Court precedent which relates to such interfamilial transfers. Appellant also completely fails to challenge the Trial Court's ruling that Appellant failed to satisfy his burden based upon its application of the interfamilial analysis. Therefore, the Trial Court's "interfamilial" ruling is now the law of the case, as

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[8] With a voluntary interfamilial transfer, the burden shifts to the transferee to establish the transfer was valid. *Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013)(citing *Windsor Props, Inc. v. Dolphin Head Constr. Co. Inc.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998)).

Appellant abandoned any argument to the contrary. Appellate consideration is, therefore, precluded, and this Court must affirm the Trial Court's Order.

B.) <u>The Trial Court's Ruling Should Be Affirmed Under the Two-Issue Rule As The Appellant Did Not, and Cannot Now, Challenge the Ground That Appellant Failed His Burden to Prove the Bona Fides of the Voluntary Inter-familial Transfers.</u>

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). In *Anderson v. South Carolina Department of Highways and Public Transportation*, the South Carolina Supreme Court illustrated the use of the two issue rule in regards to orders of a trial court:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Anderson v. S.C. Dept. of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

As set forth above, the Appellant appeals the Trial Court's determination that "Plaintiff proved the fraudulent nature of these transfers" and not the Trial Court's determination that the "Defendant Lancaster failed to meet his burden" in establishing otherwise. (Order, pp. 17-18, para. (viii)). Therefore, the Trial Court's unchallenged ruling

-- that the Appellant failed to meet his burden on these interfamilial conveyances and that they were fraudulent -- should be affirmed.[9]

II. THE CONVEYANCES APPELLANT APPEALED WERE FOUND TO BE PART OF MULTI-STEP TRANSACTIONS THAT WERE DESIGNED TO DEFRAUD CREDITORS, AND AS APPELLANT FAILED TO CHALLENGE KEY RULINGS RELATED TO THIS SCHEME, HE HAS NOT PROPERLY PRESERVED HIS ISSUES FOR APPEAL.

After observing the witnesses testify and considering all the evidence, the Trial Court found that:

> Drews and Lancaster structured the life estates, mortgages, assignments, and transfers as convoluted, multi-step transactions in contravention of typical business practices in order to defraud Drews' creditors.

(Order, p. 17, para. (i).) In an attempt to isolate some of these transactions from the pervasive, on-going scheme to defraud Drews' creditors, Appellant has only appealed the findings related to the $100,000 transfer of money from Drews to the Appellant; the $40,000 payments to Drews from the line of credit on the property largely purchased with this $100,000; and the third Meeting Street Mortgage for $20,000. Appellant ignores that the Trial Court found that there was a fraudulent pattern and scheme based on "multi-step" transactions, some appealed, some not. By appealing only a few of these conveyances or "steps," Appellant concedes the rest; thus, the pattern of fraudulent transfers is conceded for purposes of this appeal.

More specifically, Appellant has not appealed the finding that the $100,000 Meeting Street Mortgage (preceding the $20,000 mortgage Appellant has appealed) was

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[9] To the extent Appellant may assert in his Reply Brief that he is challenging the Trial Court's ruling on the interfamilial issue, Respondent respectfully submits that such an argument would be improper. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (appellant may not use the reply brief to argue issues not argued in his brief in chief).

fraudulent, and created the impression that Drews' Meeting Street Property was encumbered in excess of its actual debt by at least $100,000 (Order, pp. 9-10, para. 39.) Appellant also has not challenged the finding that the failure to satisfy the $40,000 mortgage at the time the $100,000 mortgage was obtained was in contravention of typical business practices and also further impeached Appellant's testimony regarding these mortgages. (Order, p. 9, paras. 37-38.) As the second Meeting Street Mortgage of $100,000 mislead the creditors in believing that the Meeting Street Property was excessively mortgaged, it necessarily follows that the third Meeting Street Mortgage of $20,000, without satisfaction of the prior two fraudulent mortgages, did the same. The Trial Court considered these three mortgages together when ruling as follows:

> These excessive mortgages created the impression that Drews' Meeting Street Property was encumbered in excess of its actual debt by at least $100,000.
>
> Based on the evidence as a whole, the Court finds Lancaster did have knowledge of the Meeting Street Mortgages at the time they were executed and actively participated with Drews in his scheme to create the impression that Drews' Meeting Street Property was encumbered in excess of any actual debt so as to avoid creditors.
>
> ...the evidence presented shows the only reason for Drews to grant Lancaster the excessive Meeting Street Mortgages was for Drews to appear as having encumbered assets in order to conceal his true assets from his creditors, and Defendant Lancaster was an active participant in Drews' scheme to defraud his creditors by this concealment.

(Order, pp. 10-11, paras. 45-47.) Appellant has failed to challenge these findings relating to the creation of excessive mortgages by using the $40,000, $100,000 and $20,000 mortgages, and they are now the law of the case.[10] Even if we assume for purposes of

[10] *State v. Dunbar,* 356 S.C. 138, 587 S.E.2d 691 (2003) (No point will be considered which is not set forth in the statement of issues on appeal); *Ex Parte Morris*, 367 S.C. 56, 624

argument that there was some consideration given for these mortgages,[11] they were still given for the purposes to defraud creditors as the Trial Court ruled:

> It is a violation of the usual method of doing business in a business transaction where you put $190,000 dollars on the public records to secure a $40,000 dollar loan when the public would view those records and determine that the creditor....didn't have any assets and the defendant was an accomplice in that aspect even though, I think the defendant had knowledge of it. I don't think it's believable with his background, with his training, and his business experience that he was not aware of it and obviously he was aware of it when he had to satisfy those 3 mortgages when the Meeting Street property was sold.

(Tr. p. 290, line 16 – Tr. p. 291 line 2.) As noted by the Trial Court, these three mortgages later served to "justify" the fraudulent conveyances relating to the $190,000 Meeting Street Assignment from Drews to Lancaster. (Order, p. 11, para. 48.)

Appellant also failed to challenge these multiple, fraudulent transactions relating to the $190,000 Meeting Street Assignment stemming from a Note and Mortgage given to Drews by a third party in consideration for the sale of the Meeting Street Property. Appellant accepted the excessive assignment from Drews of this $190,000 Mortgage (one month before the trial of the stock fraud case), in return for Appellant satisfying the $40,000, $100,000 and $20,000 Meeting Street Mortgages. Therefore, the Trial Court's following findings that Appellant actively participated in concealing Drews' assets and defrauding his creditors are also the law of this case:

> [Appellant]....actively participated with Drews in his scheme to create the impression that Drews' Meeting Street Property was encumbered in excess of any actual debt so as to avoid creditors (Order, p. 13, para. 68); and

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S.E.2d 649 (2006)(As a general ruling, an unchallenged ruling, right or wrong, is the law of the case).

[11] As for the $20,000 Meeting Street Mortgage appealed by the Appellant, Respondent is an existing creditor and does not have to prove valuable consideration where he shows that the conveyance was made with actual intent of defrauding his creditors where the intent is imputable to the grantee. (*Infra* at Section VI, pp. 52-62.)

> the evidence presented shows the only reason for Drews to grant Lancaster [Appellant] the $50,912 Meeting Street Note and the $190,000 Meeting Street Assignment was for Drews to conceal his true assets from his creditors, and Defendant Lancaster was an active participant in Drews' scheme to defraud his creditors by his concealment (Order, p. 14, para. 69).

As the three Meeting Street Mortgages and the $190,000 Assignment to Drews are all part of one scheme to mislead creditors into believing Drews did not have any equity and then to profit by the Meeting Street Property, they are intimately related and should be considered as a whole.

It is difficult to even summarize the relationship between all these convoluted, multi-step transactions of Drews' and Appellants' scheme to defraud creditors. However, all these transactions are intrinsically related, and therefore, inseverable from the Trial Court's Rulings: Drews' $100,000 cash payment to Appellant provides the underlying capital from which Appellant returns money back to Drews through the alleged $40,000 in "loans," which "loans" allegedly later justify the $40,000 mortgage, which together with the $100,000 mortgage and $20,000 mortgage creates the impression that the Meeting Street property is excessively encumbered, and forms the alleged basis for the Assignment of the $190,000 mortgage to the Appellant. Appellant would have this Court simply ignore the pervasive scheme which has been found, and decide his few issues on appeal in a vacuum. However, Appellant's failure to challenge the key rulings and the other fraudulent transactions has effectively resulted in his abandonment of the Trial Court's rulings related to this fraudulent scheme, and therefore the Trial Court's rulings as to the three challenged conveyances should be affirmed.

Furthermore, Drews' and Appellant's unchallenged fraudulent transactions establish the Appellant's fraudulent intent for the challenged ones. Evidence of other

financial transactions involving the Appellant is admissible to show absence of mistake, a common scheme or plan, and fraudulent intent. *State v. Johnson*, 314 S.C. 161, 166, 442 S.E.2d 191, 195 (1994) (In a breach of trust with fraudulent intent case based on writing fraudulent checks, evidence of other checks that the defendants wrote were admissible to establish lack of mistake, common scheme or plan, and fraudulent intent.) The unchallenged fraudulent conveyances have become law of this case, and the fraudulent intent proven in those conveyances establishes the Appellant's fraudulent intent as to the remaining transactions he appeals.

The Trial Court considered all these conveyances together in making its findings as evidenced by the rulings in the record:

> It seems like *throughout this process* there's been a concerted effort on Mr. Drews' part accompanied by the Defendant to conceal assets to the public and there was a in this court's opinion a departure from the usual method of doing business in those transfers." (Tr. p. 289, lines 18-22)(emphasis added).
>
> The Court finds it was a concerted effort by both parties to hide *all these transactions* from any view of the public either by recording in the Register Mesne Conveyance, tax return or any other methods to avoid any finding those assets by any creditor. (Tr. p. 291, line 25 – p. 292, line 5)(emphasis added).

As the Trial Court found a string of multi-step, convoluted fraudulent transfers, and as the Appellant abandoned the appeal on several key transactions, as well as the Trial Court's rulings relating to this fraudulent scheme as a whole, the fraudulent scheme to defraud creditors, along with all its transactions, has been established as the law of this case. Therefore, Appellant has failed to sufficiently challenge the Trial Court's findings and Respondent requests that this Court affirm the Trial Court's rulings that these transactions were part of an on-going scheme to defraud Drews' creditors and therefore, violated the Statute of Elizabeth.

III. RESPONDENTS' DECEMBER 5, 2001 AND MARCH 15, 2002 JUDGMENTS AGAINST DREWS ARE VALID GIVEN THE ACTION UNDERLYING THIS APPEAL TO ENFORCE THESE JUDGMENTS EXTEND THEIR ACTIVE PERIOD.

Contrary to Appellant's contention,[12] prevailing South Carolina precedent clearly indicates that a judgment remains active past ten years where a proceeding to enforce the judgment is pending such as the case is here:

> [If] a party takes action to enforce a judgment within the ten year statutory period of active energy, the resulting order will be effective *even if issued after the ten-year period has expired.*

The Linda McCompany, Inc. v. Shore, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (emphasis added). Our Supreme Court reasoned that:

> [t]o hold otherwise would put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.

Id. at 554-555, 703 S.E.2d at 505. The Supreme Court's rationale applies equally here: the Respondent, who is diligently attempting to enforce his judgments through an enforcement-related proceeding, should not be at the mercy of the court to render a decision in this proceeding within a pre-determined time frame.[13]

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[12] Appellant contends that Respondent's judgments are unenforceable as they were more than ten years old before Respondent obtained a judgment against the Appellant, relying on the ten-year provision contained in Section 15-39-30 of the South Carolina Code:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof and this whether any return may or may not have been made during such period on such executions.

S.C. Code §15-39-30 (2005).

[13] Appellant's contention that Respondent is required to have not only a pending action, *but a judgment against him personally*, in order for the judgments' active period to be extended is supported by neither South Carolina precedent nor our state's statutes governing supplemental proceedings. Our Supreme Court made no "original" debtor classification in *Linda McCompany* as Appellant suggests - the decision is wholly void of any language which establishes such a requirement. Moreover, Appellant cannot offer any

Respondent has done exactly what the Supreme Court required in *Linda McCompany*: he has sued to enforce the judgments, whereby extending the ten-year statutory period of active energy on them. Specifically, Respondent opened supplemental proceedings in August 2006 to seek the Court's assistance in discovering Drews' assets; and filed this action against Drews' estate, Drews' wife's estate, and Appellant on November 2, 2010. [14] The reason the suit was not brought earlier against the Appellant

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valid rationale which purports to distinguish between the original debtor and a third-party wrongfully in receipt of the original debtor's assets given a plain reading of our state's statutes indicate the direct opposite. For example, under Section 15-39-310, *et. seq.*, of the South Carolina Code, a judgment creditor may institute proceedings to discover assets applicable to an unsatisfied judgment, and these proceedings provide the creditor means of reaching assets *in the possession of third-parties*:

> The judge *may order any property* of the judgment debtor. . . in the hands either of himself *or any other person* or due to the judgment debtor, *to be applied toward the satisfaction of the judgment.*

S.C. Code § 15-39-410 (2012) (emphasis added).

[14] In this case the relevant dates are as follows:

- December 2001: Respondent was awarded the underlying judgment against the debtor, Drews;
- March 14, 2002: Respondent was awarded attorneys' fees;
- April 2002 to September 2005: Drews appealed the judgment;
- September 2005: Drews' appeal was denied, and Respondent was awarded additional attorneys' fees and expenses;
- August 2006: Supplemental proceedings opened to aid Respondent in collecting the judgments;
- September 2006: Supplemental proceedings left open because Drews failed to produce financial records;
- September 2007: Drews died;
- October 2007: Drews' estate was opened and disputes arose;
- February 8, 2010: An inventory and appraisal was filed which indicated Drews had no assets;
- February 26, 2010: The Appellant was deposed in the supplemental proceedings, and Respondent became aware of the subject transfers which rendered Drews insolvent;
- February 27, 2010: The judgment debtor's wife, Effie D. Drews, died several days before her deposition;
- June 29, 2010: Effie D. Drew's estate filed an inventory and appraisement; and
- November 2, 2010: Respondent filed this action against Appellant and the Drews' Estates.

was in part due to: Drews' appeal of the judgments; Drews' failure to produce records in contravention of a court order in supplemental proceedings; the Drews' deaths; disputes within the Drews' estates; and the Appellant's and Drews' effectiveness in hiding assets. Respondent timely brought this suit after he discovered Appellant's involvement in the fraudulent conveyances. Under *Linda McCompany*, the Respondent's diligence in attempting to collect on these judgments by seeking the court's aid through supplemental proceedings and through this lawsuit, extended these judgments' active energy through when the Court issues a final order in these proceedings.[15]

Appellant attempts to confuse the issue of the judgments' active period and enforceability with the issue of whether an action to enforce the judgments can proceed against him personally.

However, Section 15-39-30 of the South Carolina Code is not a statute of limitations as its language does not bar claims against a party after a set period of time:

> Executions may issue upon final judgments or decrees at *any time within ten years from the date of the original entry thereof and shall have active energy during such period. . .*

S.C. Code § 15-39-30. This statute only addresses the judgment's enforceability, which clearly has been addressed by the Supreme Court holding set forth above. To the extent any question remains as to whether Section 15-39-30 should be interpreted differently as Appellant contends, the South Carolina Supreme Court's decision in *Linda McCompany*

(Order, pp. 2-3.) As evidenced by the foregoing, Respondent was, and remains, completely diligent in enforcing his judgments. The record further reflects the Appellant has frustrated Respondent's enforcement efforts through all available avenues.

[15] Indeed, one might question why the ten year rule would matter at all. Respondent was a creditor when the fraudulent conveyance occurred; and a creditor at the time suit was filed against the transferee and arguably, that's all that matters.

has expressly addressed whether Section 15-19-30's ten-year limitation is a statute of limitations, and held that it is not:

> In order for a law to be a statute of limitations, it must contain within itself a specific statement limiting the time within which an action is to be brought... *[The statute at issue] provides no limitation period...*

Linda McCompany, 390 S.C. at 554, 703 S.E.2d at 504 (quoting *Hardee v. Lynch,* 212 S.C. 6, 16-17, 46 S.E.2d 179, 183 (1948)) (emphasis added).

Therefore, Section 15-39-30 does not limit the time for which a party may commence an action in aid of executing a judgment; it only limits the enforceability of a judgment in instances where no efforts to enforce the judgment are undertaken. Thus, Appellant's argument that Section 15-39-30 purportedly precludes Respondent's claims from proceeding against him is without merit given the statute, itself, contains no such limitation. Moreover, applying the Supreme Court's holdings in *Linda McCompany* and *Hardee,* it is clear that the "active energy" of Respondent's judgments extends through the conclusion of the action commenced by Respondent in an effort to enforce these very judgments. As such, the Trial Court correctly determined Respondents' judgments are active and enforceable, a determination which this Court should affirm.

This Court's affirmation of the Trial Court's ruling is further supported by the record, which reflects Respondent was assigned both Mr. and Mrs. Drews' estates' rights. (Pl. Ex. 58 & 59.) The Respondent has included the Estates' claims against the Appellant in the Second Amended Complaint that contains the following allegation: "Both estates have assigned to Plaintiff any and all rights they may have to assets which should have or could have been included in their estate." (2d. Am. Compl. p. 3, para. 12.) The Estates'

rights accrued sometime after the Drews' deaths in 2007 and 2010 respectively, as assets at issue in this matter should have been included in those Estates.[16]

Therefore, the Trial Court correctly ruled that the judgments have active energy and are enforceable. To hold otherwise, in such a case as this one, would give a party seeking to avoid creditors a great incentive to delay the proceedings against him at all costs, in hopes that the ten-year period would expire during the course of litigation.

IV. THE TRIAL COURT CORRECTLY RULED THAT DREWS' PAYMENT OF $100,000 TO THE APPELLANT IN 1992 CONSTITUTED A FRAUDULENT CONVEYANCE, AND APPELLANT NEITHER SHOWED BY CLEAR AND CONVINCING EVIDENCE THAT VALUABLE CONSIDERATION WAS GIVEN NOR THAT THE TRANSACTION WAS BONA FIDE.

The action underlying the appeal involves fraudulent conveyance claims brought by the Respondent pursuant to Section 27-23-10(A), which is commonly referred to as the Statute of Elizabeth. This statute provides:

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

S.C. Code Ann. § 27-23-10(A) (2007). To bring a Statue of Elizabeth claim, a creditor need not show that the debt was reduced to judgment at the time of the transfer. *First Citizens Bank and Trust Co. of S.C. v. Scofield*, 286 S.C. 520, 522, 335 S.E.2d 248, 249 (Ct. App. 1985) (citations omitted). "One who is in debt cannot make a voluntary conveyance which will prevail against existing debts." *Id.* (citations omitted)(court held son's transfer of residence to his mother while indebted to others and while continuing to live in the same was a fraudulent conveyance).

[16] See Section VIII, *infra.* at pp. 63-64.

> Existing creditors shall have conveyances 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 consideration.

Windsor Props, Inc., 331 S.C. at 470-471, 498 S.E.2d at 860 (citations omitted). "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." *Judy*, 403 S.C. at 209, 742 S.E.2d at 675 (quoting *Mathis v. Burton*, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995)). Subsequent creditors must show actual, moral fraud through evidence that a party acted with the intent to delay, hinder, and/or defeat creditors in the collections of their debts. *Judy* at 209, 742 S.E.2d at 675.

With a voluntary interfamilial transfer, the burden shifts to the transferee to establish the transfer was valid.[17] *Id.* at 209, 742 S.E.2d at 675 (citing *Windsor Props., Inc.*, 331 S.C. at 471, 498 S.E.2d at 860).

> 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.

Coleman v. Daniel II, 261 S.C. 198, 199 S.E.2d 74, 79 (1973) (quoting *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814 (1937)).

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[17] A conveyance is "voluntary" when it is given with only nominal consideration, or no consideration at all. *First State Sav. and Loan Ass'n v. Nodine*, 291 S.C. 445, 449-450, 354 S.E.2d 51, 54 (1987)(citation omitted). Nominal consideration will not save an interfamilial conveyance that effectively defeats creditors. *Scofield*, 286 S.C. at 522, 335 S.E.2d at 249 (citations omitted).

A.) The Trial Court Correctly Found a Fraudulent Conveyance and Appellant Failed to Show by Clear and Convincing Evidence that the $100,000 Gift Was Supported by Valuable Consideration.

Throughout Appellant's argument, Appellant relies on the subsequent creditor test -- without the burden shifting that occurs in interfamilial transfers -- to argue that the Respondent has failed to prove that there was no valuable consideration. However, it is undisputed that Drews was the Appellant's uncle, and the test for interfamilial conveyances applies as set forth in *Judy v. Judy*, 403 S.C. at 209, 742 S.E.2d at 675. Therefore, in determining whether the Trial Court properly held that the $100,000 mortgage was a fraudulent conveyance, it is the Appellant's (as transferee) burden to establish both valuable consideration and the bona fides of the transaction by clear and convincing testimony. *Id.* at 209, 742 S.E.2d at 675; *Coleman v. Daniel II*, 261 S.C. 198, 199 S.E.2d 74)(quoting *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814). However, regardless of who has the burden, there is clear and convincing evidence in the record that no valuable consideration was given for the $100,000 monetary transfer to the Appellant.

In Appellant's 2010 sworn deposition testimony, Appellant unequivocally stated that the $100,000 was a gift, and that he could have bought stocks with it. (Tr. 119, lines 6-21; Order, p. 4, paras. 2-3.) Appellant explained that it was important that the $100,000 was a gift so that his tax basis in the property would be higher. (Order, pp. 4-5; Tr. p. 39, line 10 - p. 40, line 5.) He also testified that he prepared a gift tax return for Drews to sign, and that he and Drews mailed it to the Internal Revenue Service. (Tr. p. 40, lines 1-10 & lines 18-25). Appellant did not keep a copy of the alleged tax return. (Order, p. 5, para. 3; Tr. p. 111, line 16 – p.112, line 12 and p. 113, lines 10-14).

At trial, Appellant contradicted his earlier representations in sworn testimony (and to the United States Government if his testimony regarding the gift tax returns is believed), and claimed that the $100,000 transfer was bargained for consideration, and not a gift, for granting Drews a life estate in the Bainbridge and then Nuffield properties. (Tr. p. 25, line 23 - p. 26, line 17; Order, p.5, para. 5.) He further testified that, even though it was not a gift, he participated with Drews in reporting it as a gift to the Internal Revenue Service. (Tr. p. 26, lines 1-17, p. 40, lines 6-10 & p. 40, line 18 - p. 41, line 12.) When questioned by Respondent's attorney about filing the gift return that he knew was false under penalties of perjury with the United States government, Appellant responded that at the time Appellant thought it was gift. (Tr. p. 41, lines 13-16.) Having to explain this fraudulent act, Appellant testified that it was not until eighteen years later, in 2010, when the lawsuit was filed against him, and he saw his attorney in this case, that he decided the $100,000 was not a gift. (Tr. p. 41, line 20 – p. 42, line 16 & p. 99, line 18 – p. 100, line 10.)

Appellant did not produce the tax return he supposedly filed relating to the $100,000 transfer he received. At trial, when confronted with the anomaly of the failure to keep a copy of any tax return, let alone an important one that he had "required" to be filed, Appellant attempted to claim that Drews' copier was broken that day. (Tr. p. 113, lines 10-14.) Appellant was impeached by his 2010 deposition testimony when he testified that he had "kept an eye out" for the return when he inspected Mr. Drews' desk immediately before his deposition. (Tr. p. 113, line 15 – p. 117, line 11.) Appellant then had to concede he knew the document didn't exist when he gave his sworn deposition testimony that he had "kept an eye out" for it. (Tr. p. 116, line 23 – p. 117, line 11.)

The Trial Court who observed the Appellant testifying, including his impeachment at trial with prior deposition testimony, found that there was no contemporaneous consideration for the $100,000 conveyance (Order, p. 17, para. ii), and that the Respondent's testimony lacked credibility (Order, pp. 15 & 16, para. 74).

This case is similar to that of the *Windsor Properties* case where the transferee took inconsistent positions regarding whether valuable consideration was given for an interfamilial transfer. *Windsor Properties,* 331 S.C. 466, 498 S.E.2d 858. In that case, the transferee in an earlier proceeding conceded that there was no money paid for the deed at the time it was delivered. Just like the Appellant in this case, the transferee then contradicted herself at trial, arguing that she had given valuable consideration without providing a clear and convincing record of the same. *Id.* at 472, 498 S.E. 2d at 861. The referee initially found that the transferee had paid valuable consideration for the transfer of the property, and partially based this finding on the fact that the transferee had reimbursed the transferor for the property's purchase price, although there was no contemporaneous consideration exchanged when the deed was delivered. *Id.* at 469, 498 S.E.2d at 860. The South Carolina Supreme Court reversed the special referee's finding and stressed that the transferee's contradictions were a "major problem" with her valuable consideration argument. The Supreme Court went on to hold that the deed transfer violated the Statute of Elizabeth as the transferee failed to demonstrate by clear and convincing evidence that the transfer was for consideration and bona fide. *Id.* at 472-473, 498 S.E.2d at 861-862.

Like the Appellant in *Windsor Properties*, the Appellant in this case contradicted himself in sworn testimony, was unable to show contemporaneous consideration given to him at the time Drews gave him the $100,000, was unable to show a clear and convincing

record of the bona fides of this transaction, and lacked credibility. Therefore, similar to *Windsor Properties,* the Trial Court correctly found that this transfer violated the Statute of Elizabeth.

Further impeaching the Appellant's testimony that the $100,000 conveyance was given as bargained for consideration for a life estate in the Bainbridge property is the fact that the document creating the life estate does not mention the $100,000 conveyance at all. In fact, the "Agreement" conveying the life estate provides that the life estate was given "in consideration of the sum of TEN ($10.00) AND NO/100S DOLLARS and love and affection for my uncle and aunt." (Pl. Ex. 22.) In the *Windsor Properties* case discussed above, nominal consideration[18] also was cited in the conveyance instrument when the transferee had changed her story and was claiming valuable consideration. *Windsor Properties*, 331 S.C. 466, 498 S.E.2d 858. The *Windsor Properties* court found that the nominal consideration cited to in the deed was evidence that there was no valuable consideration given. *Id.* at 471, 498 S.E.2d at 860. Just like in *Windsor Properties*, the nominal consideration recited to in the life estate document is evidence that there was no consideration supporting this transaction. It is not believable that Drews' attorney, in drafting this life estate, would fail to note that the consideration for it was $100,000, if that fact were true.[19] Drews certainly would want the $100,000 consideration, rather than nominal consideration, noted in the life estate in case he ever had to enforce the agreement

[18] Nominal consideration will not save a conveyance that effectively defeats creditors. *Scofield*, 286 S.C. at 522, 335 S.E.2d at 249 (citations omitted).

[19] Drews' attorney drafted most all the transactional documents, including the Bainbridge Agreement for the life estate (Tr. p. 81, lines 1-13); the Nuffield Memorandum of Lease (Tr. p. 85, line 24 – p. 86, line 1); the $40,000, $100,000 & $20,000 Meeting Street Mortgages (Tr. p. 74, line 18-75, line 2); and the Note for $50, 912 (Tr. p. 96, lines 17-21).

against the Appellant. The only reasonable conclusion from this evidence, and Appellant's conflicting positions, is that no valuable consideration supported this conveyance, and the Trial Court's ruling should be upheld.

B.) Multiple Badges of Fraud Surrounded This Payment Which Appellant Was Unable to Satisfactorily Explain.

In determining whether the Appellant has met his burden to show the bona fides of a conveyance, the courts will look to whether there are indicia or rather "badges of fraud." The South Carolina Supreme Court explained the examination of whether a transaction is "bona fide" or fraudulent as follows:

> Fraudulent intent in such instances can usually be shown only by a consideration of the attendant facts and circumstances, a resort to which must usually be had in order to distinguish between transactions which are bona fide, and those which are not. The Courts frequently must resort to evidence or circumstances which are not properly explained, when such circumstances lead to the belief that a fraudulent intent was present....Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as 'badges of fraud'. The badges tend to excite suspicions as to the Bona fides of a challenged conveyance. Unexplained, they may warrant an inference of fraud. Whether the inference is warranted depends in large measure on whether a satisfactory explanation is presented.

Coleman, 261 S.C. at 208 - 209, 199 S.E.2d at 79 (quoting *Dinkens v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942)).

South Carolina courts recognize the following badges of fraud, although this list is not exclusive:

(1) The insolvency or indebtedness of the transferor;

(2) Lack of, or grossly inadequate, consideration for the conveyance;

(3) Close relationship between the transferor and the transferee;

(4) The pendency or threat of litigation;

(5) Secrecy or concealment;

(6) Departure from the usual method of business;

(7) The transfer of the debtor's entire estate;

(8) The reservation of benefit to the transferor; and

(9) The retention by the debtor of possession or control of the property.

Id.; see also Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 595-96, 524 S.E.2d 621, 622-23 (1999). A transaction can be fraudulent even though it evidences only a single badge of fraud, however it is more generally held that where several such badges of fraud are present, an inference of fraud may be warranted. *Coleman,* 261 S.C. at 209-210, 199 S.E.2d at 79 – 80 (quoting 37 Am. Jur. 2d *Fraudulent Conveyances* § 10 (1968)). "A badge of fraud creates a rebuttable presumption of intent to defraud." *Royal Z Lanes, Inc.,* 337 S.C. at 596, 524 S.E.2d at 623.

As transferee of an interfamilial conveyance, Appellant has the burden of establishing the transfer's validity by clear and convincing evidence, and has the responsibility of providing an adequate record. *Windsor Props, Inc.*, 331 S.C. at 472, 498 S.E.2d at 861. This he failed to do.

1. Drews was insolvent and indebted at the time of and following the $100,000 conveyance.

Appellant testified that he received $100,000 from Drews in early 1992 on the alleged condition that he would purchase a house for the Drews to live in for the remainder of their lives. (Tr. p. 25, line 23 – p. 26, line 17.) Appellant concedes that it is "undisputed that during 1990/1991 while Mr. and Mrs. Drews attempted to keep The Drews Company operating by borrowing heavily on their Edgewater Park home, the IRS filed various liens against Mr. Drews and the company." (Appellant's Initial Br., p. 23.)(emphasis omitted). Appellant then argues, based only on his own self-serving testimony, that there was no

evidence of any continuing debts or creditors, and that the IRS debts were paid off at the time of the $100,000 conveyance.[20]

Countering this assertion, Respondent presented ample evidence that supported the Trial Court's finding that Drews remained insolvent and indebted when he conveyed the $100,000 to Appellant and throughout his remaining years. According to what Drews told Appellant, and what is reasonably inferred from the other evidence, the $100,000 payment to Appellant constituted a transfer of substantially all of Drews' valuable assets at that time. (Pl. Ex. 60, para. 5.) After Drews conveyed the $100,000, he left himself with insufficient funds to pay his bills. Appellant's testimony and other documents he submitted at trial, clearly show that the Appellant was making periodic payments from early 1993 to 1995 back to the Drews to pay Drews' living expenses; and also show that Drews was living off credit cards. (Def. Ex. 6 & 7; Tr. p. 88, line 21 – p. 89, line 14.) Additionally, Respondent presented a notice of federal tax lien issued in September, 2000, which reflected unpaid taxes for the years 1995, 1996 and 1997. (Pl. Ex. 42, Tr. p. 212, line 15 – p. 213, line 9.) Respondent also put into evidence various correspondence with the I.R.S. and S.C. Department of Revenue dealing with taxes due, penalties, and interests. (Pl. Ex. 72; Tr. p. 213, line 10 – p. 214, line 5.) Additionally, Appellant's own testimony at trial when questioned about a meeting between Kerry Koons (Drews' attorney), Mrs. Drews and himself supported the Trial Court's findings relating to Drews' indebtedness:

> Q. You all discussed that Mr. Drews had been on hard times when he did the original $100,000 transfer to you, correct? In fact, the I-R-S was after him, correct?
> A. Yeah, in '92, yes.

[20] This is impeached by Appellant's testimony that he lent Drews money in 1993 to pay off accumulated (prior, i.e. 1993) credit card debt since Drews had been living off his credit cards.

Q. Okay, and he was having creditor problems from some failed construction projects, correct?
A. Yes, that's why he sold the house at Edgewater.
Q. And he'd taken on a partner in his construction business who spent the money and not finished some of the construction projects, correct?
A. Yes.
Q. He was in dire financial straits correct?
A. Yes.
Q. And you later documented that he lived most of his nineties on his credit cards, correct?
A. Yes.
Q. In fact, you presented a list of credit card debt at your deposition, of his credit card debt from 2005 totaling 35,000 dollars, correct?
A. Yes.
Q. So during all these transfers with Mr. Drews, in your mind, he was in financial straits, correct?
A. Yes.

(Tr. p. 58, line 6 - p. 59, line 3.) (*See also*, Tr. p. 90, line 20 – p. 91, line 2.) Respondent further presented evidence that Drews had personally guaranteed a bank note to help Builders Station open. (Tr. p. 70, lines 11-15.) Builders Station defaulted on the note. (Tr. p. 70, lines 16-18.) Drews did not have any way to pay off the loans and had to come to Appellant again for money. (Tr. p. 92, lines 4-12.) The evidence at trial more than supports the Trial Court's findings that the $100,000 transfer was substantially all of the debtor's assets at the time (Tr. p. 292, lines 21-24), and that there was uncontested evidence that at the time of the $100,000 transfer and for the remainder of his life,[21] Drews had pending creditor claims (Order, p. 5, para. 6).[22]

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[21] Drews signed a sworn affidavit in January 2006 relating to his financial status and declared he had the following at that time: a 1995 Buick Century automobile with a lien on it by the Appellant (a lien which never has surfaced); a life estate in the Nuffield Road Property; and a checking account with an average balance of approximately $350.00. He also asserted that his only monthly income was $943 per month in Social Security benefits. (Pl's Ex. 50.)

[22] This finding is supported by Drews' testimony that he was wiped out after Hurricane Hugo. Drews testified in the earlier supplemental proceeding to enforce the judgment as follows:

Appellant provided no documentary or other evidence that all Drews' debts and liens had been paid off; instead he presented only his self-serving, contradictory testimony. Appellant asserts:

> the only credible evidence in the record was that Mr. and Mr. (sic) Drews specifically sold their Edgewater Park home to pay off the IRS and satisfy the outstanding loans. (Tr. 58, lines 6-12; Tr. 143, lines 11-15; Pl. Ex. 60, para. 5.)

(Appellant's Initial Br., p. 27.) However, none of these transcript cited by Appellants show what Appellant contends they do.[23] Appellant's first cite is to the following testimony:

> Q: You all discussed that Mr. Drews had been on hard times when he did the original 100,000 dollar transfer to you, correct? In fact, the I-R-S was after him, correct?
> A: Yes, in '92, yes.
> Q: Okay. And he was having creditor problems from some failed construction projects, correct?
> A: Yes, that's why he sold the house at Edgewater.

(Tr. p. 58, lines 6-12.) This testimony does not evidence anything about the debts being paid off. Appellant's next cite does not either:

> Q: And are you familiar with Mr. and Mrs. Drews having made a decision at some point after selling the construction business to sell their home on Edgewater Park?
>
> A: I knew they sold it, yes.

> ....That's why I gave Donald the $100,000. Because we took a licking on Edgewater. It was put there. When Hugo came, it knocked me out of my business. I lost a lot of money there. It knocked me out of my house, my dock. Everything went awash in the hurricane. And I would say I lost a half million dollars almost overnight.

September 26, 2006 Hearing Transcript, p. 12, line 24 – p. 13, line 5. Drews continued to explain "... after Hugo I was just busted, almost everything." Id., p. 18, lines 3-4.

[23] This is similar to the completely out of context transcript cite that Appellant makes at Note 48, which is a completely distorted, out of context reference from the middle of a well-executed cross examination.

(Tr. p. 143, lines 11-15.) These cites evidence Drews' financial problems and having to sell their home; they do not, however, provide support in any manner for Appellant's contention that the outstanding liens and other loans were paid off. Even Appellant's cite to his own affidavit does not support this assertion:

> ....During lunch, Uncle Bob told me he and Aunt Effie had decided to sell their residence in Edgewater Park to pay off the IRS and other loans associated with The Drews Company.

(Pl. Ex. 60, para. 5.) This testimony only supports that Drews had lunch with the Appellant, and told him he was going to pay off his debt; it does not, however, tend to prove anything about whether Drews actually did pay off his debt. And the evidence suggests otherwise.

The evidence cited to by Appellant does, however, prove that Appellant knew of Drews' indebtedness at the time Drews proposed this large conveyance, which triggers a duty for Appellant to investigate further: "Knowledge on the part of the purchaser that the seller is indebted or insolvent has frequently been held sufficient to place a purchaser on notice and to require him to investigate." *Coleman,* 261 S.C. at 210-211, 199 S.E.2d at 80 (citation omitted).[24] Where the grantee has failed to investigate, the grantor's fraudulent intent in making the conveyance may be imputed to him, and will support a finding of a fraudulent transfer. *Id.* There is no indication in the record, whatsoever, that Appellant attempted to verify that Drews had paid off the IRS lien or other debts at the time he accepted the $100,000 payment as a gift.[25]

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[24] This case is discussed more fully in Section VI(D), *infra.* at p. 59.

[25] At the time Appellant accepted the $100,000, he admits that he thought it was a gift. (Tr. p. 41, lines 13-16.)

Appellant has the burden to rebut the presumption of fraud stemming from this "badge of fraud" with a reasonable and credible explanation supported by clear and convincing evidence. Appellant also has the burden of providing a clear record. Appellant has failed to do both, and his testimony only strengthens Respondent's case against him further by triggering a duty for Appellant to investigate further. And the evidence is he has not shown, and has not presented any proof, either through documents or testimony, to evidence that Drews paid off these pending liens and debts.

2. The Appellant gave no valuable consideration for the $100,000 conveyance.

As set forth in section IV (A) above, the $100,000 transfer was a voluntary conveyance with no contemporaneous consideration given. Appellant's contradictory and implausible explanations relating to whether the conveyance was supported by valuable consideration provide strong evidence of Drews' and Appellant's fraudulent intent.

3. It is undisputed that Drews and Appellant had a close relationship.

The Appellant is Drews' nephew. (Pl. Ex. 60, p. 1, para. 2.) Appellant was very close to the Drews. (Tr. 90, lines 5-10; Pl. Ex. 60, pp. 1-2, para. 3.) Appellant worked for Drews during summers while he attended college (Tr. p. 24, lines 12-14 & p. 89, lines 20-25). After college, the Appellant would either call or stop by on Saturdays. (Tr. p. 90, lines 1-4.) Appellant held a real estate investment with Drews (Tr. p. 24, lines 15-19) and performed accounting services for one of Drews' entities (Tr. p. 24, lines 20-23). Appellant's multiple financial transactions with Drews (Tr. p. 25, lines 13-16) and his regular contact with Drews established this badge of fraud, which Appellant does not refute.

4. The Appellant and Drews acted in concert, and in secrecy to conceal Drews' $100,000 conveyance and his life estate interest in the homes as evidenced by their failure to follow usual business practices.

In contravention to customary business practices, Appellant and Drews did not create the Bainbridge Property life estate by deed, and did not record the life estate in the public records. (Pl. Ex. 22; Tr. p. 211, line 22 - p. 212, line 3; Order, pp. 5-6, para. 9.) Additionally, the document memorializing this interest was not labeled a life estate but rather an "Agreement" with no mention of Drews' life estate interest in the caption. By failing to properly create and record this life estate, Drews' creditors were misled and were neither on notice of the life estate's existence nor the $100,000 transfer. (Id.)

Drews and the Appellant disguised and misled creditors regarding Drews' interest in the Nuffield Property in a similar manner. In contravention of typical business practices, Drews and the Appellant again failed to create the Nuffield Property life estate by deed. (Pl. Ex. 25; Tr. p. 212, lines 4-9.) Instead, Appellant and Drews memorialized the life estate in the Nuffield property by a "Memorandum of Lease." (Pl. Ex. 25.) Even though this document was filed, Drews and Appellant mislabeled the document a "Lease," and did not reveal in its initial text Drews' life estate interest. Therefore, this document disguised and misled creditors, and failed to provide them with notice as to Drews' true interest in the property. Creating this misleading document is, in and of itself, a further deviation from typical business and legal practices.

Respondent presented expert testimony by Richard Livingston, C.P.A. who opined that not only was the $100,000 transfer done in deviation from normal business and accounting principles, but that it did not make family or favor sense either as the parties had chosen to accomplish the transactions in multiple, convoluted steps what could have

been accomplished in one or two simple steps. (Order, p. 16, para. 78.) Livingston explained that the easiest way to accomplish this transfer was for Appellant to loan Drews the $60,000 to purchase the house and for Drews to give him a mortgage back. That way Drews would have had the house with the $100,000 that he put into it. Instead, Drews and Appellant structured this transaction so that the house was put into Appellant's name and Drews' creditors could not reach it. (Tr. p. 153, lines 3-15.) Appellant offered no credible explanations as to why usual business practices were not followed in creating the alleged life estates, much less for the misleading titles and lack of public notice. The Trial Court found that no legitimate reason existed for Appellant to have purchased the Drews' residence with the Drews' monies and then incrementally pass those monies back to them through multiple convoluted steps. (Order, p. 8, para. 27.) The Trial Court further ruled that the evidence presented showed the only reason for Appellant to have done this was "to allow Drews to distance himself from ownership of his own residences, thereby giving Drews the appearance of having no assets in order to defraud his creditors." (Id.)

As further evidence that Appellant is not credible, and acted in concert to defraud Drews' creditors, is the fact that the consideration language in the life estates, as fully set forth in Section IV(A) above, does not mention the $100,000 conveyance whatsoever.[26] The fact that there is no mention of this large monetary conveyance from Drews to the Appellant anywhere in either of the documents would be contrary to customary legal and

[26] Surely, if this was a bona fide transaction, and the $100,000 was given in consideration for a life estate as the Appellant claims, then Appellant and Drews would have disclosed the $100,000 conveyance in the documents creating the life estates. Instead, they hide this monetary conveyance and provide that the life estate is given "in consideration of the sum of TEN ($10.00) AND NO/100S DOLLARS and love and affection for my uncle and aunt" (Pl. Ex. 22) and "in consideration of the sum of Ten and No/Hundreds Dollars ($10.00) and other good and valuable consideration" (Pl. Ex. 25).

business practices, and is further evidence of the Appellant's and Drews' actions to defraud Drews' creditors. Either the life estate was not given in consideration of the $100,000 as Appellant now claims, or they were hiding this large monetary conveyance from creditors by failing to disclose it.

The possible occasional use (or nonuse) of licensed attorneys by Appellant and Drews did not negate that they regularly deviated from normal business and legal practices in their transactions, but rather tends to show that these transactions were purposely structured in this manner. Appellant was unable to offer a reasonable explanation at trial as to explain why customary business practices were not adhered to, and instead the Appellant's and Drews' transactions were structured in this convoluted manner, if not to defraud Drews' creditors.

5. Drews retained the control and benefits of the $100,000 and was in possession of the properties bought substantially with this money.

Evidence of this $100,000 transaction's fraudulent nature is that Drews continued to control, use, and enjoy this money and any benefits derived from the $100,000. Although Drews gave $100,000 to the Appellant, Appellant used this money for Drews' benefit to purchase the Bainbridge Property for the Drews to live in. The Drews had full use and enjoyment of the home. The Drews also had use of and benefit of the equity obtained in the house with that $100,000, just as if the house had been in Drews' name. Appellant obtained a $40,000 line of equity on the Bainbridge property from which he returned approximately $40,000 to Drews whenever Drews needed it to pay his expenses. (Pl. Ex. 41; Tr. p. 31, lines 9-10.) Drews only paid the amount of interest that the bank charged for the line of credit, the same amount he would have paid if he had taken the line

of credit out himself. (Tr. p. 47, line 22 – p. 48, line 3.) Respondent's expert Livingston explained that Appellant was "allowing Mr. Drews to access that 100,000 dollars of equity that was his money at the cost of borrowing, as if it were his money." (Tr. p. 154, lines 15-18.)

Drews continued to derive the benefits from the original $100,000 as the majority of equity in the Nuffield property was funded by borrowing against the equity in the Bainbridge property. (Pl. Ex. 23 & 43; Tr. p. 84, lines 5-13.) Drews even got to pick out the Nuffield Property (Tr. p. 63, lines 13-15 & p. 83, lines 4-6), and signed the agreement to purchase it on Appellant's behalf (Pl. Ex. 24). Mrs. Drews also put a small deposit down for it. (Tr. p. 65, lines 3-11.) Drews once again had full use and enjoyment of the Nuffield home until his death. The Trial Court found that:

> from 1992 until the [Drews'] deaths, Lancaster held the Drews' residence(s) in his name while allowing the Drews full use, control, and enjoyment of the residence(s) (including use of money obtained through equity lines of credit secured by the residence) in contravention of customary business practices.

(Order, p. 6, para. 10.) These facts are similar to those in the *Judy* case where the grantor had continued to enjoy the benefits and ownership of the property he conveyed by continuing to farm it, receive income from it, and borrow money against it. *Judy v. Judy*, 403 S.C. at 209-210, 742 S.E.2d at 676. The court found that these facts constituted clear and convincing evidence of the grantor's intent to only transfer title, but not benefits, in an effort to hinder creditors. *Id.* The grantees, who were family members, failed to rebut the presumption of fraud, and the court affirmed the special referee's finding that the conveyance violated the Statute of Elizabeth. *Id.*

Like the grantor in *Judy*, Drews continued to use and enjoy the benefits of the

$100,000 and the benefits derived from it even though he gave the $100,000 to Appellant, and even though both of the properties were held in Appellant's name. Livingston explains this $100,000 conveyance as follows:

> ....when that 100,000 was conveyed that was done with the knowledge of potential creditors, claims by the I-R-S, other claims thereby allowing that 100,000 dollars to be an asset that in the name of Mr. Lancaster, but allows the Drews to enjoy ... that 100,000 dollar asset for the remainder of their lives.

(Tr. p. 192, lines 1-7.) Appellant has not rebutted, with any, let alone clear and convincing evidence, this badge of fraud, or the multiple other badges of fraud that attend this conveyance. Instead, Appellant's explanations have been contradictory and not credible.

C.) The Appellant's Lack of Credibility and His Contradictory Testimony Additionally Support the Trial Court's Ruling that the $100,000 Conveyance Relating to the Bainbridge and Nuffield Properties (and the $40,000 SC National Equity Line of Credit) Were Done Purposefully to Defraud Drews' Creditors.

Further evidencing that the $100,000 conveyance was fraudulent is the Appellant's testimony, which was not credible given his inconsistencies, contradictions and evasiveness. Despite the Appellant being an experienced, corporate internal auditor, as well as a sophisticated investor, Appellant was unable to show by clear and convincing evidence that the $100,000 conveyance was bona fide and in keeping with sound business practices. The Trial Court found:

> Defendant Lancaster's [Appellant's] testimony at trial regarding these transfers lacked credibility and evidenced that the transfers in question were indeed inter-family transfers for no consideration that were made in furtherance of Drews' scheme to conceal his assets from present and subsequent creditors.

(Order, p. 15, para. 74.) The Trial Court also noted Appellant's:

> claimed lack of knowledge regarding these transactions as well as typical business practices was not credible in light of his forthright responses and

> demonstrated knowledge in answering [his own] Counsel's questioning on these issues.

(*Id.*, pp. 15-16, para 74.) The Trial Court was in a position to observe the Appellant and his forthrightness, or lack thereof, in answering questions, and the finding of facts related to the Appellant's credibility should be given great deference on appeal. *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.,* 353 S.C. at 338, 577 S.E.2d at 474 (citations omitted).

As discussed above, when questioned about this $100,000, Appellant completely changed his story about whether the transfer was supported by valuable consideration, or whether it was an outright gift. He even went so far as to unequivocally testify that he filed a gift return at the time, and it was not until nineteen years later when he saw his attorney that he decided the 100,000 transfer was supported by consideration and was not a gift. Appellant's false explanations and conflicting statements constitute evidence of his guilty knowledge and intent. *Town of Hartsville v. Munger,* 93 S.C. 527, 77 S.E. 219 (1913)("False and conflicting statements . . . have always been regarded as some evidence of guilty knowledge and intent.") A reasonable inference that Appellant is covering up some wrongful purpose can be made from his false and conflicting explanations concerning this transaction. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147, 120 S. Ct. 2097, 2108, 147 L.Ed.2d 105 (2000) (holding that "the fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.").

Given the multiple indicia of fraud shown through the testimony and exhibits at trial, and the Appellant's utter failure to provide a satisfactory and credible explanation to rebut the presumption of fraud, the Trial Court properly found not only that Appellant failed to meet his burden to show the legitimacy of the transactions, but also that there was actual moral fraud surrounding the $100,000 transfer. (Order, p. 17, para. vii.) The Trial Court further found:

> ... the transfer of the initial 100,000 was substantially all of the debtor's assets at the time and the court is of the opinion it was done to hide those assets. If it wasn't done for that reason, they would have followed the routine of establishing a life estate by deed ... the court is of the opinion it was done by that reason to conceal the assets.

(Tr. p. 292, line 21 – p. 293, line 6.) Contrary to Appellant's contentions, the Trial Court correctly ruled that the $100,000 was a fraudulent conveyance, as Appellant failed to carry his burden, in the face of Appellant's clear and convincing evidence of almost all badges of fraud, to show either valuable consideration or the bona fides of the transaction.

V. THE CIRCUIT COURT CORRECTLY RULED THAT THE $40,000 PAYMENTS MADE BY THE APPELLANT TO DREWS DURING THE 1993-1995 TIME PERIOD WERE PART OF A CONCERTED EFFORT TO CONCEAL ASSETS, AND CONSTITUTED FRAUDULENT CONVEYANCES.

The Trial Court correctly found that:

> the *inter vivos* transfers (including mortgages and assignments) were made by Judgment Debtor Drews to [Appellant] in a concerted effort to conceal Judgment Debtor Drews' assets and defraud his current and subsequent creditors.

(Order, p. 17, para. vii.) The Trial Court further found that these transfers involved actual moral fraud. (Id.)

A.) Respondent's Evidence Showed that the $40,000 Payments Were Merely Returns of Part of the $100,000 that Drews Originally Gave to Appellant to Hold.

In approximately June 12, 1992, shortly after the Bainbridge Property was purchased largely with the $100,000 Drews gave Appellant, Appellant obtained a $40,000 open-end mortgage from South Carolina National Bank on the Bainbridge Property. (Pl. Ex. 41; Tr. p. 45, line 11 - p. 46, line 11.) This line of credit was obtained for Drews' benefit and not the Appellant's. From 1993 to 1995, Appellant paid Drews checks totaling $40,000 drawn from this line of credit, which effectively returned to Drews a portion of the $100,000 that Drews had previously given Appellant. (Tr. p. 27, lines 20-23; Tr. p. 46, line 12 - p. 47, line 21.) Further evidencing that this line of credit was for Drews' benefit and the payments were to return Drews' own money to him, was the fact that Drews (and not Appellant) paid the interest incurred on the line of credit. (Tr. p. 47, line 22 - p. 48, line 3.)

Appellant's contention that these payments were loans and not just payments of Drews' original $100,000 further fails as Appellant did not make any money whatsoever off the $40,000 transaction: neither principal nor interest was paid to Appellant for "lending" him the money. (Tr. p. 47, line 18 – 48, line 3 & p. 154, lines 6-18.) There were no notes of indebtedness or other form of "IOUs". Appellant presented no evidence of any meaningful discussions with Drews about terms to repay these "loans" at the time he began making these payments to Appellant. Appellant presented no evidence of arrangements with Drews regarding the amount of time Drews had to pay the loans back, whether Drews would make weekly or monthly payments to Appellant, whether Drews would owe Appellant interest, or any consequences if Drews could not pay these "loans" back. These are all conversations one would reasonably expect to occur between educated parties when loaning someone thousands and thousands of dollars. Yet, the record is void of any

testimony or other credible evidence that these issues were contemporaneously addressed in any way, or even contemplated.[27]

Instead, the Appellant's testimony supports the inference that Appellant did not believe these to be loans, as he knew Drews would not be able to pay the money back. Appellant testified many times to his actual knowledge of Drews' inability to pay his own living expenses, and that his only real income was social security. (Tr. p. 88, line 14 – p. 89, line 5.) Appellant also knew that Drews gave him substantially all of his money ($100,000) just a year or two prior to these "loans." Appellant presented no evidence whatsoever that Drews' financial health was going to change, that Drews was expecting any additional income, or that Drews was even looking for employment. The lack of any evidence showing that there was meaningful loan terms agreed to or even discussed between the parties, as well as Appellant's knowledge that Drews would not be able to pay these loans back (largely due to the fact Drews had given him all his money) evidence that they were not loans at all.

Livingston, Respondent's expert in forensic accounting, opined that Appellant had not made these loans in an arm's length transaction, but instead was allowing Drews to access the $100,000 dollars of equity in Bainbridge as if it were still Drews' assets. (Tr. p. 154, lines 9-18.) Based on the ample evidence presented at trial, the Trial Court found

[27] The Appellant presented spreadsheets claiming that he tracked these "loans" contemporaneously, but as discussed in the Fact Section *supra* at p. 5-6, this evidence was not credible, given that two versions of the same date were discovered. The Trial Court found that "[t]he contradictions in Defendant Lancaster's amortization schedules.....impeach Defendant Lancaster's claim that his detailed, personally maintained schedules were contemporaneously made and recorded." (Order, p. 9, para. 33.)

that Appellant was effectively using the equity line of credit to return to Drews part of the $100,000 transfer. (Order, p. 6, para. 13.)

B.) Several Other Badges of Fraud Attended These Transactions which Appellant Was Unable to Adequately Explain or Refute.

In addition to the lack of valuable consideration, several other badges of fraud surrounded the $40,000 payments to Drews that supported the Trial Court's finding that they were fraudulent. As noted in IV (B) above, the failure to follow customary business practices is an indicia of fraud. As previously discussed, Appellant did not have Drews sign a single note for any of the eight payments. (Tr. p. 28, lines 5-11.) Also in contravention to customary business practices, Appellant did not charge Drews any additional interest on this alleged loan, but only the actual costs incurred by the bank for the line of credit. (Tr. p. 47, line 22 – p. 48, line 3.)

Drew's insolvency and indebtedness as set forth more fully above in Section IV(B)(1), also evidenced the fraudulent nature of the scheme of the original $100,000 payment, the line of credit deriving from that $100,000, and the return of these funds. Despite Appellant's claims, Respondent presented clear and convincing evidence demonstrating that Drews was insolvent or indebted at the time of the transfers, and was facing claims from other creditors as found by the Trial Court. (Order, p. 17, paras. (iv) and (v)).[28]

[28] As detailed previously in this Brief, this evidence included that Drews had a failed construction business, that the business had defaulted on a note that he personally guaranteed, and that the creditor who had issued the note was going after Drews for collection. (Tr. p. 58, lines 10-18; Tr. p. 70, lines 11-18.) Also, the evidence showed a September 2000 Internal Revenue Service Notice of Federal Tax Lien for $56,988.85 for tax periods 1995 through 1997 (Pl. Ex. 42), as well as Appellant's own testimony that he considered Drews to be in "financial straits" at the time all these transactions took place (Tr. p. 58, line 17 – p. 59, line 3), and that Appellant was having to give Drews this money

Another indicia of fraud was that Drews exhibited control and use of this money: whenever Drews needed money for living expenses, Appellant would write him a check from the line of credit for the amount requested. (Tr. p. 31, lines 7-12.) The $40,000 in payments made back to Drews without entering into any notes for their repayment established that Appellant along with Drews, was secreting Drews' assets, while Drews maintained beneficial use of the funds derived by the original $100,000 conveyance and properties substantially purchased with his funding. Also, the uncontroverted evidence of Appellant's and Drew's close, personal relationship is yet another indication of fraud.

Where there are multiple badges of fraud present as in this case, and the Appellant has been unable to rebut the presumption of fraud with clear and convincing evidence of either valuable consideration or the bona fides of $40,000 paid back to Drews, the Trial Court correctly found these conveyances to be fraudulent, and should be affirmed.

C.) Respondent Showed That There Was No Valuable Consideration Given for the $40,000 Payments to Drews, and Appellant Did Not Show Otherwise.

Appellant had the burden to rebut the presumption in this interfamilial conveyance (and the other Badges of Fraud) by showing with clear and convincing evidence that there was valuable consideration given for these payments. As fully discussed in section V(A) above, there was absolutely no evidence of any meaningful terms related to these payments either in documents or testimony. Appellant did not have Drews sign any notes, or any other documentation supporting that these payments were loans (Tr. p. 28, lines 5-11), and Appellant did not charge Drews any interest for the use of this money, but only the actual

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to pay towards Drews' credit cards for living expenses. (Tr. p. 58, lines 19-21; Tr. p. 31, lines 9-10.)

interest that the bank charged on the line of equity held in Appellant's name. (Tr. p. 47, line 22 – p. 48, line 3.) Appellant did not offer any evidence to the Trial Court showing a bargained-for consideration which induced him to make these payments to Drews. The only evidence Appellant presented was that Drews could not pay his own bills after he gave the $100,000 to Appellant. Appellant testified that Drews' financial situation was dire; the Drews could not get a mortgage as they didn't have any income but social security; that even if they could get a mortgage, they would not be able to pay it back anyway; the Drews couldn't even rent a house; and so, their only option was to get the money from the Appellant. (Tr. p. 90, line 11 – p. 91, line 2.) This testimony certainly does not indicate that Appellant expected to be paid back for these "loans." The evidence demonstrates that when he made these payments totaling $40,000 to Drews, there was no bargained-for, valuable consideration given him, but rather they were part of a concerted effort to return part of the initial $100,000 and Drews' interest in the Bainbridge, and then Nuffield properties.

VI. THE CIRCUIT COURT CORRECTLY RULED THAT THE $20,000 MEETING STREET MORTGAGE DREWS GAVE THE APPELLANT WAS A FRAUDULENT CONVEYANCE AND THE APPELLANT FAILED TO SATISFY HIS BURDEN TO SHOW IT WAS BASED UPON VALUABLE CONSIDERATION AND THAT IT WAS BONA FIDE.

In July 1999, Drews granted Appellant a $20,000 Mortgage on the property located at 1705 Meeting Street (hereinafter "$20,000 Meeting Street Mortgage"). (Pl. Ex. 7.) This $20,000 mortgage was in addition to the $40,000 and $100,000 mortgages that Drews already had given to Respondent on this same property.[29] (Pl. Ex. 3; Pl. Ex. 6; Tr. p. 28,

[29] Although both the "$40,000" and "$100,000" Meeting Street Mortgages allegedly relate to the $40,000 cash conveyance discussed previously, they are distinct. They, both

line 21 – p. 29, line 16.) Respondent is an existing creditor as to this conveyance as his cause of action against Drews had already accrued, and he had filed suit against him three months earlier. *Matthews v. Montgomery*, 193 S.C. 118, 133, 7 S.E.2d 841, 848 (1940) ("It is only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer.") As an existing creditor, Respondent is not required to show actual fraud where there is no consideration given. *Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. at 470-471, 498 S.E.2d at 860 (citations omitted).

A.) Appellant Failed to Establish that There Was Valuable Consideration for the $20,000 Mortgage as Appellant Unambiguously Testified that He Was Not Involved in Obtaining the $20,000 Mortgage, and that There Was No New Consideration Given.

Appellant's contention that he gave valuable, contemporaneous consideration for this transaction completely ignores the very definition and essence of consideration:

> Something (such as an act, a forbearance, or a return promise) *bargained for* and received by a promisor from a promisee; *that which motivates* a person to do something, esp. to engage in a legal act.

Black's Law Dictionary, (10th ed. 2014)(emphasis added), *available at* Westlaw BLACKS. Appellant argues that the valuable consideration for this $20,000 mortgage (as well as the other mortgages and transactions) was based on past consideration. This position is contrary to the long-recognized law of this state: "It is elementary that a promise founded upon a past consideration cannot be enforced, unless it be shown to be supported by a new legal consideration, growing out of and connected with the original contract." *Henderson & Dempsey v. Skinner*, 146 S.C. 281, 281, 143 S.E. 875, 876 (1928) (citations omitted).

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separately and collectively, all form part of Appellant's and Drews' scheme to hide Drews' assets from his creditors.

The evidence overwhelmingly supports the Trial Court's ruling that there was no consideration for the $20,000 mortgage. Appellant testified that he did not receive any money from Drews at the same time that he was given the mortgage. (Tr. p. 42, line 19 - p. 43, line 3; Tr. p. 57, lines 10-13.) Rather, Appellant claims that this $20,000 mortgage was given to him for past consideration of his paying off loans Drews had obtained to finance the failed Builders Station hardware store. Appellant testified to two separate payments: a $5,000 payment made on June 2, 1999, to First Citizens, and a $15,000 payment made on June 7, 1999, to South Trust Bank. (Tr. p. 92, lines 2-24, Def. Ex. 8). These payments were made approximately three to four weeks before the July 1999 mortgage was given to him. (Appellant's Initial Br., p. 33, para. 2; Tr. p. 92, lines 2-24; Def. Ex. 8; Pl. Ex. 60, para. 8.)

Not only were the payments made in advance of the $20,000 mortgage, but there was no testimony whatsoever that this was something Appellant bargained for which induced him to pay the banks for Drews, which is the very definition of consideration. He rather argues that he made the payments before any mortgage was executed because of the exigent circumstances surrounding the banks' demands. (Tr. p. 56, line 18 – p. 57, line 13.) During trial, when asked to confirm that he gave no contemporaneous consideration for the Meeting Street mortgages, Appellant responded "[t]he money was given first; these came later after I asked for some security for the 40,000." (Tr. p. 42, line 17 – Tr. p. 43, line 3.) He further testified that he "wasn't involved in securing the loans other than asking for some security after the length of time went on and [Appellant] wasn't being paid for the first 40,000 and then the 20." (Tr. p. 28, lines 15-18.) Appellant concedes that he "was initially unaware of this last mortgage, as Mr. Drews did it without his knowledge and told

him about it sometime after the fact." (Appellant's Initial Br., p. 32, para. 2; Tr. p. 55, lines 1-6.) It is ridiculous to assert that Appellant did not know about the $20,000 Meeting Street Mortgage, while arguing he gave valuable consideration for it.

In the case of *Swearingen v. Hartford Ins. Co.*, the Supreme Court specifically rejected that a party could rely on an original agreement's past consideration to claim valuable consideration for another transaction that occurred sometime after the original agreement did. *Swearingen v. Hartford Ins. Co.*, 52 S.C. 309, 29 S.E. 722 (1898).[30] The Appellant, just as the mortgagee in *Swearingen*, is trying to rely purely on the payments he made in the past for Drews to prove that there was valuable consideration for the mortgage Drews gave him. This case's facts are even weaker in that there is no testimony or other evidence whatsoever that there was even a discussion of giving Appellant a mortgage at the time that the payments were made. In fact, the Appellant's testimony proved the opposite: that there was no inducement or bargained for consideration relating to the later mortgage. Appellant testified to the exigent circumstances that required he make the payments immediately, that he had no knowledge of the $20,000 mortgage when it was executed, and that it resulted from his requests for security sometime after his payments to Drews were already made. Under *Swearingen*, the Appellant fell far short of meeting his

[30] In *Swearingen*, a mortgagee notified the mortgagor sometime after the mortgage was already given that the mortgagor needed to obtain insurance on the property as security for the mortgage. The evidence was clear that the mortgagee agreed and did in fact insure the property. However, in determining the parties' rights, the Supreme Court held that there was no consideration for the agreement to obtain insurance either alleged or proved. *Id.* at 309, 29 S.E. at 724. The Supreme Court reasoned that there was no consideration because the agreement was made after the mortgage already was given on the property. *Id.* There was also some evidence presented that around the time the mortgage was drawn, there was discussion about procuring property insurance; however, the Supreme Court rejected this evidence as supporting consideration as there was no testimony that an agreement relating to the insurance actually occurred at the time. *Id.*

burden of proving by clear and convincing evidence that there was valuable consideration for the $20,000 mortgage, but rather proved by clear and convincing evidence that there was none. As an existing creditor, Respondent has met his burden to demonstrate that there was no consideration given for the $20,000 Meeting Street Mortgage, and therefore, the Trial Court's rulings related to this conveyance should be affirmed.

B.) The Evidence Showed that the $20,000 Mortgage Was One of Three Mortgages that Were Created to Further Defraud Drews' Creditors by Hiding Any Equity; and Appellant was Unable to Show the Bona Fides.

Even if there were valuable consideration for the $20,000, Respondent, as an existing creditor, still proved a fraudulent conveyance pursuant to the Statute of Elizabeth by presenting clear and convincing evidence of Drews' actual fraud which can be imputed to the Appellant. Although Appellant would like this Court to consider the $20,000 Meeting Street Mortgage in isolation, the circumstances surrounding and the existence of the other two Meeting Street mortgages demonstrate the fraudulent nature of these transactions.[31] Appellant testified that there were three mortgages on the Meeting Street property: one for $40,000, one for $100,000, and the mortgage at issue here for $20,000. (Tr. p. 28, lines 12 - p. 29, line 16.) The $20,000 mortgage was the third mortgage Drews granted Appellant on this property, all without contemporaneous consideration. (Tr. p. 42, line 19 - p. 43, line 21; Tr. p. 53, lines 1-8; Tr. p. 57, lines 10-13; Tr. p. 157, lines 4-10; Tr. p. 292, lines 7-9.) These mortgages totaled $160,000, even though Appellant can only show being allegedly owed $60,000 plus interest. (Tr. p. 29, lines 17-23.) The excess mortgages created the impression to the public and creditors that the Meeting Street

[31] Respondent has set forth the Trial Court's findings as well as other argument with regards to the fraudulent nature of the Meeting Street Mortgages in Section II, *supra* at pp. 18-23.

Property was encumbered in excess of its actual debt by at least $100,000. (Order, p. 10, para. 45.)

Appellant's testimony attempting to justify the second and third mortgages fell apart at trial. Appellant again provided contradictory evidence to the Trial Court, first testifying that he was not involved in securing the $100,000 Meeting Street Mortgage (Tr. p. 51, line 20 – p. 52, line 3), while later testifying that the $100,000 Meeting Street Mortgage had been intended to replace the $40,000 Meeting Street Mortgage. (Tr. p. 53, lines 9-14.) Appellant then testified that the $40,000 mortgage was not even satisfied[32] with the $100,000 Meeting Street Mortgage, further impeaching his own testimony. (Tr. p. 53, line 25 – p. 54, line 13.)

Respondent's expert testified that he was unable to find economic significance of any kind in the evidence and other financial records he reviewed for Drews to give the excessive $100,000 mortgage to Appellant. (Tr. p. 157, lines 11-21.) Appellant claimed that the excess amount of the $100,000 Meeting Street Mortgage was in case Drews needed more money (Tr. p. 54, lines 17-22.) If this is taken as true, then there was simply no reason for Drews to give the third $20,000 mortgage to the Appellant as his earlier $5,000 and $15,000 payments already were more than adequately secured by that $100,000 mortgage. Therefore, Appellant's testimony is simply not believable, and falls far short of providing clear and convincing evidence that the $20,000 mortgage was bona fide.

C.) The Timing of These Excessive Mortgages Demonstrate that Drews and Appellant Were Attempting to Hide Drews' Assets From Creditors.

[32] This mortgage was eventually satisfied in 2001 when 1705 Meeting Street was sold. (Tr. p. 53, line 25- p. 54, line 6.)

Drews gave Appellant these excessive mortgages when they knew that there were potential claims against Drews. Drews' illegal sale in Builders Station stock to Respondent occurred in September 1996 (Pl. Ex. 81), and Builders Station failed in 1997, rendering that stock worthless. In April 1998, the $100,000 Meeting Street Mortgage was given to Appellant without satisfying the prior $40,000 Meeting Street Mortgage. In addition to Respondent's claims having accrued, there also was a pending bank claim on Drews' personal guarantee. (Tr. p. 70, line 23 - p. 71, line 3.)

Respondent filed the stock fraud action against Drews in April 1999. Drews gave the $20,000 Meeting Street Mortgage to the Appellant in July 1999, three months after the underlying stock fraud case that Respondent filed against Drews. *Gordon v. Drews, et al.* (Case No. 1999-CP-1001407.) The Trial Court found:

> Importantly, at the time the Second and Third Mortgages were granted, Gordon's cause of action had already accrued. It was in large part the satisfaction of these fraudulent mortgages that was used to justify the later Assignment that occurred a month before the *Gordon* trial [].

(Order, p. 11, para. 48.)

This Assignment of the $190,000 Note, which Drews received in consideration for the sale of his Meeting Street property, occurred one month before the December 2001 trial of Respondent's underlying stock fraud action from which he obtained these judgments against Drews. (Order, p. 12, para. 59.) Specifically, in November 2001, Drews received a $190,000 note and mortgage on his sale of the Meeting Street property, and immediately voluntarily assigned both the note and mortgage to his wife, who immediately assigned the $190,000 mortgage (but not the note) to Appellant, in substitution for the prior fraudulent $40,000, $100,000, and $20,000 mortgages, which were then marked satisfied.

Remarkably, Appellant was only allegedly due less than one third of the $190,000 for which he received the mortgage. Therefore, because of the Appellant and Drews' convoluted transactions, the assignment of the $190,000 mortgage to Appellant gave the appearance to debtors that Drews did not own the $190,000 note on this property (which Drews still held). (Order, p. 12, para. 60; *see also*, Tr. p. 160, line 13 - p. 161, line 21.) Respondent's expert, Livingston, testified that this scheme was principally the same as done with the prior three Meeting Street Mortgages in making it appear that Drews had no real interest in the property, because of the large amount of debts that appeared to encumber it. (Tr. p. 161, line 5 – p. 162, line 1.)

Despite Appellant once again claiming he had no knowledge of the Assignment at the time it was made, the Trial Court found that:

> [Appellant] did have knowledge of the $190,000 Meeting Street Assignment at the time it was executed and actively participated with Drews in his scheme to create the impression that Drews' Meeting Street Property was encumbered in excess of any actual debt so as to avoid creditors.

(Order, p. 13, para 68.) Notably, the Appellant did not appeal the Trial Court's finding that the $190,000 Meeting Street Assignment constituted a fraudulent conveyance, or that the $20,000 Meeting Street Mortgage was part of a scheme to hide Drews' assets, and he is therefore bound by that finding on appeal.[33]

D.) The Appellant's Own Testimony Evidences that the Appellant Had Notice of Drews' Indebtedness and Insolvency, and Knowingly Assisted Drews in Hiding His Assets from Potential and Actual Creditors.

Fraudulent intent can be imputed to the Respondent where, as in this case, he had knowledge of circumstances which should have put him on notice that Drews may have a

[33] This argument is set forth in Section II, *supra* at pp. 18-23.

fraudulent purpose for making the transfers, and he fails to investigate. In *Coleman v. Daniel II*, the Supreme Court held that a transaction could be fraudulent even if the transferee did not have actual knowledge or participation in the debtor's fraudulent intent. *Coleman v. Daniel II*, 261 S.C. 198, 199 S.E.2d 74 (1973). The Supreme Court imputed fraudulent intent to the grantees, even though they did not know of the existing debt. The Supreme Court explained:

> The transaction is subject to attack if at the time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker. *Hudnal v. Teasdall*, 1 McCord 227 (S.C. 1821).

Id. at 210-211, 199 S.E.2d at 80. The Court applied the fraudulent conveyance test for interfamilial conveyances, emphasized that the grantees had the burden of establishing the bona fides of the transaction by clear and convincing evidence, and found that the grantees had failed to adequately explain their not making a more detailed inquiry into the transferor's financial status when the circumstances demanded such, and when the inquiry probably would have led to the discovery of the subject debts. The Court then held that the subject transaction was fraudulent. *Id.* at 211, 199 S.E.2d at 80.

The facts in this case are even more compelling than those of *Coleman* to find that fraudulent intent should be imputed to the Appellant. Appellant admitted at trial that he and Drews both knew that South Trust Bank was after Drews' guarantee for the Builders Station loan when the 1998 $100,000 mortgage was executed with no loan being extended. (Tr. p. 70, line 23 - p. 71, line 3.) He further acknowledged he then accepted the new mortgage for $20,000, and that he did nothing to stop Drews from assigning him the mortgages well in excess of what he was due. (Tr. p. 71, lines 4-19.) When Appellant was

asked to confirm that it was fine by him if Drews wanted to report another $100,000 mortgage lien on his property, Appellant demonstrated his callous attitude with regards to defrauding Drews' creditors:

> A. .... If he wanted to make the 100,000 dollar mortgage, I wasn't going to object. As I have said all along, ***as long as the mortgages were more than what I had due me, it was okay with me.*** I never collected on those mortgages.
> Q: It was okay with you if he told the world he owed you 100,000 dollars that he didn't owe you, correct?
> A: It's all right with me.

(Tr. p. 71, lines 12-19 (emphasis added).) (*See also*, Tr. p. 52, lines 19-24.) When asked, based on his 35 years of internal auditor experience, if he considered it fraudulent to allow Drews to record a lien for him that didn't exist to prevent a federally charted bank from collecting on a personal guarantee, Appellant responded that he had "[n]ever given it any thought." (Tr. p. 72, lines 3-13.)[34] Appellant did not even begin to explain why he failed to examine Drews' intent in these conveyances, even in light of his actual knowledge that Drews had a creditor trying to collect on a guarantee. Under *Coleman*, this evidence is more than sufficient to impute Drews' intent to defraud his creditors to Appellant, and to find that this transaction was fraudulent. Appellant's testimony, however, goes much further and shows Appellant's active and knowing participation in a plan to conceal Drews' assets by making it appear that the property was encumbered in excess of Drews' actual debt. As Appellant failed to meet his burden to provide clear and convincing evidence of the bona fides of this conveyance, the Trial Court correctly found that Appellant actively participated with Drews in this scheme to create the impression that Drew's property was

[34] This is simply not believable given Appellant's sophistication and background; and the Court so found.

encumbered in excess of any actual debt so as to avoid creditors. (Order, pp. 10-11, para. 47.)

Appellant utterly failed to rebut the overwhelming evidence of fraud surrounding the $20,000 Mortgage with even a slightly credible explanation, much less a clear and convincing one. In light of this evidence, Appellant's continued lack of credibility, Respondent's clear and convincing evidence that there was no consideration, and Appellant's failure to show otherwise, and the other clear and convincing evidence of actual fraud, the Trial Court's ruling that the $20,000 conveyance was fraudulent should be upheld.

VII. THE CIRCUIT COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR A DIRECTED VERDICT MADE PURSUANT TO RULE 50(a) OF THE *SOUTH CAROLINA RULES OF CIVIL PROCEDURE* AND OF THE APPELLANT'S POST-TRIAL MOTION MADE PURSUANT TO RULES 52(b) AND 59(e) OF THE *SOUTH CAROLINA RULES OF CIVIL PROCEDURE.*

Although the Appellant has brought this appeal on a motion for a directed verdict under Rule 50, such a motion is appropriate only in jury trials. *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007), reh'g den'd, cert. den'd; *Waterpointe I Property Owner's Association, Inc. v. Paragon, Inc.*, 342 S.C. 454, 536 S.E.2d 878 (Ct. App. 2000). Since this trial was before a judge without a jury, the proper motion is for involuntary non-suit under Rule 41 of the South Carolina Rules of Civil Procedure. *Paragon, Inc.* at 458, 536 S.E.2d at 880.

When ruling on motions for involuntary non-suit, the trial court is required to view the evidence, and all reasonable inferences from that evidence, in the light most favorable to the party opposing the motion. *Crapps v. Spivey*, 271 S.C. 29, 30, 244 S.E.2d 520, 521 (1978). "It is not the province of the court to weigh the testimony, but only to determine

if there is any relevant competent evidence reasonably tending to establish the material elements of the plaintiffs' case." *Id.* The motion should be denied if more than one reasonable inference can be drawn from the evidence, or the inferences to be drawn from the evidence are in doubt. *Brown v. Reynolds*, 266 S.C. 41, 221 S.E.2d 396 (1975).

With regards to the post-trial motions, whether to grant a new trial is a matter within the trial judge's discretion, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law. *Daves v. Clearly*, 355 S.C. 216, 584 S.E.2d 423 (Ct. App. 2003). An appellate court's review of the trial court's ruling is limited to consideration of whether evidence exists to support the trial court's order. *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002).

In his appeal of the Trial Court's denial of the directed verdict and post-trial motions, Appellant again fails to set forth the correct burden of proof for the parties. Once the evidence established an interfamilial conveyance, the badges of fraud, and/or moral fraud, the burden shifted to Appellant to establish both valuable consideration and the bona fides of the transaction by clear and convincing evidence. The Trial Court's rulings denying these motions should be upheld if there is any evidence, or any inference from the evidence, that support Appellant's failure to carry this burden.

For the reasons briefed in each of the foregoing sections, the Trial Court correctly ruled during and at the end of the trial of this matter; and there was no error supporting Appellants' post-trial motions. When the evidence and the inferences are taken in the light most favorable to the Respondent, the Respondent has established his case, and Appellant's position that the Trial Court's findings are wholly unsupported by the evidence is without

merit. Therefore, the Trial Court's holdings and findings related to the Appellant's directed verdict and post-trial motions should be upheld.

VIII. As an Additional Sustaining Ground, Respondent Was Entitled to Bring the Action Underlying this Appeal as Assignee of the Drews' Estates.

The record reflects Respondent was the assignee and judgment creditor of the Drews' Estates, and thus, entitled to prosecute the action underlying this appeal against the same. Respondent's assignee status serves as an additional, sustaining ground for this Court to affirm the Trial Court's Order irrespective of the Appellant's argument that Respondent's Judgment had expired and was unenforceable.

Indeed, as of November 2011, Respondent had a renewed right to bring suit against Appellant as a de facto, "executor de son tort" of the monies that rightfully belonged in the Estates of Mr. and Mrs. Drews.[35] On November 16 and 17, 2011, respectively, Respondent became the assignee of the Estate of Rudolph Robert Drews, Case No. 2007-ES-00-1518, and assignee of the Estate of Effie D. Drews, Case No. 2010-ES-00-0494, by way of the *Confession of Judgment, Assignment and Settlement Agreement with the Estate of Rudolph Robert Drews* and *Assignment and Settlement Agreement with Jessie Atkinson, Individually and as Personal Representative of the Estate of Effie Drews.* (Pl. Ex. 58-59). Each Assignment entitles Respondent to have any monies owed to the Drews' Estates

[35] S.C. Code Ann. § 62-3-619 provides that an "executor de son tort" is "[a]any person who obtains, receives, or possesses property of whatever kind, belonging to the decedent, by means of fraud or without paying valuable consideration equivalent to the value of the property, shall be charged and chargeable as executor of his own wrong (executor de son tort) with respect to the goods and debts. The value of the property is charged to the executor de son tort..."

collected to satisfy Respondent's original judgment and the Estates' *Confessions of Judgment*. This further support this Court's affirmance of the Trial Court's Order.

CONCLUSION

Appellant failed to challenge the Trial Court's Rulings: 1) that he failed in his burden of proof; 2) that a number of the transactions were fraudulent; 3) that both the appealed and un-appealed transactions combined to form a convoluted, fifteen year pattern of bogus and fraudulent transactions between Drews and Appellant; and 4) that the single dominant purpose of these transactions was to hide Drews' assets from creditors. Therefore, Appellant's failure to challenge these rulings precludes consideration of his issues on appeal.

Even if the appeal was properly preserved, the Court should affirm the Trial Court's Rulings because not only did Respondent prove his case, but Appellant clearly failed to carry his burden to demonstrate valuable consideration and the bona fides of these transfers. The Trial Court had the opportunity to observe the Appellant and his attempts to explain away the overwhelming evidence of fraud, and found him to be unconvincing and not credible.

Moreover, the Court should also affirm the Trial Court's Rulings based on Respondent's renewed right as assignee and judgment creditor of the Drews' Estates to bring the underlying suit against Appellant for the monies rightfully belonging in the Drews' Estates.

Based upon the foregoing arguments and citation of evidence and authority, the Respondent, Frank Gordon, Jr., respectfully requests that this Court of Appeals deny Appellant's appeal and affirm the decisions of the Trial Court in all respects.

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April 3, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096
And 2011-CP-10-8840

Frank Gordon, Jr., Individually and as Trustee
of the Dorothy S. Gordon (Deceased) Trust,

Respondent.

v.

Donald W. Lancaster,

Appellant.

Proof of Service for Initial Brief
and Designation of Matter

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I, Justin O'Toole Lucey, Esquire, hereby certify that on April 3, 2015, I served a copy of the ***Respondent's Initial Brief and DOM*** submitted by the Respondent, Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, on counsel for Appellant, Donald W. Lancaster, via the United States Mail, postage pre-paid, and addressed as follows:

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