

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

The Honorable Joe M. Crosby, Master-In-Equity

**RECEIVED**

JUL - 6 2015

Case No. 2011-CP-22-00180

Appellate Case No. ~~2013-001447~~

2015-001125

**S.C. Supreme Court**

Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas ..... Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and  
J. Mars Sapp, Defendants,  
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-  
Cribb are Respondents and

J. Mars Sapp is the ..... Petitioner.

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**REPLY MEMORANDUM OF PETITIONER  
ON PETITION FOR WRIT OF CERTIORARI**

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## INTRODUCTION

The issue before this Court is whether the Court of Appeals erred by according priority to a lender's mortgage over an innocent judgment creditor when the lender knew that its borrower was the owner of property by virtue of a fraudulent transfer, and the lender in fact required the transfer. The "Counter Questions Presented" by Respondents Kennedy Funding, Inc. and BNP Paribas (collectively "Kennedy") simply reiterate Parts II and III of the Court of Appeals' erroneous decision (the "Decision"). The Decision cannot be supported by the law of this State and Kennedy's return makes no creditable argument in support of it.

## ARGUMENT

Kennedy's return asserts that the Court of Appeals correctly decided two issues – (1) the mortgage transaction between the fraudulent grantee ("Pawleys") and Kennedy did not violate the Statute of Elizabeth, and (2) the recording statute affords Kennedy priority over Sapp. These issues overlook and have no bearing on the facts under which Kennedy took its mortgage – that Kennedy's borrower (Pawleys) acquired the property by fraudulent transfer, that Kennedy required the transfer, and that when Kennedy made the loan, it was fully cognizant of the badges of fraud associated with Pawleys' acquisition of the property. The Court of Appeals did not properly address Kennedy's priority in the context of these undisputed facts, which is a denial of substantial justice as to the Petitioner, J. Mars Sapp.

- A. Instead of acting on its determination that Pawleys fraudulently acquired the property, the Court of Appeals erroneously relied upon the validity of the Kennedy/Pawleys mortgage loan *inter sese*, which was in conflict with *Coleman v. Daniel*.**

Kennedy's return does not dispute the Court of Appeals' proper determination of fraud in the property transfer from Wheeler to Kennedy's borrower, Pawleys. However, the Decision veered off course by examining the validity of the mortgage loan between Kennedy and Pawleys.

The Court of Appeals determined that the loan, as between Pawleys and Kennedy, was not a fraudulent conveyance and the Decision granted the lender priority over Sapp based on the timing of the mortgage filing and the judgment.

As discussed extensively in the Petition, a finding that the mortgage loan between Pawleys and Kennedy was not fraudulent has no bearing on the proper determination of Sapp’s rights as a defrauded, innocent judgment creditor. As between Pawleys and Kennedy, that loan may be valid and enforceable, but that does not translate into a determination that Kennedy’s mortgage has priority over Sapp as the conveyance to Pawleys is void as to Sapp. Whether the mortgage transaction between Pawleys and Kennedy was fraudulent is inconsequential to the question presented and this Court’s precedent.

In *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), where property had been fraudulently transferred and the fraudulent grantee later mortgaged the property, the Supreme Court ordered a sale of the property to satisfy the defrauded judgment creditor under even less compelling circumstances than those presented in this case.<sup>1</sup> In *Coleman* this Court ordered the sale of the property to satisfy the judgment creditor’s claim without even considering the validity of the fraudulent grantee’s loan and mortgage with its lender. It was irrelevant to the outcome of and holding in the case.

The facts and holding of *Coleman* are compared with the case before this court in the table below:

<i>Coleman</i> Facts:	Sapp Facts:
1. Sometime prior to October 26, 1964 (the date of the fraudulent conveyance), Linzie Rogers became indebted to Coleman.	Sometime prior to April 28, 2009 (the date of the fraudulent conveyance), Wheeler became indebted to Sapp.

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<sup>1</sup> Here, Kennedy actually required the transfer and made the loan with actual knowledge of the badges of fraud which gave rise to its borrower’s acquisition of the property.

<p>2. On October 26, 1964, Rogers fraudulently transferred property to his daughter Annie Daniel and her husband (the Daniels). The deed recited consideration of “\$5, love and affection, and subject to the lien of a mortgage held by Lake City Building &amp; Loan Association” which was \$29,000. The fraudulently transferred property appraised between \$85,000 and \$100,000.00.</p>	<p>On April 28, 2009 Wheeler fraudulently transferred to his family owned LLC two lots at Pawleys Island. The deed recited the consideration of “FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor.” At the time of the transfer, lot 4 of the Property was subject to a \$300,000.00 mortgage in favor of First South Bank. Lot 3 was unencumbered. The property appraised at \$1,920,000, \$880,000 for lot 4 and \$1,040,000 for lot 3.</p>
<p>3. The Daniels (the fraudulent grantees) did not assume payment of the Lake City mortgage; however, after execution of the fraudulent conveyance deed, they secured a loan from another financial institution for \$32,000 and paid the Lake City Building &amp; Loan mortgage. <b><u>Nothing in the opinion calls into question the validity of Daniels’ loan with their lender, or the mortgage given the lender.</u></b></p>	<p>Pawleys Island North, LLC (the fraudulent grantee) did not assume payment of the First South Bank mortgage; however, two days after execution of the fraudulent conveyance deed, Pawleys secured a loan from Kennedy receiving \$697,438.50 of which it paid \$300,000.00 to First South Bank. <b><u>Kennedy was fully cognizant of the many badges of fraud in the Wheeler to Pawleys transfer, and actually required the transfer.</u></b></p>
<p>4. On May 30, 1966, approximately 19 months after the fraudulent conveyance and 18 months after the Daniels (fraudulent grantees) gave a mortgage on the property, Coleman obtained a judgment against Rogers, the fraudulent grantor.</p>	<p>On June 4, 2010, approximately 13 months after the fraudulent conveyance and after Pawleys (fraudulent grantee) gave a mortgage on the property to Kennedy, Sapp obtained judgment against Wheeler, the fraudulent grantor.</p>
<p>5. The Supreme Court held that the deed to Daniels was void as to Coleman (the judgment creditor), that the fraudulently conveyed property was subject to Coleman’s judgment lien, and ordered that Coleman may seek an order of the lower court for sale of the property in satisfaction of his judgment.</p>	<p>The Court of Appeals properly found the conveyance by Wheeler to be fraudulent and void as to Sapp. However, in contravention of <i>Coleman</i>’s holding, the Court of Appeals erred by failing to remand the case for a sale of the property in satisfaction of Sapp’s judgment.</p>

Comparing the facts and holding of *Coleman* to those of the instant case, the Decision deviated from this Court’s precedent that the judgment creditor could have the property sold “in satisfaction of his judgments . . . .” *Coleman*, 261 S.C. at 211, 199 S.E.2d at 80.

Although the *Coleman* case did not address the validity of the mortgage given by the fraudulent grantee, Kennedy mistakenly relies upon *Coleman* (Return, pp. 7-10) for the proposition that the Pawleys/Kennedy mortgage was not fraudulent *inter sese*. It does not matter. Kennedy’s

argument, reiterating the Court of Appeals' opinion, is simply an irrelevant and empty position. Even assuming *arguendo* the validity of the Kennedy/Pawleys mortgage, *Coleman* would provide a remedy for sale of the fraudulently transferred property in satisfaction of the judgments owed by the fraudulent grantor. After the Court of Appeals determined the conveyance from Wheeler to Pawleys was fraudulent and void as to Sapp, the Court of Appeals was compelled to remand the case to the lower court for a sale of the property in satisfaction of Sapp's judgment, but it did not.

Even more compelling than the Decision's clear conflict with *Coleman*, in which the validity of the mortgage was irrelevant, is Kennedy's actual knowledge of the badges of fraud by which Pawleys acquired the property and Kennedy's instigation of the property transfer to its borrower, which further insulated the mortgaged property from Wheeler's creditors. These badges of fraud include:

- Kennedy knew Wheeler was indebted to Sapp.
- Kennedy knew Sapp had a pending suit against Wheeler to collect the debt.
- Kennedy's appraiser set the property's value at \$1.92 million.
- Kennedy knew that the \$1.92 million property, two beach lots at Pawleys Island, was conveyed to the fraudulent grantee (Kennedy's borrower) while Sapp's suit was pending for "FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration."
- Kennedy required Wheeler to transfer the property from his individual name to Pawleys.
- Kennedy knew the property transfer by Wheeler was to a family owned LLC.
- Kennedy knew that Wheeler possessed a 99% interest in the LLC and that by virtue of this interest, he retained the benefit of any sale of the property.

Despite Kennedy's knowledge of Wheeler's indebtedness to Sapp, prior to closing its loan with the fraudulent grantee, Kennedy failed to seek any explanation from Sapp of the pending

litigation. South Carolina precedent, including *Coleman*, does not tolerate such plausible deniability.<sup>2</sup> Kennedy had actual knowledge of the badges of fraud. These facts should have aroused the suspicion of an ordinarily prudent person<sup>3</sup>, and Kennedy may not hide behind the purported shield of an erroneous opinion letter of the borrower's counsel. In the history of this litigation, Kennedy has yet to cite a case, and neither does the decision of the Court of Appeals, in which any court has enforced a deed or mortgage over a fraudulent conveyance where the grantee or mortgagee took an interest in property with notice of the fraudulent conveyance.<sup>4</sup>

**B. The recording statute will not protect a mortgage lender over an equitable claim to property when the lender has notice, and in this case knowledge, of a fraudulent conveyance.**

The Court of Appeals' decision misapplies the recording statute at S.C. Code Ann. § 30-7-10 (1976), which cannot be used to supersede a void transfer of property. This issue is briefed at page 9 of the Petition for Writ of Certiorari and also addressed beginning at page 18 of Petitioner's Reply Brief (Appx. 927 – 934). No South Carolina case has used this statute to shield an interest in property taken from a fraudulent grantee, particularly an interest taken with knowledge of the fraud as Kennedy had. In addressing the recording statute, the Decision's reliance on *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979) is misplaced. In *Atlas Supply* no fraudulent conveyance was before the court. *Atlas Supply* was a priority dispute among two innocent creditors

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<sup>2</sup> *Horry County v. Ray*, 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009) (inquiry should be directed to the party who stands to be injured by the fraud (Sapp), not the closing attorney for the borrower whose letter is cited in the Court of Appeals' decision).

<sup>3</sup> 261 S.C. at 210, 199 S.E.2d at 80.

<sup>4</sup> In contrast, the cases found and cited by Petitioner's counsel never enforce a mortgage or deed taken with notice of a fraudulent conveyance. *See, e.g., Brunson v. Sports*, 239 S.C. 58, 121 S.E.2d 294 (1961); *Matthews v. Montgomery*, 193 S.C. 118, 7 S.E.2d 841, 848 (1940); *Messervy v. Barelli*, 11 S.C. Eq. (2 Hill Eq.) 576 (1837; and *Rilling v. Schultze*, 95 Tex. 352, 67 S.W. 401 (1902).

as opposed to this case in which Sapp is the only innocent creditor. Kennedy knew of Sapp's claim and equity in the property, a fact not present in *Atlas Supply*.<sup>5</sup>

Just as Kennedy cannot cite a case in support of its contention that the validity of its mortgage from Pawleys has any bearing on the proper outcome of this case, it cannot cite a case where the recording statute has been used to protect a fraudulent grantee or one who takes a property interest from a fraudulent grantee. Further, neither Kennedy nor the Decision properly addresses opinions in cases such as *Leasing Enterprises, Inc. v. Livingston*, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987) (holding that the recording statute does not apply where there is a fraudulent conveyance), or *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011) (holding that the recording statute does not protect a recorded mortgage over a known equitable, but unrecorded interest in property). The recording statute provides Kennedy no protection, and it especially provides no protection since Kennedy had actual knowledge of Sapp's claim.

## CONCLUSION

The Court of Appeals did not properly apply this Court's fraudulent conveyance precedent (*Coleman*) and its impact on a mortgage taken from a fraudulent grantee.

The Court of Appeals particularly overlooked the equity of a lender foreclosing on a mortgage and the priority of that lender's lien when the lender actually required the property transfer deemed to be fraudulent, and when the lender was fully knowledgeable of the badges of fraud associated with its borrower's conduct in the fraudulent transfer. The decision of the Court of Appeals rewards Kennedy's rash conduct. It protects the fraudulent grantor. It protects the fraudulent grantee. It penalizes Sapp, the only innocent party in this equitable proceeding, who

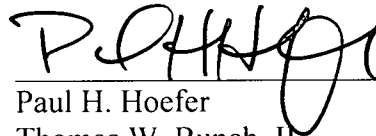
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<sup>5</sup> Even if Kennedy had not known of Sapp's interest in the property, *Coleman* would still bind the Court of Appeals to remand the case for a sale of the property.

cannot secure payment of his judgment after Kennedy was complicit in Wheeler's and Pawleys' fraudulent conduct. Denial of the Petition will leave Sapp with no remedy to collect his judgment against Wheeler even though the conveyance of the property is void as to Sapp. Denial of the Petition is a denial of substantial justice to Sapp, a compelling reason to grant the Petition.

This Court corrects errors of law. It is respectfully submitted that the decision of the Court of Appeals granting priority to Kennedy is controlled by errors of law, that the errors of law are in conflict with the precedent of this Court, that the errors of law mistakenly grant priority to Kennedy which was complicit in its borrower's acquisition by fraud of the mortgaged property, that the errors of law deny justice to Sapp, and that these are special and important reasons to grant the Petition under *Rule* 242, SCACR. The Petitioner prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,



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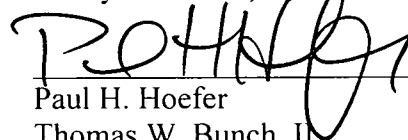
J. Mars Sapp is the ..... Appellant.

**PROOF OF SERVICE**

I certify that I have filed the Reply to Return to Petition for Writ of Certiorari and served opposing counsel by depositing a copy in the United States Mail, postage prepaid, on **July 6, 2015** addressed as follows:

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