THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LAURENS COUNTY

Court of Common Please
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2010-CP-30-1141
Appellate Case No. 2014-002295

First Citizens Bank and Trust Company, Inc.....Respondent,

v.

Park at Durbin Creek, LLC, Kenneth E. Clifton, and
Linda G. Whiteman.....Defendants.

Of whom Park at Durbin Creek, LLC and
Kenneth E. Clifton are the.....Appellants.

FINAL BRIEF OF THE RESPONDENT

ROE CASSIDY COATES & PRICE, P.A.

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2. Whether the trial court properly set aside Clifton's fraudulent conveyance of property owned as tenants in common with Whiteman when the challenged conveyance was accomplished in a single deed absent a showing of the non-debtor's fraudulent intent?

3. Did the trial court abuse its discretion in admitting evidence and testimony concerning Clifton's transfer of his interest in the Property to Streamline Management, LLC?

II. STATEMENT OF THE CASE

First Citizens Bank & Trust Company, Inc., (*hereinafter* "Respondent" or "First Citizens") filed an Amended Complaint against the Defendants Park at Durbin Creek, LLC ("PDC"), Kenneth E. Clifton ("Clifton") (*hereinafter collectively* "Appellants" or "Clifton") and Linda G. Whiteman ("Whiteman") on October 20, 2010 seeking relief under South Carolina's Statute of Elizabeth, S.C. Code Ann. § 15-7-10 *et seq.* and alleging causes of action for fraudulent conveyance, civil conspiracy, and partition. Whiteman filed an Answer on December 23, 2010 setting out a general denial of the claims against her. PDC also filed an Answer on December 23, 2010 generally denying the allegations. Finally Clifton filed his Answer on January 3, 2011 denying First Citizen's claims against him.

A non-jury trial was held before The Honorable Eugene C. Griffith, Jr. on June 26, 2014. Following trial the Court issued an August 5, 2014 Order to Set Aside [the] Conveyance (*hereinafter* the "Order") of a 370 acre property in Laurens County Clifton owned as tenants in common with Whiteman. (R. pp. 1-11). The trial court found the evidence established sufficient "badges of fraud" to infer Clifton possessed fraudulent intent when he transferred his interest in the Property to PDC on September 18, 2008. (R. pp. 8-10). In light of that finding, the Court deemed Clifton's conveyance of his 50% interest in the Property to PDC null and void pursuant to the Statute of Elizabeth. (R. p. 10). The Court also held that a later attempted transfer of Clifton's 50% interest in PDC, a company whose only asset was the Property, to Streamline Management, LLC was improper and invalid. (R. pp. 10-11). Specifically, the Court held that the attempted transfer on August 5, 2009 was void *ab initio* as Streamline did not exist until months

after the purported transaction. (R. pp. 10-11). Finally, the Court held that even if Clifton could have contracted with and transferred his interest in PDC to a non-existent entity, his failure to obtain Whiteman's consent to the admission of new members into PDC as a member-managed LLC invalidated the Streamline transaction under S.C. Code Ann. § 33-44-404(7). (R. pp. 10-11). On August 6th Appellants filed a Motion to Reconsider, Alter or Amend the Court's August 5th Order. The circuit court denied that motion by Order dated August 25, 2014. This appeal followed.

III. STATEMENT OF THE FACTS

In 1995 Clifton and Whiteman purchased approximately 370 acres of real property located in Laurens County, South Carolina (the "Property") as tenants in common. (R. p. 221). Testimony at trial established that Clifton and Whiteman purchased the Property for retirement purposes. (R. p. 187 lines 6-9). Clifton and Whiteman owned the Property in their individual names as tenants in common for over twenty years until September 18, 2008 when it was conveyed to a newly formed limited liability company Park at Durbin Creek, LLC ("PDC"). (R. pp. 225-27). In addition to the Laurens Property, Clifton and Whiteman owned two other tracts of land purchased in 1992 and 1993 respectfully. (R. pp. 233, 236-38). They owned these properties as tenants in common in their individual names until July 31, 2008 and September 18, 2008 when each was transferred into an LLC. (R. pp. 234-35, 239-41).

Clifton is in the real estate business and was actively engaged in real estate development until 2009. (R. p. 121 lines 2-4; R. p. 145 lines 13-24). He typically purchased and/or transferred property he planned to develop into limited liability companies which either he or his office staff organized. (R. p. 146 lines 4-9). Over the course of his career Clifton organized in excess of forty limited liability companies. (R. p. 191 line 25 - p. 192 lines 1-2). He commonly owned personal investment property in his individual name. (R. pp. 80-81; R. p. 124 lines 2-15).

In order to finance his real estate development business Clifton routinely borrowed money from third party lenders, including First Citizens. Beginning in October 2002, Clifton entered into three loans with First Citizens in which he personally borrowed and/or guaranteed loan obligations to finance three different real estate development

projects – Edge Water Subdivision, Plantation Holdings, and Shellbrook Plantation. (R. pp. 49-52). The Edge Water loan originated in October 2002 and both Shellbrook Plantation and Plantation Holdings loans in 2006. (R. p. 49 line 25 – p. 50 line 1; R. p. 50 lines 22-25 – p. 51 lines 1-4; R. p. 58 lines 5-8). The original principle amount of the three loans totaled Three Million Eight Hundred Seventy-Three Thousand and 00/100 ($3,873,000.00) Dollars. These development loans were never intended to be long term each having maturity dates one to two years from origination. (R. p. 51 lines 23-24). Over the years First Citizens renewed the loans, extending the maturity dates as progress payments were made. (R. p. 51 lines 23-25- p. 52 lines 1-2).

On or around January 2008, as two of Clifton's loan obligations with First Citizens neared maturity he sought modifications requesting an extension on the maturity dates. (R. p. 53 lines 1-15). Before deciding on Clifton's requested modifications First Citizens asked him to provide a personal financial statement. (R. pp. 53-54). Clifton presented a financial statement dated January 23, 2008 (*hereinafter* "Financial Statement") to the bank reflecting a personal net worth of approximately Fifty Million Dollars ($50,000,000.00). (R. pp. 247-53). Clifton's real estate assets comprised over Forty-Eight Million Dollars ($48,000,000.00) of his claimed net worth. (R. p. 250). One of the assets listed on the Financial Statement was Clifton's fifty percent (50%) interest in the Laurens Property. (R. p. 247). According to the Financial Statement, the Property was unencumbered and valued at One Million Five Hundred Seventy Thousand and no/100 ($1,570,000.00) Dollars. (R. p. 247). First Citizens relied upon the Financial Statement in evaluating Clifton's financial condition to determine whether or not to modify and/or extend the loans. (R. p. 52 lines 4-25- p. 53 lines 1-23; R. p. 152 lines 18-

25 - p. 153 lines 1-18). Relying on the information set forth in the Financial Statement, First Citizens agreed to extend the maturity date on the two loans to January 2009.

Clifton's third loan was set to mature on July 12, 2008. Sometime in the spring or early summer of 2008, the real estate market declined and sales in Clifton's development projects significantly slowed and/or ceased altogether. (R. p. 74 lines 2-12). First Citizens became increasingly concerned regarding the loans and Clifton's ability to pay as he was becoming slow in making payments. (R. p. 55 lines 2-24; R. p. 74 lines 2-25 – p. 75 lines 1-13). Clifton was unable to pay the third loan when it became due on July 12, 2008, and requested another extension. First Citizens granted his request on September 22, 2008, extending the maturity date to January 2009 to coincide with the other two loans. According to the bank, Clifton's payments started to get slow around September 2008. (R. p. 52 lines 12-15).

While Clifton and First Citizens were engaged in negotiations over modifying the third loan, he and Whiteman transferred their interests in the Laurens Property to Park at Durbin Creek, LLC ("PDC") on September 18, 2008. (R. p. 221; R. pp. 225-27). Clifton and Whiteman were each 50% owners and members of PDC whose only asset was the Laurens Property. (R. p. 82 lines 16-19; R. p. 221; R. pp. 270-72). Clifton testified that he transferred his interest in the Property to PDC at the insistence of Whiteman for liability protection because it was being leased to third parties for recreational hunting. (R. p. 172 lines 4-24). Whiteman testified that she asked Clifton to put the Property in an LLC for years due to her liability concerns to no avail. (R. pp. 87-90). Clifton and/or his office prepared the organizational documents for PDC and unilaterally decided when to transfer the Property. (R. p. 82 lines 20-25 – p. 83 lines 1-4; R. p. 119 lines 1-6). On or

around the same time Clifton was in the midst of transferring personally held property out of his name as set forth below:

a) July 31, 2008, Clifton and Whiteman transferred ownership of property they owned in their individual names since 1993 to Gardens at Fourteen, LLC.

b) September 15, 2008, Clifton transferred ownership of four tracts of land which he owned individually since 2004 (or earlier) to Pawley Plantation, LLC.

c) September 18, 2008, Clifton and Whiteman transferred ownership of property they owned in their individual names since 1992 (or earlier) to Pelham at Boiling Springs, LLC.

d) September 19, 2008, Clifton transferred ownership of his office building which he owned individually since 1997 to Central Office, LLC.

(R. p. 221). Clifton did not disclose these transfers to First Citizens nor update his January 23, 2008 Financial Statement which reflected him owning these properties. (R. p. 74 lines 18-25 – p. 75 lines 1-17; R. pp. 247-53). Clifton's loan payments had slowed in September 2008 while unbeknownst to First Citizens he was undertaking a campaign of transferring property out of his name. (R. p. 52 lines 12-15). Even without knowing of Clifton's efforts to divulge himself of individually held property, under the circumstances First Citizens harbored continued concerns over his ability to pay the loans when due. (R. p. 55 lines 2-24; R. p. 73 lines 20-25 – p. 74 lines 1-12).

In October 2008 the parties began discussing another loan modification to extend the three loans' maturity dates past January 2009. (R. p. 52 lines 4-25 – p. 53 lines 1-15; R. pp. 256-67). First Citizens advised Clifton that he needed to bring his interest payments current and provide a business plan detailing how he planned to pay down the

balances. (R. pp. 52-55; R. pp. 256-67). The bank also requested he provide additional collateral to secure repayment. (R. pp. 52-55). These discussions took place over the course of approximately two months during which time Clifton consistently failed to provide the information and documents requested by the bank. (R. pp. 256-67). The information and documents requested were necessary for First Citizens to evaluate the propriety of again modifying the loans' terms by extending the maturity dates. It was not until late November 2008 that Clifton first expressed concern to the bank that he may not be able to honor his obligations. (R. pp. 262-63). Ultimately Clifton failed to bring the loans current, provide a business plan or additional collateral as requested. (R. p. 55 lines 18-24; R. p. 74 lines 18-25 – p. 75 lines 1-17; R. pp. 256-67). As a result, First Citizens elected not to modify the three loans.

First Citizens accelerated the loans and commenced foreclosure proceedings in February 2009. (R. p. 55 lines 18-24; R. p. 75 lines 1-17). Clifton retained an attorney to represent him in the foreclosure actions and filed Answers in each of the cases, thereby delaying the foreclosure process. First Citizens obtained foreclosure judgments in June 2009 and held foreclosure sales on August 3 and August 4, 2009. Deficiency sales then took place on September 3, 2009. On October 20, 2009, deficiency judgments were entered against Clifton in the total amount of $745,317.86 plus interest.

While First Citizens was in the process of obtaining judgments against Clifton he entered into yet another transaction to further distance himself from his interest in the Laurens Property. Specifically, on August 5, 2009 Clifton and his two daughters entered into an Assignment of Interest in Park at Durbin Creek, LLC ("Assignment"), wherein Clifton agreed to disassociate from PDC and transfer his membership interest to

Streamline Management, LLC ("Streamline"). (R. pp. 228-30). The sole members of Streamline Management were his daughters Rene Gilreath and Leah Winton and ex-wife. (R. p. 124 lines 20-25- p. 125 lines 1-21). Clifton testified that he transferred his interest in PDC to Streamline to repay his daughters a rather sizeable debt owed to them that he negotiated down to approximately $27,000. (R. pp. 178-88). Streamline did not exist at the time Clifton and his daughters executed the Assignment and was not organized until months later on January 12, 2010. (R. pp. 228-231; R. p. 128 lines 14-25- p. 130 lines 1-13). PDC is a member-managed limited liability company. (R. pp. 270-72; R. p. 83 lines 6-10). Whiteman, the other member of PDC, did not authorize or consent to Clifton's transfer or assignment of his membership interest to Streamline. (R. p. 83 lines 19-23; R. p. 87 lines 3-8).

In October 2010, Plaintiff started supplemental proceedings against Clifton in an effort to try and collect on the judgments. By this time, Clifton did not own any of the assets listed in his Financial Statement. (R. pp. 277-78). All of those properties had been foreclosed upon (or a deed in lieu of foreclosure issued), transferred by Clifton to business partners in exchange for forgiveness of debt, or otherwise disposed of by him. (R. pp. 277-78). Clifton no longer had remaining assets to pay his debt to First Citizens. As a result First Citizens instituted the underlying action to set aside the conveyance of the Laurens Property to PDC.

IV. LEGAL ARGUMENTS AND AUTHORITIES

A. The trial court properly found that the evidence presented at trial established sufficient badges of fraud to infer Clifton's transfer of the Property to PDC was motivated by fraudulent intent and should be set aside under the Statute of Elizabeth

"A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth." *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459 (2012). An action to set aside a conveyance under the Statute of Elizabeth is an equitable action subject to *de novo* review on appeal. *Id.*; S.C. Const. art. V § 5. Under a *de novo* standard of review the appellate court has jurisdiction to find facts in accordance with its own view of the evidence but is not required to disregard the findings of fact by the trial court or ignore that the trial judge is in a better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See South Carolina Cable Television Ass'n v. Southern Bell Telephone and Tele. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). Further, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. *See e.g., Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154 (1996); *Wallace v. Milliken and Co.*, 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

The Statute of Elizabeth provides for the following:

> 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). When interpreting this statute, the South Carolina Supreme Court has held that there are two occasions upon which a conveyance shall be set aside under the Statute of Elizabeth: (1) where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud creditors; and (2) where the transfer was made without actual intent to defraud creditors but without valuable consideration. *Oskin*, 400 S.C. at 397, 735 S.E.2d at 463.

Under the first circumstance where there is valuable consideration, the plaintiff must establish by clear and convincing evidence that the grantor transferred the property with "'a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts.'" *Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013) *quoting First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 409, 1 S.E.2d 797, 808 (1939). When a debtor denies any fraudulent intent in making the challenged transfer, the Court may infer it when one or more of the following "badges of fraud" exist:

(1) The insolvency or indebtedness of the transferor;

(2) Lack of consideration for the conveyance;

(3) 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 of the property.

In re Haddock, 246 B.R. 810, 815 (Bankr. D.S.C. 2000) *citing Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973). The debtor's intention is demonstrated by examining the circumstantial evidence surrounding the challenged transfer and considering what badges of fraud are established by it. "A badge of fraud creates a rebuttable presumption of intent to defraud." *Id.*[1]

1. *The clear and convincing evidence presented to the trial court established numerous badges of fraud*

At trial Clifton denied he transferred the Property to PDC in September 2008 to defraud creditors, insisting it was done at the request and insistence of Whiteman for liability protection. (R. p. 172 lines 4-24). He claimed that convenience rather than nefarious intentions dictated the timing of the transfer to PDC. (R. p. 171 lines 14-25 - p. 173 lines 1-24). The trial court rightfully found Clifton's claims uncreditable as they were overwhelmingly contradicted by the existence of numerous badges of fraud. (R. pp. 8-10).

First, the evidence presented at trial established that when Clifton transferred the Property to PDC on September 18, 2008 he was unable to fulfill his loan obligations to First Citizens. On the stand Clifton denied experiencing financial difficulty and claimed he was current on his loan payments to the bank. (R. p. 159 lines 20-22; R. p. 161 lines 2-8). The evidence presented to and relied upon by the trial court in setting aside the conveyance handily undermines his sworn testimony.

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[1] Under the second circumstance where there is lack of valuable consideration, the plaintiff does not have to establish actual intent; rather, a transfer may be set aside as fraudulent if (1) the grantor had existing debt owing to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness in full - not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. *Future Group, II v. NationsBank*, 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996).

Around the time of the September 2008 transfer the real estate market was in the midst of a massive downhill slide into the Great Recession causing Clifton's real estate developments to come to a halt. His personal real estate holdings, which comprised the vast majority of his wealth, deteriorated with the market. (R. pp. 247-53). This had a massive negative impact on Clifton's financial condition, causing him to get behind in making loan payments to the bank. Both First Citizens officers testified that as of September 2008, Clifton had become slow in making loan payments. (R. p. 55 lines 2-24; R. p. 74 lines 2-25 – p. 75 lines 1-13). Email correspondence between First Citizens and Clifton's office also showed that he continued to be behind, requesting past due payments for October 2008 that were still outstanding in late November of that year. (R. p. 256, p. 259, pp. 261-63). In fact the scant evidence submitted by Clifton and PDC at trial included a November 24, 2008 email from First Citizens to Clifton's office listing three loan "[p]ayments past due for October." (R. p. 214).[2]

In addition, when one of the three loans matured in July 2008 Clifton could not repay it and was in the process of negotiating another extension when he transferred the Property to PDC. In fact, in September 2008 Clifton was actively seeking to modify all three loans requesting the bank extend their maturity dates past January 2009. Clifton knew that he did not have the ability to repay the loans under their current terms and was completely reliant upon the bank approving modification. (R. p. 170 lines 13-19). His argument for legitimacy of the PDC transfer treats modification as a foregone conclusion

[2] On cross examination Clifton finally admitted that he was in fact behind on his loan payments in the fall of 2008 while he negotiated another modification with the bank. (R. p. 170 lines 13-19). Following his begrudged admission, Clifton claimed that he still had the ability to repay the loans at the time of the transfer. (R. pp. 173-74). As detailed in this brief, his claim of financial wherewithal to fulfill his obligations to the bank is sufficiently undermined by the overwhelming evidence to the contrary.

rather than the uncertainty it was. However, before granting yet another extension on the repayment dates First Citizens required Clifton submit certain information including a list of marketable assets that could be quickly liquidated, a budget showing sources of income and a business plan detailing how he planned to repay the bank. (R. pp. 259-65). First Citizens needed this information to evaluate the propriety of granting another modification, indicating it was anything but guaranteed. (R. p. 256, pp. 261-65).

Both at trial and on brief, Clifton treats ability to repay loan obligations as they stood in late 2008 as financial wherewithal to repay them under modified terms. In other words, Clifton claims that he was able to repay his debts to First Citizens when he transferred the Property in September 2008 because the bank was going to modify the terms. (R. pp. 168-75; App. Br. at 9-10). Clifton's misguided assumption cannot hide the fact that the evidence presented to the court showed he lacked the finances to repay his debts as they stood in September 2008. It is axiomatic that Clifton could not meet his loan obligations as they stood in September 2008 if he was reliant upon modification of the terms. The trial court correctly analyzed whether Clifton could pay the obligations as they then stood, not as he expected them to be, and found that he could not meet them.

Moreover, in the course of negotiating loan extensions Clifton was actively forming LLCs and divesting himself of all personal holdings. The evidence presented at trial showed that Clifton not only transferred the Laurens Property to PDC but was engaged in a coordinated effort of moving any personally held property out of his name. (R. pp. 277-78). *See supra* at 6-7.[3] Clifton did not disclose these transfers to First Citizens or update his January 23, 2008 Financial Statement which reflected him owning

[3] As noted above, Clifton was unable to repay one of the loans when it matured in July 2008. Clifton's efforts to divulge himself of all personally held property began the same month (R. pp. 221).

these properties. (R. pp. 247-53). Clifton's entire financial condition and personal net worth had dramatically changed, and rather than informing First Citizens of that fact, he sought to postpone his loan repayment dates and divulge himself of assets owned in his name. Tellingly, neither at trial nor on brief does Clifton acknowledge this devastating evidence.[4]

Clifton attempts to dismiss the timing of the transfer by claiming it was done in September 2008 merely out of convenience because he was setting up companies for other development projects at the time and it made sense to go forward with the PDC conveyance. (R. p. 171 lines 19-25 - p. 173 lines 1-24). This rings hollow given the circumstances. The evidence established Clifton and/or his staff (consisting of his two daughters Rene Gilreath and Leah Winton) prepared the PDC organizational documents and decided *when* the transfer occurred. (R. p. 82 lines 20-25 – p. 83 lines 1-4; R. p. 119 lines 1-6; R. pp. 270-72). Whiteman testified that she asked Clifton to put the Property in an LLC for liability protection for years to no avail. (R. pp. 87-90). Over his career as a real estate developer Clifton and his staff always used limited liability companies for his development projects; organizing over forty LLCs. During the twenty plus years he and Whiteman owned the Laurens Property he could have easily transferred it into an LLC long before September 2008 however it was not until Clifton found himself in dire financial straits that he chose to transfer the Property out of his name.

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[4] Additional evidence presented by the bank showed that Clifton found himself in a dire financial condition prior to the transfer in September 2008. Specifically, the bank submitted an August 1, 2008 Agreement between Clifton and Whiteman under the terms of which Whiteman allowed Clifton to pledge his interest in jointly held property as collateral for a $125,000 loan he needed to make interest payments on loan debt with Cornerstone Bank. (R. pp. 273-76). This Agreement shows that in August 2008 Clifton was reliant upon borrowing money just to make interest payments on a debt to another bank and could not obtain credit without pledging significant collateral.

Clifton's claim that liability concerns motivated the transfer is further belied by the fact that the third parties utilizing the Property for hunting obtained liability insurance naming Clifton and Whiteman as the insured and providing $2 million in landowner liability coverage. (R. pp. 254-55). That insurance policy provided extensive coverage for the potential liability Whiteman expressed concerns over and Clifton argues motivated his transfer of the Property.[5]

The objective evidence presented to and relied upon by the trial court established that Clifton did not have the financial wherewithal to fulfill his loan obligations to First Citizens at the time of the transfer. Clifton's paltry explanation of his intent in making the transfer and its timing cannot stand and are overcome by a mountain of evidence to the contrary. Under the circumstances, the evidence presented at trial established nearly all of the recognized badges of fraud. Therefore, the clear and convincing evidence presented to and relied upon by the trial court provided more than adequate grounds to infer fraudulent intent and set aside the challenged conveyance pursuant to the Statute of Elizabeth.

2. *Appellants' argument relies upon a partial statement of relevant considerations and a myopic view of the evidence*

Clifton's argument on brief relies upon the court viewing but a part of the evidence through an overly narrow analytical prism.

Clifton contends that he presented sufficient evidence to rebut the presumption of fraudulent intent created by the presence of numerous badges of fraud. (App. Br. at 9).

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[5] Additional badges of fraud that were not directly mentioned in the Order include the reservation of benefit to the transferor and retention of possession by the debtor. Whiteman and Clifton were the original members of PDC, each holding a 50% ownership interest in the company. (R. p. 82 lines 16-19; R. pp. 270-72). PDC's only asset was the Laurens Property. Therefore, Clifton retained his 50% ownership interest in the Property after transferring it to PDC.

This evidence consists of three witnesses' testimony (Clifton, Whiteman, and Rene Gilreath) and single page sections of two email chains. (App. Br. at 8; R. pp. 214-15). Clifton argues the definitive and determinative evidence warranting reversal is these three witnesses' testimony, as the only ones with "direct knowledge of the transfer." (App. Br. at 8). All three testified that Clifton transferred the Property to PDC at the insistence of Whiteman and the timing was merely borne of convenience. (App. Br. at 8). These three interested parties' claims of legitimacy are substantially overcome by contrary objective evidence and Appellants' position relies upon acceptance of this biased and self-serving testimony without regard to the substantial countervailing evidence.

Appellants argue that a court may only infer fraudulent intent if the challenged transfer occurs when litigation against the debtor is pending or imminent. Specifically, Clifton contends that "[t]he relevant inquiry vis-à-vis intent is whether he knew or had reason to know that litigation was imminent at the time of the transfer." (App. Br. at 12-13); *see also* (App. Br. at 9)(The "[o]nly relevant badge of fraud as to timing concerns the pendency or threat of litigation."). The pendency or threat of litigation constitutes but one of some nine recognized badges of fraud courts consider in determining whether it can infer fraudulent intent. *See In re Haddock*, 246 B.R. at 815. Clifton attempts to drastically alter this analytical framework advocating for consideration of a singular determinative factor that, if absent, allows the challenged conveyance to stand. This argument amounts to a wholesale discount of the many other recognized and useful badges of fraud which Clifton tellingly resigns to a footnote in his brief. (App. Br.at 9 fn5).

When a debtor denies he intended to defraud a creditor the court must consider what badges of fraud, if any, are present. *In re Haddock*, 246 B.R. at 815. Clifton denied any fraudulent intent and claimed he transferred the Property for liability protection at the bequest of Whiteman. (R. p. 172 lines 4-24). Evaluating the veracity of such claims are exactly what the various recognized badges of fraud considerations are for. They provide objective guideposts for a court to make an evidence-based determination as to the debtor's true intention. This holistic evidence-based approach provides an objective check on the debtor's stated motives. Those objective checks are much more reliable and probative than the debtor's testimony as to his stated intention. Therefore, a debtor's denial of fraud can and should be overcome when rebutted by objective evidence to the contrary. In this case, Clifton's self-serving denial of untoward motives and argument to overturn the trial court are belied by the established facts and circumstances.

As detailed above, the evidence before the trial court established that when Clifton transferred the Property to PDC in September 2008 his development projects had come to a halt, he was behind on loan payments, actively negotiating modification, and in the midst of a concerted effort to divulge himself of all assets held in his name. *See supra* at 6-7, 12-16. This evidence established the presence of multiple badges of fraud necessary to support the trial court's inference of fraudulent intent.

Even if the Court were to utilize Clifton's truncated analysis where the singular determinative consideration is whether litigation is pending or imminent, his argument still fails. Clifton knew that if he failed to repay his loans litigation would ensue. At trial and on brief Clifton maintains that he had no reason "to doubt his ability to satisfy ongoing obligations or suspect litigation was forthcoming." (App. Br. at 9; R. pp. 159-

62; R. pp. 168-75). All of the more reliable objective evidence presented at trial shows otherwise.

Clifton's position that litigation was not imminent necessarily depends upon his ability to repay the loans under their terms as of September 2008. At trial Clifton claimed he could have accessed additional credit to repay First Citizens however under questioning he admitted having no written commitment from a lender. (R. p. 173 line 25 – p. 175 lines 1-4). As detailed above, all of the overwhelming evidence handily contradicts Clifton's claims of financial wherewithal.

In September 2008 Clifton had already failed to pay off a loan that matured in July and was reliant upon modification to meet his obligations to the bank. At trial Clifton admitted that he was concerned about making payments and dependent upon modification:

> Q: So you knew the bank was concerned about these three loans?
>
> A: We were concerned about the three loans. We were wanting to make sure they got extended.

(R. p. 170 lines 16-19). Under these circumstances litigation was indeed imminent because there was no guarantee First Citizens would grant him yet another modification and postpone the maturity dates past January 2009. (R. pp. 256-67). Perhaps most importantly, Clifton's campaign of transferring property out of his name into LLCs strongly indicates he foresaw litigation on the horizon and took steps to protect his assets.

In sum, Clifton attempts to challenge the lower court by presenting but a portion of the evidence brought forth at trial and ignoring the substantial and more reliable countervailing evidence establishing numerous badges of fraud. Specifically, Appellants'

seek reversal of the trial court's ruling on this issue strictly on the basis of the testimony of three interested witnesses without any regard to the record as a whole analyzed in an overly narrow framework. The trial court properly found First Citizens provided clear and convincing evidence from which to infer fraudulent intent and the paltry evidence and truncated analysis argued by Appellants fails to rebut the presumption of fraud established by it.

B. The trial court properly set aside Clifton's fraudulent conveyance of the Property owned as tenants in common without a showing of the non-debtor cotenant's fraudulent intent

Clifton and Whiteman owned the Laurens Property in their individual names as tenants in common. (R. pp. 222-24). On September 18, 2008 each conveyed their respective interest in the Property to PDC through a single deed. (R. pp. 225-27). Clifton takes issue with the trial court setting aside his conveyance arguing that "[t]he court cannot, as a matter of law, set aside half of an instrument and thereby divide the deed." (App. Br. at 13). He claims, without citation to any supporting authority, that because "the transfer involves two grantors in a single deed, the entire transfer must stand or fall." (App. Br. at 15). Appellants unsupported argument mistakenly treats the transfer as a single conveyance.

As tenants in common, Clifton and Whiteman each owned a fifty percent undivided interest in the Laurens Property separate and apart from the other. Charles D. LeGrand, *Tenancy in Common*, 6 S.C. JURIS. COTENANCIES § 5 (Dec. 2014)("Tenants in common each own a distinct and proportionate but undivided interest or estate in the property and do not have privity of estate with each other."). Each cotenant may transfer their separate ownership interest in the property without consent or participation of the

other. *Young v. Edwards*, 33 S.C. 404, 11 S.E. 1066 (1890); *Ex parte Johnson*, 147 S.C. 259, 145 S.E. 113 (1928)("In the absence of a contrary contractual provision, one cotenant may sell, lease, or mortgage his share or interest in the property to...third parties."). Importantly in this case, "[t]he interest of a tenant in common is freely alienable...and is subject to the claims of creditors." 6 S.C. JURIS. COTENANCIES § 6.

As tenants in common, Clifton and Whiteman's conveyances were two separate and distinct transfers they chose to accomplish through a single deed. As mutually exclusive conveyances, the invalidity of one does not necessarily invalidate the other. Therefore, despite Clifton's contention to the contrary, the trial court's setting aside of his conveyance does not require invalidation of the entire deed. [6]

Clifton also claims the trial court erred "[i]n setting aside the conveyance where there was no evidence of fraudulent intent on the part of Whiteman." (App. Br. at 13). As distinct conveyances, Whiteman's intent in transferring her proportional interest in the Property is wholly irrelevant and the absence of evidence concerning it inconsequential. Clifton's proportional interest is subject to claims of his creditors and he cannot legitimize his fraudulent transfer by lumping it together with Whiteman's presumably valid one. First Citizens, as Clifton's creditor, sought to invalidate his transfer, not

---

[6] The trial court setting aside Clifton's conveyance results in him being cotenants with PDC. *Garret v. Wienberg*, 43 S.C. 36, 20 S.E. 756 (1895); 6 S.C. JURIS. COTENANCIES § 39("A conveyance by one cotenant to a third party that purports to convey the entire interest conveys only the interest of the cotenant, and thus his grantee becomes a tenant in common with the other cotenants."). South Carolina courts may compel tenants in common to make a severance and partition of their jointly held lands. S.C. Code Ann. § 15-61-10. A cotenant can mortgage their undivided interest in jointly owned property and subject their pledged interest to foreclosure. *Z.V. Pate, Inv. v. Kollock*, 202 S.C. 522, 25 S.E.2d 728 (1943). Should a creditor seek to foreclose on that mortgage a court may order either a partition of the land and attachment of the lien to the debtor's allotted portion or a sale of the entire property and division of the proceeds among the cotenants. *Id.* Under the current circumstances it appears that a court may order sale of entire property and division of proceeds among cotenants. Clifton's earnings from that sale can then be collected by First Citizens as a judgment creditor.

Whiteman's. Therefore, the trial court rightfully set aside his conveyance without evidence establishing Whiteman harbored similar fraudulent intentions in making hers.

C. The trial court did not abuse its discretion in admitting evidence of a later transaction involving the attempted transfer of the Property to Streamline Management, LLC

As an initial matter, First Citizens contends this issue was not properly preserved for appellate review. During trial Appellants failed to lodge a contemporaneous objection when evidence concerning the Streamline transaction was first introduced. (*See* R. p. 65 lines 1-7 - Plaintiff Exhibit 4 containing the Assignment document admitted without objection; R. p. 85 lines 17-25- p. 87 lines 1-11 - on direct First Citizen's counsel questioned Whiteman regarding the Streamline transfer without objection). Without objecting when the challenged evidence was first introduced, Appellants waived their right to later object to admission of that evidence at trial or on appeal. The failure to make a contemporaneous objection cannot later be 'bootstrapped' by a mistrial motion or cured by an objection to the same evidence introduced later through a different source. *Pinkerton v. Jones*, 310 S.C. 295, 423 S.E.2d 151 (Ct. App. 1992)(Holding that the failure to object to the evidence on a particular ground the first time it is admitted waives the objection/ground to the same or similar evidence subsequently offered.). The same rule applies when the aggrieved party fails to object to a witness's initial testimony but subsequently objects to the same or similar testimony from the same witness, i.e., the objection is untimely and no issue is preserved for appeal. *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994); SCRCP 43(c)(1). Therefore, this issue was not properly preserved for appellate review. Should the Court determine the issue is properly before

it, the trial court did not abuse its discretion in admitting evidence regarding the Streamline transaction.

1. *Evidence of the Streamline transaction was properly admitted relevant evidence*

Admission of evidence is a matter addressed to the sound discretion of the trial judge. An appellate court may overturn the lower court's admission of evidence upon finding that the trial judge abused their discretion and admission resulted in prejudice to the objecting party. *Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assoc., Inc.*, 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001); SCRE 103. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *Wilson v. Rivers*, 350 S.C. 536, 567 S.E.2d 482 (Ct. App. 2002).

During trial the court admitted evidence related to the August 5, 2009 transfer of Clifton's membership interest in PDC to Streamline Management, LLC. Appellants contend the court's admission and consideration of evidence related to this later transfer was inappropriate and resulted in prejudice to them. (App. Br. at 15-16).

Clifton's argument on this issue does not appear to be one claiming irrelevance; merely noting a relevancy objection was lodged at trial. (App. Br. at 15). Rather, Appellants claim that due to the issue not being included in the pleadings or tried by consent it was not properly before the court. (App. Br. at 15-16). That argument ignores the fact that the threshold and overarching admissibility determination is an evaluation of relevancy. SCRE 401("'Relevant evidence' means evidence having a tendency to make the existence of any fact that is consequential to the determination of the action more probable or less probable than it would be without the evidence."). If a court determines

evidence is relevant to the issues at hand then it may only be rightfully excluded under certain exceptions including when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues...or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." SCRE 403; SCRE 402("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.").

The trial court properly admitted evidence of the Streamline transaction as it was relevant to the issues before it and inextricably intertwined with the initial challenged conveyance to PDC. First and foremost, the validity of the later Streamline transaction depends upon the legitimacy of the initial transfer to PDC. If the initial transfer to PDC is properly set aside, the subsequent Streamline transaction necessarily suffers the same fate. Therefore, First Citizens seeking to set aside the transfer to PDC was necessarily an attack on any subsequent transfers of that Property or Clifton's interest in it.

Furthermore, Clifton's transfer of his interest in PDC to Streamline was yet another piece of evidence establishing the existence of numerous badges of fraud. This second transfer involved and impacted the ownership of the same Property transferred to PDC. It is evidence of Clifton attempting to further distance himself from the Laurens Property and the initial fraudulent conveyance to PDC. The Streamline transfer also provided evidence of Clifton's dire financial condition indicating that he had been accumulating debt and had no liquid assets with which to repay it. It is also proof of him retaining ownership of the Property and enjoying the benefits of that possession by using

it to pay down debt. Thus, the court rightfully admitted evidence of this second nefarious transaction as part of a related series of actions and events impacting the same Property conveyed in the challenged transfer and evidencing Clifton's fraudulent intent.

Clifton failed to demonstrate that the Streamline transaction was irrelevant and that the court's admission of evidence concerning it prejudiced him in any way. As demonstrated above, its relevancy to the issues before the Court cannot be argued. Appellants summarily claim to have suffered prejudice because Clifton and PDC "had no notice that First Citizens sought to set aside the second conveyance." (App. Br. at 16). A statement, as detailed above and discussed below, that lacks any credence whatsoever.[7]

2. *Evidence concerning an issue not raised in the pleadings was properly admitted at trial*

Clifton argues that the trial court erred in admitting evidence concerning the Streamline transfer as the issue "was neither raised in the pleadings nor tried by consent." (App. Br. at 15-16; R. pp. 106-107; R. p. 198 lines 17-25 – p. 199 lines 1-19). Including an issue in the pleadings is not a prerequisite to admission of testimony or other evidence concerning it at trial. SCRCP 15(b). Under SCRCP 15(b) an issue not raised in the pleadings may be tried by the express or implicit consent of the parties:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, *they shall be treated in all respects as if they had been raised in the pleadings*. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but *failure so to amend does not affect the result of the trial of these issues*."

SCRCP 15(b).

---

[7] Streamline is the only party that could have suffered any potential prejudice by admission of this evidence, although First Citizens maintains there was none, and Clifton and PDC do not have standing to assert any arguments on behalf of Streamline Management, LLC.

The Streamline transfer, while not mentioned in the pleadings, permeated the entire litigation and was tried by implicit consent. First Citizens discovery requests to Clifton and PDC included some fourteen requests for information and documents related to Streamline and/or the transfer to it. (*See* R. pp. 35-36). PDC identified Renee Gilreath, a member of Streamline, as its 30(b)(6) deposition witness. During deposition, both Ms. Gilreath and Mr. Clifton were questioned extensively about the facts and circumstances surrounding the transfer of Clifton's interest in PDC to Streamline. Therefore, despite their contention, Appellants knew and had sufficient notice that the second conveyance from Clifton into Streamline would and/or could be an issue raised at the trial of this case.

The Rule also states that:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

SCRCP 15(b). At trial the court could have allowed First Citizens to amend the pleadings in order to incorporate the Streamline issue because it subserved the presentation of the merits and no showing of prejudice was made. Neither party nor the trial court looked to amend the pleadings during the proceedings. As a practical matter doing so was unnecessary and would have been a formalistic act at best. While Clifton objected to the Streamline evidence, he failed to demonstrate that its admission would prejudice his defense.

V. Conclusion

The clear and convincing evidence presented to and relied upon by the trial court established that when Clifton transferred the Property to PDC in September 2008 his development projects had come to a halt, he was behind on loan payments, actively negotiating modification, and in the midst of a concerted effort to divulge himself of all assets held in his name. The trial court properly found that this reliable and substantial evidence established the presence of multiple badges of fraud necessary to infer fraudulent intent and set aside Clifton's conveyance to PDC under the Statute of Elizabeth.

Appellants attempt to challenge the lower court by presenting but a portion of the evidence brought forth at trial and ignoring the substantial and more reliable countervailing evidence establishing numerous badges of fraud. They seek reversal of the trial court's ruling strictly on the basis of the testimony of three interested witnesses analyzed in an overly narrow framework. The trial court properly found First Citizens provided clear and convincing evidence from which to infer fraudulent intent and the paltry evidence and truncated analysis argued by Appellants fails to rebut the presumption of fraud established by it.

Also, the trial court properly set aside Clifton's fraudulent conveyance of the Property owned as tenants in common without a showing of the non-debtor co-tenant's fraudulent intent. As tenants in common, Clifton and Whiteman's conveyances were two separate and distinct transfers they chose to accomplish through a single deed making Whiteman's intent in transferring her proportional interest in the Property wholly irrelevant and the absence of evidence concerning it inconsequential. Furthermore, as

mutually exclusive conveyances, the invalidity of one does not necessarily invalidate the other. Therefore, despite Clifton's contention to the contrary, the trial court's setting aside of his conveyance does not require invalidation of the entire deed.

Finally, the trial court did not abuse its discretion in admitting evidence of a later transaction involving the attempted transfer of Clifton's interest in the Property to Streamline Management, LLC. As noted above, First Citizens contends Appellants failed to properly preserve this issue for appellate review by allowing admission of the disputed evidence when it was first introduced at trial without lodging a contemporaneous objection. Should the Court determine the issue is properly before it, the trial court did not abuse its discretion in admitting this evidence as it was relevant to the issues before it and inextricably intertwined with the initial challenged conveyance to PDC. This second nefarious transaction was part of a related series of actions and events impacting the same Property conveyed in the challenged transfer and further evidence of Clifton's fraudulent intent. The Streamline transfer, while not mentioned in the pleadings, permeated the entire litigation and was tried by implicit consent. Despite their contention, Appellants knew and had sufficient notice that the second conveyance involving Streamline would and/or could be an issue raised at the trial of this case. Appellants failed to demonstrate that the Streamline transaction was irrelevant and the court's admission of evidence concerning it prejudiced them in any way.

For the reasons set forth above, the Circuit Court's Order of August 5, 2014 should be affirmed.

(signature page to follow)

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May 11, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM LAURENS COUNTY

Court of Common Please
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2010-CP-30-1141
Appellate Case No. 2014-002295

First Citizens Bank and Trust Company, Inc.....Respondent,

v.

Park at Durbin Creek, LLC, Kenneth E. Clifton, and
Linda G. Whiteman.....Defendants.

Of whom Park at Durbin Creek, LLC and
Kenneth E. Clifton are the.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S FINAL BRIEF was served upon all counsel of record in the above-referenced action this 12th day of May, 2015, by depositing same in the United States Mail, sufficient postage affixed thereon, and addressed as follows:

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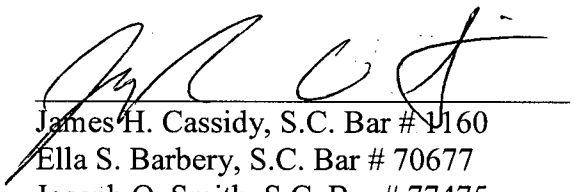

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