THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

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 APPELLANT

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Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRANSFER OF CLIFTON'S INTEREST IN THE PROPERTY WAS A FRAUDULENT CONVEYANCE WHERE THE TESTIMONY OF BOTH OWNERS ESTABLISHED A VALID PURPOSE FOR THE TRANSFER AND THERE WAS INSUFFICIENT EVIDENCE TO PRESUME FRAUDULENT INTENT?

2. WHETHER THE TRIAL COURT ERRED IN SETTING ASIDE THE CONVEYANCE WHERE THE PROPERTY WAS TRANSFERRED BY BOTH OWNERS IN A SINGLE DEED AND THERE WAS NO EVIDENCE OF FRAUDULENT INTENT ON THE PART OF DEFENDANT WHITEMAN?

3. WHETHER THE TRIAL COURT FAILED TO EXERCISE DISCRETION IN ADMITTING TESTIMONY REGARDING A SECOND, LATER CONVEYANCE WHERE THE ISSUE WAS NEITHER RAISED IN THE PLEADINGS NOR TRIED BY CONSENT?

STATEMENT OF THE CASE

The Plaintiff, First Citizens Bank and Trust Company, Inc. (hereinafter "First Citizens"), initiated this action by filing its Summons and Complaint on October 15, 2010 and Amended Summons and Complaint on October 20, 2010. The Amended Complaint contained three causes of action against three Defendants. (R. pp. 14-20). Named Defendants were Park at Durbin Creek, LLC (hereinafter "Durbin Creek"), Kenneth E. Clifton (hereinafter "Clifton"), and Linda G. Whiteman (hereinafter "Whiteman"). *Id.* In its first cause of action, First Citizens alleged that Clifton transferred his interest in a tract of land owned jointly with Whiteman, some 370 acres (hereinafter "the property"), to Durbin Creek in violation of the Statute of Elizabeth. Amended Complaint, p. 2, (R. p. 15). Second, First Citizens alleged that Clifton and Whiteman conspired to frustrate collection of debts owed by Clifton, specifically by virtue of the aforementioned transfer. *Id.* at 5, (R. p. 18). Finally, First Citizens sought to partition the property. *Id.* at 6, (R. p. 19). Each Defendant timely answered and denied the substantive allegations of the Amended Complaint.

Following discovery, the parties dismissed the second cause of action alleging civil conspiracy by stipulation. Stipulation of Dismissal p. 1, (R. p. 29). However, Whiteman remained a Defendant for the limited purpose of asserting her interest in the property. *Id.*, (R. p. 29).

The case proceeded to trial on the two remaining causes of action on June 26, 2014 before the Honorable Eugene C. Griffith, Jr. Tr. p. 1, (R. p. 40). The Plaintiff was represented by James H. Cassidy and Ella S. Barberry. Tr. p. 6:7-9, (R. p. 45). Defendants Clifton and Durbin Creek were represented at trial by J. Calhoun Pruitt, Jr.

Tr. p. 6:13-15, (R. p. 45). Defendant Whiteman appeared but was not represented by counsel. Tr. p. 7, (R. p. 46). At the close of Plaintiff's case, the Defendants moved for a directed verdict as to the partition cause of action. Tr. p. 157:14 – p. 158:6, (R. pp. 196-197). The Defendants also moved for a directed verdict as to the fraudulent conveyance cause of action. Tr. p. 158:18 – p. 159:4, (R. pp. 197-198). The Defendants renewed their motions at the close of Defendants' case. Tr. p. 170:25 – p. 171:2, (R. pp. 209-210). Judge Griffith ruled that the partition cause of action was premature. Tr. p. 171:21 – p. 172:2, (R. pp. 210-211). The Court took the sole remaining cause of action and pending motions under advisement. Tr. p. 171:3-5, (R. p. 210). By written Order filed August 5, 2014, the Court ruled that Clifton's transfer of his interest in the property to Durbin Creek was fraudulent and set aside the conveyance. August 5, 2014 Order at 10, (R. p. 10). The Court also ruled that a second transfer, whereby Clifton transferred his interest in Durbin Creek to another LLC, was void *ab initio*. August 5, 2014 Order at 11, (R. p. 11).

By written motion filed August 13, 2014, the Defendants moved to Reconsider, Alter, or Amend Judge Griffith's Order. (R. pp. 31-32). Judge Griffith denied the motion in a written Order filed September 25, 2014. (R. pp. 12-13). Clifton and Durbin Creek timely filed their notice of appeal on October 24, 2014. (R. pp. 38-39). This appeal followed.

STATEMENT OF FACTS

Defendant Clifton had, for many years prior to this action, been engaged in various real estate development businesses. Tr. p. 106:13 – 107:3, (R. pp. 145-146). To finance his business interests, Clifton frequently borrowed money from commercial lenders, including Plaintiff First Citizens. Clifton or individuals working on his behalf often organized limited liability companies to facilitate ownership of various properties. Tr. p. 107:4-14, (R. p. 146).

Clifton previously owned an undivided one-half interest in a tract of land in Laurens County, the property, in his individual name with Whiteman. Tr. p. 133:25 – p. 134:15, (R. pp. 172-173). On September 18, 2008, Clifton and Whiteman transferred their interest in the property to a newly formed limited liability company, Durbin Creek, in exchange for an equivalent ownership percentage in the new company. Tr. p. 42:16-22, (R. p. 81); Tr. p. 51:3-7, (R. p. 90). At the time of the transfer, Clifton was indebted to Plaintiff First Citizens pursuant to three separate development loans unrelated to the property. Tr. p. 117:22 – p. 118:6, (R. pp. 156-157). At the time of the transfer, Clifton was current on his loan obligations. Tr. p. 120:20 – p. 122:8. (R. pp. 159-161).

As Clifton's loans to First Citizens became due, he requested renewals for each loan. Tr. p. 121:16-23, (R. p. 160). Clifton had previously received renewals for the same loans, and as late as November, 2008, had no reason to doubt that the loans would again be renewed. Tr. p. 120:1-5; Tr. p. 128:14 – p. 129:25, (R. p. 159; pp. 167-168); Defendants Exhibit 1, (R. p. 214). However, First Citizens ultimately declined to approve renewal, accelerated the loans, and commenced foreclosure proceedings against Clifton and the collateral associated with each of the three loans. Tr. p. 16:18-24, (R. p.

55). First Citizens also sought and obtained deficiency judgments against Clifton. Following unsuccessful attempts to enforce the deficiency judgment against Clifton, First Citizens initiated the instant action

At trial, all three witnesses with knowledge of the Durbin Creek transaction testified substantially the same: that Linda Whiteman had been the impetus for the transfer owing to her fears about liability from hunters on the property. First, Whiteman herself testified that she pressed Clifton to transfer the property into a limited liability company. Tr. p. 48:21 – 51:2, (R. pp. 87-90). Next, Renee Gilreath[1] testified regarding formation of a limited liability company for the property, at the insistence of Whiteman. Tr. p. 81:6 – 82:1, (R. pp. 120-121). Finally, Clifton testified that he agreed to transfer the property only after repeated and frequent urging from Whiteman. Tr. p. 133:4-24, (R. p. 172). Clifton also testified that the timing of the transfer was the result of unrelated business activities; specifically, Clifton instructed his staff to form Durbin Creek at the same time they were already preparing articles for other limited liability companies. Tr. p. 134:16-24, (R. p. 173).

There was no evidence that Whiteman was ever indebted to the Plaintiff. There was no evidence presented of Whiteman's intent to defraud the Plaintiff.

Finally, Clifton's testimony at trial demonstrated that foreclosures by First Citizens and the general decline of the real estate market ultimately eroded his financial standing to such an extent that he could not repay his obligations. Tr. p. 134:9 – p. 135:16, (R. pp. 173-174).

[1] The transcript incorrectly identifies Ms. Gilreath as Renee Gilree.

STANDARD OF REVIEW

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459 (2012) (*citing Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998)). An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. *Id.* (citations omitted). On appeal from an equitable cause of action, "this Court has jurisdiction to find facts in accordance with its own view of ... the evidence." *Pinckney v. Warren*, 544 S.E.2d 620, 344 S.C. 382 (S.C., 2001) (*citing Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995)).

The admission of evidence related to a second conveyance not raised in the pleadings is subject to review for an abuse of discretion. *Simmons v. Berkeley Elec. Coop. Inc.*, 404 S.C. 172, 744 S.E.2d 580 (S.C. App., 2013). ("As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court.") (*quoting Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 241, 616 S.E.2d 431, 435 (Ct.App.2005). "The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision." *Id.* (*quoting Seabrook*, 365 S.C. at 242).

ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING TRANSFER OF THE PROPERTY WAS A FRAUDULENT CONVEYANCE WHERE THE TESTIMONY OF BOTH OWNERS ESTABLISHED A VALID PURPOSE FOR THE TRANSFER AND THERE WAS INSUFFICIENT EVIDENCE TO PRESUME THE REQUISITE FRAUDULENT INTENT.

Pursuant to the Statute of Elizabeth, "[e]very gift, grant, alienation, bargain, transfer, and conveyance of lands ... for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken ... to be clearly and utterly void.... S.C. Code Ann. § 27–23–10(A) (2007). In construing the relevant statutory language, our courts have identified two separate conditions that justify setting aside an otherwise valid conveyance. "First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration." *Oskin v. Johnson*, 480 S.C. 390, 399-400, 735 S.E.2d 459 (2012) (*citing Future Group, II*, 324 S.C. 89, 96, 478 S.E.2d 45, 48-49 (citations omitted); *McDaniel v. Allen*, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975) (citations omitted)).

The trial court correctly concluded that the transaction whereby Clifton and Whiteman transferred their interest in the property to Durbin Creek was supported by adequate consideration.[2] August 5, 2014 Order at 8, (R. p. 8). In order to set aside a conveyance supported by adequate consideration, the Plaintiff must prove by clear and convincing evidence the grantor's intent to defraud. *Oskin v. Johnson*, 400 S.C. 390, 398, 735 S.E.2d 459, 464 (2012) ("The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land." (citations omitted)). Accordingly, the key issue at trial and in this appeal is Clifton's intent in transferring the property.

[2] Indeed, transferring ownership of property into a newly formed limited liability company, whose only asset is the transferred property, for an equivalent ownership percentage in the company is- by definition- supported by adequate consideration. Specifically, whatever the value of the subject property here, the value of consideration was necessarily equivalent to Clifton's interest in the property where he received an equal percentage ownership in the company into which the property was transferred.

In this case, all three witnesses with direct knowledge of the transfer testified that Clifton transferred the property at the insistence of Whiteman. Tr. p. 48:21 – 51:2, (R. pp. 87-90); Tr. p. 81:6 – 82:1, (R. pp. 120-121); Tr. p. 133:4-24, (R. p. 172). Whiteman testified that she wanted the property in a limited liability company based on her fear of liability that might arise from hunting activities on the property.[3] Tr. p. 48:21 – 51:2, (R. pp. 87-90). Furthermore, while Whiteman testified regarding longstanding concerns about liability, she also emphasized that recent events related to the subject property lead her to again pressure Clifton to place the property in a limited liability company. *Id.* Clifton testified that he would not have transferred the property to an LLC but for Whiteman' insistence. Tr. p. 154:7-11, (R. p. 193). Finally, Renee Gilreath's testimony established that the timing of the transfer was related to legitimate business purposes for the convenience of office staff in preparing multiple transactions simultaneously. Tr. p. 81:10-22, (R. p. 120).

The trial court, notwithstanding the foregoing testimony, concluded that there was sufficient evidence to infer fraudulent intent. August 5, 2014 Order at 10, (R. p. 10). The Court reasoned that several "badges of fraud" permitted an inference of fraudulent intent.[4] Our courts have identified specific badges of fraud that, if found to exists, create

[3] Ironically, several of the individual hunting the property were employed by Plaintiff First Citizens. Tr. p. 21:8-12, (R. p. 60). Indeed, John Wood, a Senior Vice President that had worked closely with Ken Clifton, acknowledged hunting on the property and conversations about liability from hunters on the property. *Id.*; Tr. p. 28:5-8, (R. p. 67).

[4] Here it is important to note the trial court's reasoning that fraud may be inferred. Assuming, *arguendo*, there was sufficient evidence of any particular badge of fraud, our courts have reasoned that such indicators of intent create a rebuttable presumption rather than an inference. *See, e.g., Royal Z Lanes v. Collins Holding Corp.*, 524 S.E.2d 621, 337 S.C. 592 (1999) ("A badge of fraud creates a rebuttable presumption of intent to defraud.") (*citing Dinkins v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942); *James v. Martin*, 150 S.C. 75, 147 S.E. 752 (1929)). It is well settled that a rebuttable presumption shifts the burden of production such that the party against whom the presumption is directed must go "forward with evidence to rebut or meet the presumption." SCRE, Rule 301. Furthermore, the burden of persuasion is unaffected a rebuttable presumption. *Id.* Accordingly, if the Court found sufficient evidence of any badge of fraud, the

a rebuttable presumption of fraudulent intent.[5] In this case, to the extent any particular badge of fraud applies, Clifton presented sufficient evidence to rebut the presumption of fraud.

The trial court reasoned that Clifton controlled the timing of the transfer at issue here. August 5, 2014 Order at 10, (R. p. 10). That conclusion, while admittedly true, does little to shed light on the purpose of the transfer. Furthermore, the only relevant badge of fraud as to timing concerns the pendency or threat of litigation. *Haddock*, 246 B.R. at 815. The transfer at issue here took place before the commencement of litigation, or even the threat of litigation. Indeed, the transfer here took place some two months prior to when the Plaintiff bank represented that an extension was nearing approval.[6] Defendant's Exhibit 1, (R. p. 214). While the trial court noted that Clifton could have transferred his interest at an earlier time, again admittedly true, the availability of earlier opportunities to transfer the property is irrelevant where the transfer ultimately took place before Clifton had any reason to doubt his ability to satisfy ongoing obligations or suspect litigation was forthcoming.

The trial court also pointed to assumptions regarding Clifton's knowledge to find badges of fraud here. First, the court reasoned that Clifton knew he could not pay his debts to First Citizens when they became due. August 5, 2014 Order at 9, (R. p. 9).

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appropriate question becomes whether the rebuttable presumption is then overcome by countervailing evidence rather than whether the court may draw an inference.

[5] Specific badges of fraud include (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)).

[6] In email correspondence from November 25, 2008, John Wood of First Citizens relayed to Renee Gilreath that "I think we have everything worked out for the extension thru [sic] July, just waiting on the appraisals and the budget."

However, as argued above, Clifton did not yet have any reasons to suspect declination of his renewal request. He also testified that at the time renewal was under active consideration, he had the ability to access additional credit to service his debt to First Citizens if necessary. Tr. p. 122:22 – 123:6, (R. pp. 161-162). The trial court also concluded that Clifton knew failure to pay would result in foreclosure. August 5, 2014 Order at 10, (R. p. 10). However, while Clifton certainly would have known that foreclosure was possible if he refused to pay his obligations, there was no evidence presented that he suspected foreclosure was likely or imminent at the time of the subject transfer. Clifton's ability to access other means to service his debt only dissipated in response to First Citizen's election to pursue foreclosure immediately after declining renewal. Tr. p. 134:9 – p. 135:16, (R. pp. 173-174). Renee Gilreath also testified that the First Citizens foreclosure actions triggered an avalanche of subsequent foreclosures by other banks. Tr. p. 78:13 – 79:3, (R. pp. 117-118).[7]

Finally here, the trial court opined that Clifton's initial intent to hold the Durbin Creek property for retirement belied his professed legitimate purposes as he knew he was placing the property beyond the reach of creditors. August 5, 2014 Order at 10, (R. p. 10). Again, that analysis yields little the point towards any particular badge of fraud. Clifton's original purpose for obtaining the property is irrelevant to his intentions for the challenged transfer. His knowledge that forming a limited liability company provided protection from creditors, particularly in light of Whiteman's concerns, serves to underscore the legitimacy of his intentions. Indeed, if this court were to adopt the

[7] Taken as a whole, the records reflects that at the time of the challenged transfer, Clifton intended to renew his loans, believed renewal approval was forthcoming, and had access to capital to continue paying the loans. While subsequent events eliminated Clifton's access to credit, and ultimately eroded his financial standing, the relevant inquiry into his intent is properly focused on his state of mind at the time of the transfer.

position that a party's familiarity with liability protection is sufficient to presume fraud, then the formation of any entity that offers liability protection might be viewed as suspect.[8]

In the most recent South Carolina case concerning an allegedly fraudulent conveyance, our Supreme Court clarified that legitimate protection of financial interests is insufficient to create a badge of fraud. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459. In that case, Johnson owned oceanfront property jointly with his uncle. *Oskin*, 400 S.C. at 393. Oskin obtained a judgment against Johnson pursuant to a breach of contract action. *Id.* Thereafter, when the oceanfront property was threatened by foreclosure unless Johnson could refinance, the wife of the co-owner formed a limited liability company to take assignment of the existing note and mortgage. *Id.* The transaction was collateralized through the pledge of securities, allowing the limited liability company to pledge sufficient assets to secure the deal without requiring the company's owner to liquidate securities at a deflated value. *Id.* However, the nature of the transaction also allowed the newly formed limited liability company to assume priority status superior to Oskin's judgment. *Id.* In denying Oskin's claims that the transaction was a fraudulent conveyance, the Supreme Court dismissed concerns that the formation of a limited

[8] Admittedly, the formation of an LLC here ultimately provided Clifton some protection from creditors. Here the timing is key. Clifton sought protection from potential liabilities identified by Whiteman and unrelated to his financial standing when he neither suspected nor anticipated liabilities related to his business ventures. Legitimate protection from one form of liability ought not serve as the basis for presuming fraud in avoiding other forms of liability absent clear evidence that the debtor used the stated purpose as pretext for the impermissible avoidance of creditors. *See, e.g., Judy v. Judy*, 403 S.C. 203, 742 S.E.2d 672, 676 (Ct.App. 2013) (concluding that transfers made to avoid potential liability from one creditor still subject to Statute of Elizabeth where debtor intends to "confound or hinder creditors"). The reasoning in *Judy* does not apply where, as here, transfer of ownership to a limited liability was intended to protect the owners from one form of liability, hunters, but ultimately has the unintended consequence of affecting the interests of subsequent creditors.

liability company allowed a transfer designed to protect the property from Oskin's judgment. *Oskin*, 400 S.C. at 398.

In this case, there is no basis for presuming fraud merely because a transaction legitimate on its face ultimately placed property beyond the reach of Clifton's creditors. Indeed, Clifton's claims are stronger in some respects than those in *Oskin*, as the transfer at issue in that case occurred after the debtor was subject to a judgment.

The Supreme Court has also clarified the interplay between the Statute of Elizabeth and the protection of ownership interests by innocent parties. In *McDaniel v. Allen*, Grant Allen transferred his interest in certain property he owned jointly with his wife, Ada Allen. 265 S.C. 237, 217 S.E. 773, 774 (1975). The transfer at issue in that case took place mere days before McDaniel obtained a judgment against Grant Allen. *Id.* However, that Court concluded that the transfer was supported by valuable consideration and that any intent to defraud Grant Allen's creditors was not imputable to his wife. *Allen*, 265 S.C. at 243. The Court also reasoned that Ada Allen had a legitimate purpose in securing her own interests in the property. *Allen*, 265 S.C. at 244.

Here as in *McDaniel*, inquiring into the intention behind the transfer necessarily requires evaluating the interests of a co-owner unrelated to the judgment creditor. Whiteman's testimony established her desire to protect her interest in the subject property from potential liabilities. That Clifton acceded to her demands is insufficient evidence of fraudulent intent to presume the entire transfer is void under the Statute of Elizabeth. Of further significance, *McDaniel* concerned a transfer completed at a time when judgment against the debtor was imminent. 265 S.C at 239. In this case, while Clifton as an experienced real estate developer was admittedly familiar with the nature of foreclosure

proceedings, the 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. He did not and thus the presumption of fraud was erroneous.

The Statute of Elizabeth serves to protect the interests of creditors and others from fraudulent efforts to defeat enforcement of valid obligations. However, the statute by its plain letter and as interpreted by our courts does not apply to every scenario where a creditor fails to receive recompense. When, as here, the evidence suggests that the challenged transfer was made pursuant to a legitimate purpose prior to the initiation of litigation or the belief that legal action was forthcoming, there is no basis for presuming fraud and setting aside the transfer. Furthermore, to the extent First Citizens presented evidence to establish a badge of fraud in this case, Clifton and Durbin Creek provided sufficient evidence to meet and rebut any presumption. The Court below erred in inferring fraud to set aside the transfer.

2. THE TRIAL COURT ERRED IN SETTING ASIDE THE CONVEYANCE WHERE THE PROPERTY WAS TRANSFERRED BY BOTH OWNERS IN A SINGLE DEED AND THERE WAS NO EVIDENCE OF FRAUDULENT INTENT ON THE PART OF DEFENDANT WHITEMAN.

Clifton and Whiteman transferred ownership of their interest in the property to Durbin Creek in a single instrument. Amended Complaint at Exhibit "A" p. 1, (R. p. 21). Setting aside the challenged conveyance here necessarily affected Whiteman's interest. The court cannot, as a matter of law, set aside half of an instrument and thereby divide the deed. In setting aside the conveyance where there was no evidence of fraudulent intent on the part of Whiteman, the court below erred.

The Statute of Elizabeth provides, in relevant part, that "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). However, the reach of statutory protections is limited "only as against that person or persons, his or their heirs, successors, executors, administrators and assigns." *Id.*

First, the Court below erred in setting aside the conveyance absent evidence of fraudulent intent by Whiteman.[9] Legitimate actions by co-owners of property to protect their own interests are beyond the remedial reach of the Statute of Elizabeth. As previously noted, the Supreme Court recently addressed the legitimate decision by an innocent co-owner to form a limited liability company and take assignment of the note and mortgage for the property at issue in that case. *Oskin*, 400 S.C. at 398. While the transaction was admittedly designed to avoid foreclosure without liquidating assets, and preserve the priority of the mortgage as superior to the interest of the judgment creditor, the Court determined that there was no fraudulent intent on the part of the grantor.[10] *Oskin*, 400 S.C. At 398-399. Similarly, the Supreme Court previously refused to set aside a deed transferring the interest of the debtor to an innocent co-owner. *McDaniel*, 265 S.C. at 243-244. In that case, the court noted that the evidence presented at trial

[9] The parties dismissed the only cause of action, alleging civil conspiracy, directed at Whiteman. Stipulation of Dismissal at 1, (R. p. 29). At trial, there was no evidence of fraudulent intent on the part of Whiteman.

[10] In *Oskin*, the limited liability company took assignment of the note and mortgage directly from the bank. 400 S.C. at 398. Thus, the grantor in the challenged transaction was the bank. *Id.* However, the Court's reasoning applies with equal force to the transaction at issue here. Whiteman was both a co-owner and grantor in the challenged conveyance. Absent any evidence of fraudulent intent on the part of Whiteman, the transaction here could not have been a fraudulent conveyance as both owners transferred their interest in a single instrument. Thus, in order to prevail, the Plaintiff was necessarily required to prove fraudulent intent on behalf of the both grantors.

failed to establish fraud on behalf of the wife, "and merely shows a purpose to secure her own Bona fide claim." *McDaniel*, 265 S.C. at 244. That same reasoning applies with equal force to Whiteman here, and absent evidence of fraud on her part, the Court erred in setting aside the conveyance.[11]

In this case, the trial Court attempted to set aside Clifton's conveyance without reaching Whiteman's interest. August 5, 2014 Order at 8, (R. p. 8). However, Clifton and Whiteman affected the challenged transfer in a single deed. Where the challenged transfer involves two grantors in a single deed, the entire transfer must stand or fall. In attempting to select a third option that does not exist, the court below impermissibly divided the deed.[12]

3. THE TRIAL COURT FAILED TO EXERCISE DISCRETION IN ADMITTING TESTIMONY REGARDING A SECOND, LATER CONVEYANCE WHERE THE ISSUE WAS NEITHER RAISED IN THE PLEADINGS NOR TRIED BY CONSENT.

At trial, First Citizens sought to introduce testimony regarding Clifton's subsequent transfer of his interest in Durbin Creek to Streamline Management, LLC (hereinafter "Streamline"). Tr. p. 85:16 – 86:6, (R. pp. 124-125). Defendants Clifton and Durbin Creek timely objected to the proffered testimony on the grounds of relevance, in that Streamline was not a party to the action nor was the second transfer raised in the pleadings. Tr. p. 86:13-16, (R. p. 125). The Court allowed the testimony over

[11] It should be noted, however, that in *McDaniel* the Court evaluate the wife's claims as grantee under the challenged instrument. 265 S.C. at 243. Here, Whiteman was both a grantor an obtained an interest in the grantee company. However, the required result is the same. In the absence of evidence of fraudulent intent by Whiteman, the Court erred in reaching her interest.

[12] The undersigned is aware of no South Carolina cases that address division of a deed as outlined herein. However, it logically follows that a conveyance challenged as fraudulent pursuant to a single deed admits of but two possible conclusions: either the conveyance is fraudulent or it is not. Attempting to divide the deed, as the Court below did, merely highlights the failure of proof as to the intent of the grantors.

Defendant's objection.[13] On the basis of the disputed evidence, the Court ruled that the second transfer was *void ab initio*. August 5, 2014 Order at 11.

Streamline was not a party to this action. Amended Complaint, (R. pp. 14-20). Neither Streamline nor Clifton's conveyance of his interest to Durbin Creek is referenced in the Amended Complaint. (R. pp. 14-20). Furthermore, in light of Clifton and Durbin Creek's objections to testimony regarding Streamline and the second transfer, they did not consent to try the issue by consent. *See, e.g., Simmons v. Berkeley Elec. Coop. Inc.*, 404 S.C. 172, 178, 744 S.E.2d 580 (S.C. App., 2013) (*quoting* Rule 15(b), SCRCP).[14]

As the issue was not otherwise before the Court, the decision to admit testimony regarding Streamline is subject review for an abuse of discretion. *Simmons*, 404 S.C. at 180. In reviewing the admission of evidence, the objecting party must demonstrate prejudice. *Id.* In this case, Defendants Clifton and Durbin Creek had no notice that First Citizens sought to set aside the second conveyance. While there was some overlap in evidence and witnesses between the two conveyances, the prejudice to Clifton and Durbin Creek is apparent from the circumstances. They might have prepared their case differently, or called additional witnesses to meet the new allegations.

CONCLUSION

In light of the foregoing, there was insufficient evidence to presume fraudulent intent attached to Clifton and Whiteman's conveyance of the property to Durbin Creek. The insufficiency of proof here is underscored by the clear and convincing evidence

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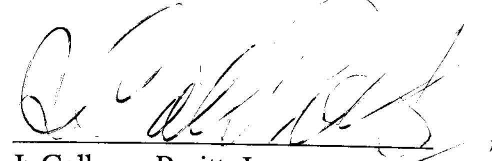
[13] The Defendants re-crossed Ms. Gilreath regarding the second transfer, but maintained an objection to the entire line of questioning. Tr. p. 98:16-18, (R. p. 137). In arguing for a directed verdict at the close of Plaintiff's case, the Defendants again objected to the Court's consideration of a second transfer and an additional party not present in the pleadings. Tr. p. 159:17 – p. 160:2, (R. pp. 198-199).

[14] Defendants Clifton and Durbin Creek also raised the issue in their Rule 59 motion. Motion to Reconsider, Alter, or Amend, (R. pp. 31-32). Judge Griffith denied the motion. September 25, 2014 Order, (R. pp. 12-13).

standard applicable to actions alleging a fraudulent conveyance. To the extent there was evidence of any particular badge of fraud, Clifton rebutted such presumption by providing sufficient evidence of the bona fides of the transfer. Furthermore, in the absence of evidence related to fraudulent intent on the part of Whiteman, setting aside the deed was an error of law. Finally, the issue of Clifton's subsequent transfer of his interest in Durbin Creek was neither raised in the pleadings nor tried by consent. The Court below erred in ruling on an issue not properly before that court. In exercising de novo review, this Court should REVERSE the decision below.

Respectfully Submitted,



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May 7, 2015.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

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,

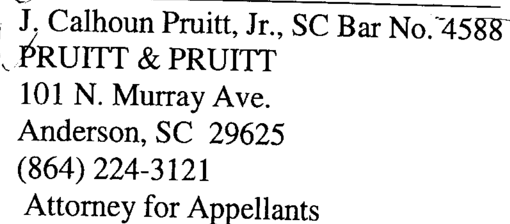
v.

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 this Final Brief complies with Rule 211(b), SCACR.



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