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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Martin R. Banks, Special Referee

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SC Court of Appeals

Case No. 2007-CP-18-1794

James T. Judy, Bobby R. Judy
and Kevin Judy,

Respondents,

v.

Ronnie F. Judy, J. Todd Judy
Ryan C. Judy and Wanda B.
Judy, Defendants,

Appellant.

Of Whom: Ronnie F. Judy is
Appellant

MOTION TO AMEND FINAL BRIEF

It has come to my attention that Appellant has inadvertently violated Rule 211(b) of the South Carolina Appellate Court Rules. In Appellant's Final Brief, while not changing any substantive or legal arguments of the initial brief, I corrected Appellant's initial brief by removing passive voice, correcting sentence structure and rearranging existing language to make the content flow more smoothly. This error was occasioned by my lack of familiarity with Rule 211(b) SCACR.

After discovering my error, I along with co-counsel, Eric C. Hale, communicated with counsel for the Respondents and counsel for the Respondents indicated that he consents to Appellant being allowed to substitute Appellant's initial brief in its original form with citations to the record as required by Rule 211 for the current Final Brief of Appellant filed with the Court. An Amended Final Brief that complies with Rule 211(b) is attached as Exhibit A. In addition, a certificate of council regarding the compliance of the Amended Final Brief with Rule 211(b) is attached.

Appellant prays that he be given leave to substitute his original Final Brief with the attached Amended Final Brief.

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Exhibit A

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Ronnie F. Judy, J. Todd Judy Ryan C. Judy and Wanda B. Judy, Defendants,

Appellant.

Of Whom: Ronnie F. Judy is Appellant

FINAL BRIEF OF APPELLANT (AMENDED)

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING THAT ALL THE ELEMENTS OF THE STATUTE OF ELIZABETH WERE SATISFIED AS TO SET ASIDE THE 1998 AND 2007 CONVEYENCES OF THE APPELLANT?

II. DID THE TRIAL COURT ERR IN FORMING THE REMEDY FASHIONED AS IT PERTAINS TO THE "REMOTE CONVEYANCES"?

III. DID THE TRIAL COURT ERR IN AWARDING ATTORNEYS FEES?

Statement of the Case

The case was heard in front of Special Referee Martin R. Banks on July 18th, 2011. (R. p. 7). The case was referred to the Special Referee by the Order of the Honorable Edgar W. Dickson on April 16th, 2010, after the Master-in-Equity for Dorchester County recused himself from hearing the matter. (R.pp. 1-3).

The complaint of the Respondents sought to set aside certain conveyances of real property by Appellant to his sons, J. Todd Judy and Ryan C. Judy, and to restore title to Ronnie Judy under the Statute of Elizabeth, Sections 27-23-10, *et seq.* of the Code of Laws of South Carolina for 1976, as amended. (R.pp. 58-62, 71-75). Respondents also sought an award of attorney fees and for the costs of the action. The Lis Pendens filed in the case described ten parcels of real property more fully described therein as Parcels "A" through "J", which comprised the lands at issue in the case. (R.pp. 53-57, 76-80). There were two types of conveyances the Respondents wish to set aside. (R.p. 18). The first type occurred in 2007, which the court refers to as the "recent conveyances" and the second type occurred in 1998 which the court referred to as the "remote conveyances." (R.pp. 19-21).

Plaintiffs, James T. Judy and Bobby Judy were present and represented by Capers G. Barr, III. (R.p. 7). Defendants, Ronnie F. Judy, J. Todd Judy, and Ryan C. Judy appeared *pro se*. Plaintiff, Kevin Judy, and Defendant, Wanda B. Judy, did not appear. *Id.* (Because all parties to this case carry the surname "Judy" they will be referred to from time to time by their first names, for the sake of clarity.)

On December 16th, 2011, judgment was granted for the Plaintiffs. (R.pp.7-38). The Appellants filed a motion to reconsider which was heard on January 23rd, 2012 and was denied in a formal order filed on January 30th, 2012. (R.pp. 98-100, 47-51). This appeal follows.

Facts

The case involves members of the Judy Family. Respondents, James T. Judy (James), Bobby Judy (Bobby), Kevin Judy (Kevin) and Appellant, Ronnie F. Judy (Ronnie), are sons of the late Blease Judy (Blease). (R.p. 86). Ronnie is the father of Defendants, J. Todd Judy (Todd) and Ryan C. Judy (Ryan), and is the husband of Wanda B. Judy (Wanda). (R.p.221, lines 17-21). Prior to the instant action, the parties have been in litigation since 2001. The contentious history between the parties has been described in *Judy v. Judy*, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009) and *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). The litigation between the members of the family is the result of land disputes relating to conveyances of property that left different brothers with joint half interests of property. For the purposes of this appeal, the history of the land conveyances at issue is set forth.

The first conveyance occurred in 1965 when Blease conveyed approximately 259 acres of farmland to Ronnie. (R.pp. 378-380; Plaintiff's Exhibit 1). The second conveyance occurred in 1966 when Blease conveyed approximately 133 acres of farmland to Ronnie and Bobby. (R.pp. 395-396; Plaintiff's Exhibit 5). Thereafter, in 1979 Ronnie conveyed a ½ interest of the aforementioned 259 acres to James T. Judy. (Rpp. 380-382; Plaintiff's Exhibit 2). The aforementioned "Blease" conveyances came to form, after partition described *infra*, Parcels C – G as set forth in the Respondents Lis Pendens. A third conveyance occurred in 1983 when Vesta Rumph ("Mrs. Rumph") died testate, leaving, *inter alia*, three parcels of real property in

Dorchester County to be distributed equally between Ronnie and James. (Rpp. 401-402, 403-404, 410, 411-413, 414-419; Plaintiff's Exhibits 7, 8, 11, 12, and 13). The three parcels included: (1) a 10.9-acre tract ("10.9-acre Tract"); (2) a 9.29-acre tract, on which the Rumph family homestead stood ("Homestead Tract"); and (3) a 134.71-acre tract, which included an 11-acre, man-made pond ("Pond Tract"). Parcels one (1) and two (2) of the aforementioned "Rumph" conveyances came to form, after partition described *infra*, Parcels A and B as set forth in the Respondents Lis Pendens. Parcels H, I, and J, as set forth in the Respondents Lis Pendens, were owned by Appellant exclusive of any estate or joint claim as of 1997. Parcels C - G, as set forth in the Respondents Lis Pendens, were deeded to Todd in 1998 and Parcels H - J, as set forth in the Respondents Lis Pendens, were deeded Todd and Ryan, jointly, in 1998. (R.pp 383-390; Trial Exhibits 3 and 3-A). In 2007 Appellant deeded to his son, Todd, Parcels A and B, as set forth in the Respondents Lis Pendens. (R.pp. 429-434; Trial Exhibit 15). By deed recorded December 31, 2008, Todd deeded to his mother, Wanda, Parcels A and B, as set forth in the Respondents Lis Pendens. (R.pp. 435-440; Trial Exhibit 16). From July 1983 until October 15, 2001, Ronnie served as personal representative of Mrs. Rumph's estate ("Estate"). (R.p. 239, 373, 447,449).

Parcels A & B

On February 8, 2001, James filed suit in probate court seeking partition of the Estate's property. On February 12, 2001, Ronnie executed a Deed of Distribution in his capacity as personal representative of the Estate granting ownership of the three tracts to himself and James

as the heirs. (R.pp. 403-404; Plaintiff's Exhibit 8). On October 15, 2001, the probate court removed Ronnie as personal representative of the Estate and appointed James in his place. (R.p. 409; Plaintiff's Exhibit 10).

In early May 2003, an earthen dam supporting the eleven-acre, man-made pond on the Pond Tract was damaged and the pond drained completely. James again petitioned the probate court to partition the property alleging Ronnie damaged the pond. By order dated January 7, 2004, the probate court granted the requested relief. (R.pp. 414-419; Plaintiff's Exhibit 13). The probate court awarded ownership of the Pond Tract to James and the 10.9-acre Tract and Homestead Tract to Ronnie. *Id.* These later two tracts of land constitute Parcels A & B. *Id.*

Parcels C, D, & E

James also filed suit in a 2001, in order to partition lands held jointly with Todd. In an action captioned *James T. Judy vs. J. Todd Judy*; Case No. 2001-CP-18-122, the case was heard in front of Master-in-Equity, Patrick R. Watts. In August of 2001, Ronnie was dismissed as part of the case because he held no interest in the lands in question. (R.pp. 192 line 21 through 193 line 11). As a result of the action, Judge Watts issued an Order on November 15th, 2004 that conveyed to Todd Parcels C, D, & E. (Rpp. 391-393; Plaintiffs Exhibit 4).

Parcels F & G

Bobby filed a partition action concerning parcels F & G. In a Title to Real Estate (General Warranty Deed) that referred to an action captioned *Bobby Judy v. J. Todd Judy* 02-CP-18-2008, Bobby consented to granting parcels F & G to J. Todd Judy. (Rpp. 397-400; Plaintiffs Exhibit 6).

Parcels H, I, and J

As set forth *supra*, Parcels H, I, and J were owned by Ronnie outright. (R.p. 34, 42, 56).

Challenged Conveyances

On November 16th, 1998, Plaintiff Ronnie executed two conveyances, the consideration for each of which was "five dollars, love and affection." (R.pp 383-390; Trial Exhibits 3 and 3-A). By deed recorded in Book 2007, Page 096, Dorchester County Register of Deeds Ronnie conveyed to his son, Todd, his undivided one-half interest in tracts more fully described in the deed as 259 acres, 133 acres, 2.06 acres, 75 acres, 100 acres, 143 acres, and 10.9 acres. (R.pp. 383-386; Plaintiffs Exhibit 3). On the same day, he conveyed to both of his sons, Todd and Ryan jointly, title to tracts of 87.78 acres and 59 acres, by deed recorded in Book 2077, Page 092. (R.pp. 387-390; Plaintiffs Exhibit 3a). The lands described in the two 1998 deeds comprised land that formed, after partitions, Parcels C, D, E, F,G, H, I and J in the Lis Pendens filed with this action. (R.pp. 53-57, 76-80). These parcels were described by the court as the "remote conveyances." (R.p. 20).

In 2007, Ronnie Judy executed a conveyance for the consideration of "five dollars, love and affection." (R.pp. 429-432; Plaintiffs' Exhibit 15). By deed recorded in Book 5844, Page 224, Dorchester County Register of Deeds Ronnie conveyed to his son, Todd, his full interest in tracts more fully described in the deed as 9.29 acres and 10.9 acres. *Id.* The 9.29 acre and 10.9 acre tracts are described as parcels A and B. (R.p. 31). These parcels were described by the court as the "recent conveyances." (R.pp. 19-20). Thereafter, Todd conveyed the same to his mother, Wanda. (Rpp. 435-440; Plaintiffs' Exhibit 16).

Judgments/Creditors

On or about July 22nd, 1997, Judgment was entered in the Dorchester County Court of Common Pleas in favor of Larry Thomas Mills against Ronnie for the sum of $9,424.00. (R.pp. 334-336; Plaintiffs Exhibit 40, p. 6-8). After a number of post-judgment motions and an appeal, this judgment was satisfied for the amount of $14,546.49 on December 29th, 2000(R.p. 635; Plaintiffs Exhibit 40, p. 32 and R.p. 372; Defendant's Exhibit 10).

On May 2nd, 2007, Judgment was awarded on a jury verdict in favor of Respondents, Bobby and Kevin, against Appellant, Ronnie, for the amount of $37,668.00 by Order of the Dorchester Court of Common Pleas. (R.p. 463; Plaintiffs Exhibit 21). The Judgment was affirmed by the Court of Appeals of South Carolina, and the case was remitted by the Court of Appeals to the Dorchester County Clerk of Court on December 22nd, 2009. . (R.pp. 464-475; Plaintiffs Exhibit 22). This case involved the alleged destruction of a corn crop by Ronnie. *Judy v. Judy*, 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009). *Id.*

On April 9, 2007, the Dorchester Court of Common Pleas conducted a jury trial relating to a civil cause of action filed by James against Ronnie relating to the tort of waste and the destruction of a man made pond. The jury found in favor of James and awarded him $67,350 actual damages and $22,650 punitive damages. (R.p. 452; Plaintiffs Exhibit 18). After the court denied Ronnie's post-trial motions, Ronnie appealed to the Court of Appeals. The Court of Appeals found that James's suit for waste was barred on the basis of *res judicata. Judy v. Judy,* 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009). The South Carolina Supreme Court affirmed this ruling in a separate opinion *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011) *rehearing denied.*

Standard of Review

An action to set aside conveyances as fraudulent pursuant to the Statute of Elizabeth, as codified at S.C. Code § 27-23-10, is an action in equity. *Durham v. Blackard*, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993). In an appeal from an action in equity, tried by a judge alone, the Court may review the entire record and determine facts in accordance with its own view of the preponderance of the evidence. *Id.* "An appellate court may decide questions of law with no particular deference to the [circuit] court." *Verenes v. Alvanos,* 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010). Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived. *Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984). Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court. *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653-54 (Ct. App.1998).

Arguments

I. BECAUSE THE RESPONDENTS HAVE FAILED TO SHOW APPELLANT FAILED TO RETAIN SUFFICIENT PROPERTY TO PAY HIS INDEBTEDNESS OR THAT THE 1998 CONVEYENCES WERE MADE WITH A VIEW TO FUTURE INDEBTEDNESS OR WITH ACTUAL FRAUDLENT INTENT THE TRIAL COURT ERRED IN FINDING THE STATUTE OF ELIZABETH APPLIED.

The Statute of Elizabeth is codified in South Carolina Code Sections 27-23-10, et seq., and provides, in relevant part: "Every...conveyance of land...made to or for any intent or purpose to

delay, hinder, or defraud creditors and others of their just and lawful actions.. .must be deemed.. .to be clearly and utterly void...". Conveyances may be set aside for both existing creditors as well as subsequent creditors. *Mathis* v. *Burton,* 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995). As for existing creditors, conveyances can be set aside where the transfer was not made on a valuable consideration. No actual intent to hinder or delay creditors must be proven. *Id.* Instead, as a matter of equity, the transfer will be set aside if the Plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the Plaintiff in full - not merely at the time of transfer, but in the final analysis when the creditor seeks to collect his debt. *Mathis v. Burton*, supra, 319 S.C. at 264, 265; citing *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993). For subsequent creditors a conveyance may be set aside when (1) the conveyance was "voluntary," that is, without consideration and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors. *Mathis* v. *Burton, supra,* 319 S.C. at 265; citing *Gentry* v. *Lanneau,* 54 S.C. 514, 32 S.E. 523 (1899); *Parker Peanut Co.* v. *Felder,* 200 S.C. 203, 20 S.E.2d 716 (1942). Subsequent creditors must show "actual moral fraud" rather than legal fraud. *Gentry* v. *Lanneau,* 54 S.C. 514, 32 S.E. 523 (1899).

The Respondents have not met their burden of proof to establish the conveyances should be set aside. It is not disputed that both the recent and remote conveyances were voluntary. (R.p.19). Additionally, it is not disputed that Bobby and Kevin became judgment creditors on May 2nd, 2007 subsequent to the 1998 conveyances. (R.p 193 line 17).

A. **Recent Conveyances**

The court made an error of fact in finding that the recent conveyances should be set aside under the Statute of Elizabeth. The Respondents failed to prove that the Appellant failed to retain sufficient property to pay the indebtedness to the Respondent in full. While the Appellant may not have real property to satisfy the judgment against him, the Respondents' case in chief demonstrated that there is substantial reason to believe the Appellant has assets sufficient to pay his indebtedness in full. The Respondents demonstrated through the introduction of tax records, evidence of substantial income, the buying of personal and business property, and loans from a bank that the Appellant did in fact have property that could be used to pay his indebtedness. (R.pp. 36, lines 12 - 17, p. 40, lines 14 through p. 42, line 2, p. 48, line 12 through p. 53, line 3, 476-506, 597-618, 619-628; Plaintiffs Exhibits 23 – 27, 39, and 43). Additionally, there is no showing that the Respondents attempted to execute the judgment and the judgment was returned *nulla bona*. There is no allegation in the Complaint to that effect and there has been no offer of proof to that effect. In order to avail themselves of the protections of the Statute of Elizabeth, and set aside these conveyances, Respondents have to show that the Appellant did not retain enough real and personal property to pay his indebtedness and they have not.

B. **Remote Conveyances**

The court erred in finding that the remote conveyances should be set aside under the Statute of Elizabeth. The Respondents have failed to prove that this transfer was made with a view to future indebtedness or with an actual fraudulent intent to defraud creditors.

The May 2nd, 2007 Judgment, which is the only surviving judgment for this Statute of Elizabeth claim, was the result of an alleged intentional tort that occurred a minimum of 6 years

after the conveyances the Respondents are trying to overturn. (R.p 193 line 17, 326 line 14). At the time of the 1998 conveyances, the Appellant could not have considered that he would be subject to a lawsuit six years later where he would be accused of an intentional tort relating to the destruction of corn crops. *Id.* These acts are so remote in timeframe that they are unrelated to one another.

Additionally, Respondents have not shown that Ronnie acted with actual moral fraud. In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993); *King v. Oxford,* 282 S.C. 307, 318 S.E.2d 125 (Ct. App.1984). Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. *Id.* Beyond a showing of fraud; the Respondents must show actual, moral fraud. *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995). Actual fraud consists of deceit, artifice, trick, design, some direct and active operation of the mind. It includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another. Ralph King Anderson, Jr. South Carolina Requests to Charge- Civil, 2002, §18-1; see *Wright v. Public Sav. Life Ins. Co*, 262 S.C. 285, 204 S.E.2d 57 (1974).

The Respondents have shown that there may have been a conversation between Ronnie and James relating to the avoidance of a potential judgment and that Ronnie may have had some benefits of ownership. (Rpp. 181, lines 9 through 185, line 7, 112-163; Trial Transcript, p. 80,

line 9 through p. 84, line 7; Trail Transcript, testimony of witnesses West, Cantley, Utsey, and Dantzler). A 1998 conversation between the parties is not tantamount to fraud nor does it satisfy all the elements of fraud. Additionally, the facts show that Ronnie did not defraud anyone. Ronnie did not avoid the 1997 judgment creditor and satisfied this judgment in 2000. (R.p. 372, 635; Defendant's Exhibit 10, Plaintiffs Exhibit 40, p. 32). The fact that Ronnie may have enjoyed the benefits of ownership is of no import. While Ronnie may have continued to farm the property he already conveyed the Respondents have not shown that the act of farming constitutes actual moral fraud. There is no clear, cogent, and convincing evidence of any fraud or representation.

There is no doubt that the Respondents knew of Ronnie's conveyances in 2001 and 2002 when the partitions actions took place. The Respondents had constructive knowledge of the conveyances. It is matter of public record that Ronnie conveyed these lands in question in 1998. Additionally, Respondents demonstrate actual knowledge of these conveyances when:

a) In an action captioned James T. Judy vs. J. Todd Judy; Case No. 2001-CP-18-122, as a result of the action, issued an order on November 15th, 2004 which conveyed to Todd J. Judy Parcels C,D, & E. (Plaintiffs Exhibit 4)

b) In a Title to Real Estate (General Warranty Deed) referring to an action captioned Bobby Judy v. J. Todd Judy 02-CP-18-2008, Bobby consented to granting parcels F and G to J. Todd Judy. (Plaintiffs Exhibit 6)

These actions show that the Respondents could not have been ignorant of the conveyances, relied on this truthfulness, have a right to rely, nor have consequent and proximate injury. There is no

actual moral fraud in this case because no one was tricked or deceived by these conveyances of land. The creditor existing in 1997 was paid in full and the Respondents have no reason to assert they have been cheated when they knowingly participated in these transfers. (R.p. 372, 635; Defendant's Exhibit 10, Plaintiffs Exhibit 40, p. 32).

In short, there has been no showing by the Respondents that Appellant has failed to retain assets sufficient to satisfy the judgment such that the conveyances should be overturned. As to the remote conveyances, there has been no showing of actual moral fraud or that the conveyances were done with a view to a future indebtedness. Indeed, even if there were sufficient evidence to find that actual moral fraud or that the conveyances were made with a view to a future indebtedness, which the Appellant asserts there is not, it still remains true that any such alleged fraud or view to a future indebtedness was not fraud as it pertains to these Respondents or a view to the indebtedness owed to these Respondents. To allow the Respondents to piggy-back on speculative claims of fraud of another is impermissible and contrary to public policy. If the Respondents theory is allowed to prevail then inter vivos transfers will be subject to challenge by subsequent creditors in perpetuity, thus effectively affecting the marketability of title to countless parcels of land. For the foregoing reasons, the ruling of the trial court must be reversed.

II. THE REMEDY FASHIONED BY THE COURT BELOW, AS IT PERTAINS TO THE "REMOTE CONVEYANCES", EXCEEDED THE AUTHORITY OF THE COURT, DEPRIVED THE APPELLANT OF DUE PROCESS, AND IS MANIFESTLY INEQUITABLE.

Even if the Respondent had adequately established its entitlement to void the 1998 conveyances under the Statute of Elizabeth, the court below did not have the authority to fashion the remedy it reached. As the court below noted, "the 1998 conveyances (the 'remote conveyances') are more complex, inasmuch as, succeeding those conveyances, partitions were effected by Master's Deeds and by deeds exchanged by the parties to implement partition orders. Notably, all relevant partition deeds are in evidence before the Court, and the parties to the partition deeds are also parties to this action." (R.p. 22; Order, p. 16). However, the trial court overstepped its authority when it concluded that the appropriate remedy was "to declare, *sua sponte*, that the respective partition deeds that were the product of fraudulent conveyances be deemed reformed, the same as if [Appellant] were a party to the partition actions and putative grantor or grantee, as the case may be, to the partition deeds". *Id.* The court even notes that the consequence of its ruling is to treat the Appellant, a party who admittedly had no interest in the partition actions concerning the remote conveyances, as if he "were the real party in interest in the partition proceedings", *nunc pro tunc. Id.*

The remedy of subjecting the Appellant, *nunc pro tunc*, to the outcomes reached in partition actions to which he was not a party raises a number of concerns. It implicates the authority of the Court to reach and modify court orders of other courts; orders that have not been appealed from or challenged by appropriate post-judgment motion. It also implicates concerns over due process/jurisdiction inasmuch as the orders subject the Appellant to rulings that he did not participate in and inasmuch as it, *sua sponte*, grants relief not demanded in the Complaint. (R.pp. 108 lines 9-15, 323 lines 2 through 324 line 24). It also implicates the inequity in allowing parties to partition actions, who dealt with the Appellant's sons as the presumptive

owners of the property in accordance with the 1998 conveyances, to later challenge the very conveyances that they relied upon in the partition actions, all after the property had been divided amongst the parties. *Id.*

A. **Lack of authority/jurisdiction to reach the outcome set forth in the Order as it pertains to Parcels C – G.**

As set forth *supra*, in an action captioned James T. Judy vs. J. Todd Judy; Case No. 2001-CP-18-122, the portion of the first 1998 conveyance made by Appellant to J. Todd Judy that created joint ownership between J. Todd Judy and James Judy, resulted in an order that ultimately conveyed to J. Todd Judy Parcels C, D, and E, as described in the Lis Pendens filed by the Respondent. (R.pp.391-395; Plaintiffs Exhibit 4). Ronnie was dismissed as a party to the case because he held no interest in the lands in question. (R.pp. 287 line 1 through 288 line 19, 323). Similarly, as the result of a partition action captioned Bobby Judy v. J. Todd Judy; 02-CP-18-2008, the portion of the first 1998 conveyance made by Appellant to J. Todd Judy that created joint ownership between J. Todd Judy and Bobby Judy, resulted in a deed from Bobby Judy that conveyed to J. Todd Judy Parcels F and G, as described in the Lis Pendens filed by the Respondent. (R.pp. 397-400; Plaintiffs Exhibit 6). Ronnie Judy was not a party in this partition action.

The court below committed reversible error in granting the remedy of subjecting the Appellant, *nunc pro tunc*, to the outcomes reached in partition actions to which he was not a party, because in doing so the court below exceeded its authority to reach and modify court orders of other courts. The law in this regard is clear, "[a] prerequisite for a *nunc pro tunc* order

... is some previous action by the court that is not adequately reflected in its record." *Ex parte Strom*, 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000) citing *Dewees v. Sweeney,* 947 S.W.2d 861 (Tenn. Ct. App. 1996), *app. den'd* (1997); *Simmons v. Atlantic Coast Line R.R. Co.,* 235 F. Supp. 325, 330 (D.S.C. 1964) (*nunc pro tunc* entry cannot be made to serve the office of correcting a decision or of supplying non-action on the part of the court); *Carroll v. Carroll,* 338 S.W.2d 694, 695 (Ky. 1960) ("The error could not be corrected by *nunc pro tunc* order because such an order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an error or supply an omission of judicial action."); and 20 Am. Jur. *Courts* § 29 (1995). Moreover, the decree of a court of competent jurisdiction is final and conclusive if not reversed by the appellate court, or set aside or modified by direct proceedings, and cannot be collaterally attacked or modified.

The *Strom* case, *supra*, involved a situation where an attorney, believing his representation had terminated, failed to participate in the case, which was ultimately dismissed, and after the conclusion of the case filed a motion to be relieved of counsel *nunc pro tunc* to the date when he believed representation ended. *Ex parte Strom*, 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000). After some lengthy discussion of the policy reasons for Rule 11 motions as the sole vehicle for being relieved as counsel, the Court went on to conclude that, even if the trial court's order removing the attorney as counsel of record were appropriate under Rule 60, it should not have been granted nunc pro tunc. *Id*, 343 S.C. at 265, 539 S.E.2d at 703. In so concluding the South Carolina Supreme Court held that *nunc pro tunc* entry is not an appropriate vehicle to correct an error or supply an omission of judicial action. *Id.* Even more instructive is the non-

binding case of *Simmons v. Atlantic Coast Line R.R. Co.,* 235 F. Supp. 325, 330 (D.S.C. 1964) cited to by the *Strom* Court.

Simmons v. Atlantic Coast Line R.R. Co., 235 F. Supp. 325, 330 (D.S.C. 1964) involved an ineffective probate appointment of an administrator, which ineffective appointment was attempted to be rescued by a *nunc pro tunc* order appointing the administrator. What is of particular import in the *Simmons* case is the determination that the *nunc pro tunc* entry could not correct a decision or fill gaps due to non-action on the part of the court. *Id.* In so concluding, the *Simmons* Court noted that to allow the *nunc pro tunc* order giving efficacy to the appointment would go to the very heart of the lower court's jurisdiction over the matter. *Id.*

Similarly to the above cited cases, the order in the within action purports to correct an error or supply an omission in the partition actions, which errors were, in effect, created by the order of the court below. Plainly, the trial court recognized that its ruling had the effect of rendering moot the outcomes of the partition actions and, in an effort to rescue the "titles conveyed to the innocent parties in the partition actions" (R.p. 22; Order, p.16), it fashioned a remedy modifying the partition deeds so as to reflect that the Appellant was the real party in interest in the underlying partition actions. And, even more egregiously, the correction the court below attempts to effect is upon the orders and deeds of separate courts in distinct actions, over which the trial court had no jurisdiction and from which no appeal or other post-judgment motion had been taken, and to which the Appellant was not an interested party. If the outcomes of the partition actions relevant to the within action were applied *nunc pro tunc* to the Appellant then the trial court would in effect be subjecting Appellant to the rulings of courts in actions that

he was determined to have no interest and to which he did not participate in the outcome. This goes to the heart of the partition courts' jurisdiction over the parties and has serious implications on denial of due process to the Appellant. Appellant's interest in Parcels C - G, as revived by the order within, was not adjudicated in the partition actions and the trial court lacks the subject matter jurisdiction to, *sua sponte*, deem the respective partition deeds reformed "as if [Appellant] were a party to the partition actions". (R.p. 22; Order, p. 16)

B. **The outcome set forth in the Order as it pertains to Parcels C – G improperly subjects Appellant to collateral orders in actions where the underlying courts had no jurisdiction over the Appellant and deprives the Appellant of Due Process.**

As set forth *supra*, as the result of two separate partition actions, the portions of the first 1998 conveyance made by Appellant to J. Todd Judy creating joint ownership between J. Todd Judy, James Judy and Bobby Judy, resulted in either Master's Deeds or consent deeds whereby J. Todd Judy came to own Parcels C - G, as described in the Lis Pendens filed by the Respondent. (R.pp.391-395, 397-400; Plaintiffs Exhibit 4, Plaintiffs Exhibit 6). In the first of the partition action Appellant was dismissed for not being an interested party and in the second partition action the Appellant was not a party at all.

Notwithstanding the fact that Appellant was not an interested party in the partition actions affecting Parcels C – G, and notwithstanding the fact that the trial court herein had subject matter jurisdiction only over the Respondents' petition to set aside conveyances made by Appellant, the trial court's order, *sua sponte*, deems the respective partition deeds reformed "as if [Appellant] were a party to the partition actions". (R.p. 22; Order, p. 16). It is hard to imagine in

what scenario a court that has jurisdiction only over the matters presently before it could, *sua sponte*, exercise subject matter jurisdiction over outcomes in cases not presently before it and, *sua sponte*, subject a party to personal jurisdiction in cases to which he was not an interested party. Such an outcome is clearly erroneous and has the improper effect of depriving the Appellant of due process in the partition actions and implicitly giving the partition courts personal jurisdiction over Appellant and subject matter jurisdiction over property rights not before those courts.

Moreover, the trial court's order, *sua sponte*, granting relief not prayed for in the Complaint, is not supported by the record in the case and has the effect of denying the Appellant of due process in the within action. In essence, the trial court fashioned a remedy that was not demanded in the complaint, that was not advanced at trial, and that no testimony or evidence was offered concerning. (Plaintiffs Complaint) Even if granting relief, *sua sponte*, not demanded in the complaint or advanced at trial is within the trial court's discretion, the ruling was in error because there is not a scintilla of evidence offered concerning the outcome. There is no evidence that the outcomes in the partition actions would have been the same had Appellant been a party. There is no evidence that the Appellant had no claims or defenses that might have been asserted in the partition actions had he been a proper party at the time. In short, there is no evidence whatsoever offered by either party in support of the outcome reached. In fact, the only justification given for the *sua sponte* ruling was the trial court's desire to protect "the quality and marketability of the titles conveyed to the innocent parties to this action." (R.p. 22; Order, p. 16). Without a factual basis for the relief granted, the trial was in error to grant, *sua sponte*, the relief granted herein. See *Johnson v. Robinson*, 267 S.C. 660, 230 S.E.2d 815 (1976) (court erred in

granting more relief than was sought, in failing to make up a record sufficient to enable review, and in failing to set out facts upon which relief is granted; case remanded for a hearing de novo); *Jones v. Jones*, 270 S.C. 280, 241 S.E.2d 904 (1978) (where complaint does not specifically request relief, but does contain a prayer for 'such other and further relief as to this Court may seem just and proper', trial judge must set forth facts and conclusions of law upon which relief was based; remanded for further consideration). Accordingly, even if the *sua sponte* order of the trial court was within its authority to reach, the matter must, nonetheless, be remanded because the record within is devoid of any evidence concerning the outcome reached.

C. **As it pertains to the 1998 conveyances, the outcome reached by the trail court is manifestly inequitable.**

As set forth *supra*, the Respondents herein were acutely aware of the 1998 conveyances. There were two separate partition actions wherein it was acknowledged by the Respondents that J. Todd Judy was the just and legal joint owner of lands with James Judy and Bobby Judy as a result of the 1998 conveyances. (R.pp.391-395, 397-400; Plaintiffs Exhibit 4, Plaintiffs Exhibit 6). Appellant was either determined by the partition court to have no interest in the subject property or was not named as a party by the commencing party. James Judy even alleges that he suggested the transfer to Appellant and was aware of the transfer being effected. (R.pp. 181, line 9 through 185 line 7; Transcript of trial, p. 80, line 9 through p. 84, line 7).

The Respondents knew and conducted themselves in accordance with the understanding that the 1998 conveyances were valid and beyond reproach. The Respondents even benefitted from the 1998 conveyances in so much as they resolved partition actions with the grantee of the

1998 conveyances, thus quieting title to the partitioned lands in their names. It is, therefore, manifestly inequitable for the Respondents to subsequently take the position that the conveyances were fraudulent. To allow such an outcome permits the Respondents to acquiesce and condone the conveyances as proper for purposes that benefit them and to simultaneously challenge the propriety of the conveyances when so doing benefits their whim. It is a fundamental maxim of equity that, he who comes into equity must come with clean hands. In the instant action the Respondents knew and conducted themselves in accordance with their understanding that the 1998 conveyances were proper and now seek to advance factual position directly opposite of their prior representations and acts, all to the great detriment of the Appellant. Therefore, the Respondents should be estopped from promoting such an outcome and the court below was in error in finding that equity favored the outcome as to the 1998 conveyances.

III. BECAUSE NO CONTRACTUAL OR STAUTORY FOUNDATION EXISTED THE TRIAL COURT ERRED WHEN AWARDING ATTORNEYS FEES.

The trial court's order espouses the theory that attorney's fees ought to be awarded in this case pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, Sections 15-36-10, et. seq. Code of Laws of South Carolina for 1976, as amended, Code Section 27-23-30, the South Carolina Code of Civil Procedure ("SCRCP"), principles enunciated by the United States Supreme Court in *the Roadway Express, Inc. vs. Piper*, 447 U. S. 752, 100 S.Ct. 2455 (1980).

There is no dispute that the parties in this case did not enter into a contractual relationship. The only evidence that the court finds to support its award of legal fees is the conveyances of Parcels A and B by Ronnie in 2007 conveyance to Todd and Todd's conveyance of the same parcels to Wanda the following year. (R.pp. 24-25; Order, p. 18 - 19).

However, none of these avenues of awarding attorney's fees applies to the present case. Normally attorney fees can only be recovered under contract or by statute. *Baron Data Systems, Inc. vs. Loter, 297 S.C.382, 377 S.E.2d 296 (1989).* There is no common law right to recover attorney's fees. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001); *Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750 (1997). In South Carolina, courts interpret statutes that grant the power to award attorney's fees narrowly because these laws were enacted in derogation of the common law. *Id.*

South Carolina Frivolous Civil Proceedings Sanctions Act Section 15-36-20 states that sanctions may be appropriate when a litigant participates in: (a) filing a frivolous pleading, motion, or document ...(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

There is no evidence or findings by the court to support that the Respondents made any frivolous, motions, or arguments. For this reason an award of attorney's fees cannot be supported by the South Carolina Frivolous Civil Proceedings Sanctions Act.

While there are several rules under the SCRCP that allow the award of attorney's fees as sanctions or costs. None of these rules, however, apply to this particular situation. *See* Rule 11,

SCRCP (allowing an award of attorney's fees when the court finds the opposing party has filed pleadings that were made in bad faith and/or frivolous); Rules 30 and 37, SCRCP (granting award of attorney's fees as sanctions for discovery abuse); Rule 45, SCRCP (allowing attorney's fees for placing on undue burden on a person responding to a subpoena); Rule 54, SCRCP (allows imposing attorney's fees as costs when authorized by statute); Rule 56, SCRCP (permitting for sanction awarding attorney's fees when affidavits are made in bad faith).

S.C. Code § 27-23-30 commonly referred to as the Statute of Elizabeth, by its own terms does not refer to attorney's fees. "A statute allowing attorney fees is in derogation of the common law and must be strictly construed." *Dowaliby v. Chambless*, 344 S.C. 558, 562, 544 S.E.2d 646, 648 (Ct. App.2001). Because the Statute of Elizabeth does not specifically describe the process of awarding attorney's fees it cannot support the award of attorney's fees.

Likewise, it is improper for the court to rely on the principles enunciated by the United States Supreme Court in the *Roadway Express, Inc. vs. Piper*, 447 U. S. 752, 100 S.Ct. 2455 (1980) to award attorney's. In *Roadway Express* the Court examined the power of the Federal Courts to award attorney's fees pursuant to 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 37 in light of abuses in the discovery process in an employment discrimination case. The Court goes on to describe that there is a bad faith exception to the award of attorney's fees "The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "'[B]ad faith' may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973).

As previously asserted, there have been no findings by the court that the Appellants engaged in any abuse of the discovery process. Further, the bad faith exception advanced by the

Respondents essentially argues that the "bad faith" exception is satisfied by the Appellants fraud in the complained of transfers. The fraud advanced by Respondents is an essential element of their claims and not the foundation of a bad faith exception. Moreover, the conveyances were ineffective to avoid the Respondents action because they were made during the pending action and subject to the protections of the Respondents' Lis Pendens. (See S.C. Code Ann. § 15-11-20 (1976) (any person obtaining an interest in land subject to a lis pendens is bound by all proceedings taken after the filing of the lis pendens to the same extent as if made a party to the action). Bad faith entitling a variance from the normal prohibition on the award of attorney fees in the absence of a contract or statute allowing for recovery is normally bad faith in the nature of frivolous proceedings, vexatious litigation or other misconduct in the litigation (i.e. suborning perjury, intimidating witnesses, bribing officials, etc.). The rule on this is clear and it requires a showing of extrinsic fraud in the proceedings. If the alleged fraud in the conveyances were sufficient to award attorney fees then attorney fees would be available in every fraud action, and they clearly are not.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Special Referee and/or remand the case for hearings consistent with the reasons stated.

Respectfully submitted,

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August 24, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Martin R. Banks, Special Referee

Case No. 2007-CP-18-1794

James T. Judy, Bobby R. Judy
and Kevin Judy,

Respondents,

v.

Ronnie F. Judy, J. Todd Judy
Ryan C. Judy and Wanda B.
Judy, Defendants,

Appellant.

Of Whom: Ronnie F. Judy is
Appellant

PROOF OF SERVICE

I certify that I have served the Appellant's Motion To Amend Final Brief, Final Brief of Appellant (Amended), Certificate of Counsel, and a Proof of Service to James T. Judy, Bobby T. Judy, and Kevin Judy, by depositing a copy of it in the United States Mail, postage prepaid, on February 29, 2012, addressed to their attorney of record, Capers G. Barr, III, Post Office Box 1037, Charleston, South Carolina 29402-1037.

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Ronnie F. Judy, J. Todd Judy,
Ryan C. Judy and Wanda B.
Judy, Defendants,

of whom Ronnie F. Judy *is*, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Amended Final Brief of Appellant, filed with the Court on August 24, 2012, complies with Rule 211(b), SCACR Rule 211.

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August 24, 2012

The Honorable Tanya A. Gee
Atten: Laurie Field
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29201

RE: James T. Judy, Bobby T. Judy, and Kevin Judy v. Ronnie F. Judy, J. Todd Judy, Ryan C Judy and Wanda B. Judy, Case No. 2007-CP-18-1794

Dear Ms. Field,

As a result of your August 16, 2012 letter, it came to my attention that I had inadvertently violated Rule 211(b) of the South Carolina Appellate Court Rules. In order to correct this error, enclosed are copies of Appellant's Motion to Amend Final Brief, Final Brief of Appellant (Amended), Certificate of Counsel, and a Proof of Service.

Thank you for your understanding in the matter and please advise if you need anything further.

With kindest regards I am

Very truly yours,

Craig Stanley, S.C. Bar # 79420

Attorney for Appellant

Enclosures (as stated)
Cc: Capers G.Barr, III Esq. (w/ enclosure)

RECEIVED
AUG 24 2012
SC Court of Appeals