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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

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

Respondent.

v.

Donald W. Lancaster,

Appellant.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE CASE

On November 2, 2010, Respondent, Frank Gordon, as Trustee of the Dorothy S. Gordon (Deceased) Trust ("Respondent"),[1] filed this action against Appellant Donald Lancaster ("Appellant") to collect on judgments obtained in 2001 and 2002, and costs awarded in 2005 against Appellant's then-deceased uncle, Rudolph Robert Drews ("Drews"). In the initial and amended complaint, Respondent asserted claims of fraudulent conveyance, constructive trust, civil conspiracy and negligence/aiding and abetting. (R. pp. 150-169). Appellant denied the allegations and asserted various affirmative defenses, including statute of limitations and adequate consideration. (Supp. R. pp. 1092-1097).

Respondent also filed this suit against Shirrese Brockington as Special Administrator of the Estate of Rudolf Robert Drews ("Ms. Brockington") and Jessie B. Atkinson, Individually, and as Personal Representative of the Estate of Effie D. Drews ("Ms. Atkinson"). In November 2011, Respondent settled with both Drews' estate and Effie Drews' Estate. Both Estates assigned to Respondent their rights of recovery against Appellant (R. pp. 751-762). In his Second Amended Complaint, paragraph 3, Respondent included the Estates' rights that were assigned to him in enforcing these judgments.

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

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

Appellant lacked credibility. (R. p. 580, lines 2-6; R. p. 582, line 11-p. 583, line 5). On August 19, 2013, the Trial Court issued its written Order and Judgment[2] (R. pp. 10-27), which found for Respondent on the fraudulent conveyance claim and awarded him judgment in the amount of $211,677.30. The Trial Court found against Respondent on his claims of constructive trust, civil conspiracy, and negligent aiding and abetting.

In September 2013, Appellant filed Motions for Reconsideration to Amend the Court's Findings pursuant to Rule 52(b) and to Alter or Amend the Court's Judgment pursuant to Rule 59(e), (S.C.R.C.P. Rule 52(b) and 59(e)) (R. pp. 296-306), which were denied by Orders dated May 6, 2014 and May 19, 2014 (R. pp. 1-2).

On June 6, 2014, Appellant filed his Notice of Appeal. The amount of the judgment has not been appealed; rather, a minority of the findings have been appealed.

STATEMENT OF THE FACTS

A. The Underlying Judgments

The underlying Judgments that give rise to this case stem from Drew's promotion of a new enterprise known as Builders Station, a hardware store. In 1996, Drews marketed and sold stock in this company to the Respondent. (R. pp 1044-1048). In 1997, the company failed. On April 16, 1999, Respondent filed suit against Drews in the Charleston County Court of Common Pleas for the illegal sale of stock under S.C. Code Section 35-1-1490, alleging violation of the South Carolina securities laws. *Gordon v. Drews, et al.* (Case No. 1999-CP-1001407). In December 2001, a three-day non-jury trial was held in *Gordon v. Drews,* which culminated in a $50,000 Judgment against Drews, plus

[2] Throughout this Brief, "Order" will refer to the August 19, 2013 Order and Judgment that is being appealed. Any other Order will be set forth with specificity as to name and date.

$15,782.12 in interest. By Order dated March 15, 2002, Respondent was also awarded $42,693.50 in attorney fees, for a total Judgment of $108,482.62.

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

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

On September 25, 2007, Drews died, and his estate was opened on or about October 26, 2007, Case No. 2007-ES-10-1518. On February 8, 2010, the estate's inventory and appraisement was filed, which indicated the Estate had no assets. (R. pp. 732-739). Various contested proceedings took place over who would serve as the Administrator of the Estate.

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

On February 27, 2010, Drews' wife, Effie D. Drews ("Mrs. Drews"), also died, several days before her deposition, and on March 30, 2010, her estate was opened. On June 29, 2010, the estate's inventory and appraisement was filed, which indicated a net worth of $55,460.04. (R. pp. 745-749).

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

1. Drews' $100,000 Transfer to Appellant

In the early 1990s, Mr. and Mrs. Drews were in financial trouble. Mr. Drews had a failed business, was suffering from creditor claims, and was living off his credit cards – which he could not pay. (R. p. 764, p. 2, para. 4 and R. p. 765, para. 6). By early 1992, the IRS was closing in on collecting tax debt from Mr. Drews. (R. p. 764, p. 2, para. 4). Despite these debts that Drews could not pay, in early 1992, Drews transferred $100,000 to Appellant. (R. p. 322, lines 17-19; R. p. 956). In 2010, Appellant testified in his pre-suit deposition that the $100,000 was a gift with which he could do anything he wanted, including buying stocks. (R. p. 418, lines 6-19). After Appellant conferred with his new counsel for this suit, he claimed *for the first time at trial* that the $100,000 was not a gift (R. p. 338, lines 10-24), but was given on condition that he purchase a house in which the Drews could live the remainder of their lives. (R. p. 323, lines 5-8). The $100,000 transfer was substantially all of Drews' assets at the time. (R. p. 764, p. 2, para. 5).

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

On May 22, 1992, Appellant invested Drews' $100,000 and $60,000 of his own money in the purchase of 17 Bainbridge Drive in Charleston, South Carolina (hereinafter "Bainbridge Property"). (R. p. 765, p. 3, para. 6; R. pp. 709-712). Soon thereafter, Appellant executed an agreement whereby he purportedly gave the Drewses a life estate in the Bainbridge Property. (R. pp. 665-666). Appellant did not create the alleged life estate by deed, and neither the life estate nor the $100,000 transfer was recorded in public records to give proper notice. (R. pp. 665-666; R. p. 508, line 22 – R, p. 509, line 3). The "Agreement" conveying the life estate stated that the consideration for the transaction was

"the sum of TEN ($10.00) AND NO/100S DOLLARS and love and affection for my uncle." (R. pp. 665-666). Notably, the "agreement" does not mention the $100,000 conveyance that Appellant alleged was the consideration for this conveyance.

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

On June 12, 1992, Appellant obtained a $40,000 open-end mortgage on the Bainbridge Property from South Carolina National Bank ("SC National Equity Line of Credit"). (R. pp. 696-699). From 1993 to 1995, Appellant gave the Drewses several checks totaling $40,000, which were drawn from South Carolina National Bank. (R. p. 324, lines 20-23; R. p. 692). This $40,000 was allegedly paid to Drews so that he could pay his living expenses. (R. p. 328, lines 9-10). Appellant did not have Drews sign notes of indebtedness, or even "IOUs" for any of these payments. (R. p. 325, lines 5-11). Appellant was using the equity line of credit on the house, largely paid for by Drews, to return to Drew's part of the $100,000 transfer from Drews to Appellant. (R. p. 344, lines 18-21). The Drewses, and not the Appellant, paid the interest incurred on the SC National Equity Line of Credit. (R. p. 344, line 22 – R. p. 345, line 3). Appellant did not charge Drews for any additional interest for these alleged loans. (R. p. 450, line 19 – R. p. 451, line 18).

Appellant testified that he tracked all the activities relating to the $40,000 of "loans" in a spreadsheet, including any interest Drews paid. He further testified that the spreadsheet entries were made contemporaneously. (R. p. 388, lines 9-22). However, at trial, two versions of the spreadsheet, both dated "February 3, 1997," were admitted which contained material differences.[3] (R. pp. 692-695 and R. pp. 1066-1071; R. p. 467, line 4

[3] One version of Appellant's amortization schedule indicated a balance forward of $44,211.20 and the other indicated a balance forward of $50,292.80, resulting in a 1996

– R. p. 468, line 20). One of the principal differences is that the one produced at trial showed Appellant being owed approximately $6,000 more than the one that had been produced at his deposition. (R. p. 468, lines 16-20). Appellant was unable to explain this discrepancy. The discrepancy in these two identically dated documents indicated that the accounting records were not contemporaneously kept, contrary to Appellant's testimony.

4. Bainbridge Property Is Exchanged for Nuffield Property

In 1995, Drews and Appellant allegedly agreed that they would substitute a one-story house of the Drewses' choice for the two-story Bainbridge house because Drews was having medical issues with his knees. (R. p. 360, lines 13-15; R. p. 379, line 18 – R. p. 380, line 6). Although Appellant claims he gave Drews power of attorney to find and buy a house, Appellant was unable to produce for the Trial Court a Power of Attorney evidencing the same. (R. p. 360, line 13 – R. p. 361, line 11). On April 27, 1995, Drews, allegedly acting as Appellant's Power of Attorney, signed an agreement to purchase the replacement residence located at 2 Nuffield Road in Charleston, South Carolina (hereinafter "Nuffield Property"). (R. pp. 672-676) Mrs. Drews (not Appellant) made a $1,000 down payment on the house. (R. p. 362, lines 3-11). On May 15, 1995, Appellant increased the $40,000 SC National Equity Line of Credit to $79,250 (further drawing out Drews' original transfer). (R. pp. 696-699 and R. pp. 701-704). The very next day, on May 16, 1995, Appellant purchased the Nuffield property for $125,000. (R. pp. 667-671).

On May 17, 1995, Appellant executed a "Memorandum of Lease and Subordination Agreement" for the Nuffield Property. (R. pp. 677-681) However, this document was not

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balance-forward discrepancy of $6,081.60. (R. pp. 692-695 and R. pp. 1066-1071). Appellant's amortization schedules contained contradictory information regarding interest paid in 1995.

a "lease" as entitled, but rather a document that purported to give the Drewses a life estate in the Nuffield Property, allegedly in substitution for the purported Bainbridge Property Life Estate. (R. pp. 677-681). This document was recorded but did not give meaningful notice of Drews' interest in the property since it was mistitled a "Lease." The Memorandum cites the consideration for the life estate as "Ten and No/Hundreds Dollars ($10.00) and other good and valuable consideration." (Id). Appellant again did not create and record a deed for this life estate.

5. Appellant Sells Nuffield Property after Mr. and Mrs. Drewses' Deaths

From 1992 until Mr. and Mrs. Drewses' deaths in 2007 and 2010 respectively, Appellant held their alleged residence(s) in his name while allowing them full use, control, and enjoyment of the residence(s). Following their deaths, on April 29, 2010, Appellant sold the Nuffield Property for $246,000 (R. p. 359, lines 21-23, R. pp. 741-744), and received $121,000 in profit from its sale(Supp. R. pp. 1098-1102.

C. Conveyances Relating to Mortgages on Drews' Meeting Street Property

1. The $40,000 Meeting Street Mortgage

In March 1995, Drews granted Appellant a $40,000 mortgage on Drews' property located at 1705 Meeting Street in Charleston, South Carolina (hereinafter "$40,000 Mortgage"). (R. pp. 629-630). Appellant did not provide Drews any contemporaneous consideration for the $40,000 Mortgage. (R. p. 454, lines 4-10). No note was ever executed on this mortgage, and this mortgage was not recorded until November 1995, approximately eight (8) months after it was executed. (R. pp. 629-630; 333, lines 9-22, R. p. 346, line 25 – R. p. 347, line 6). Drews allegedly paid the interest Appellant incurred for this line

of equity. (R. p. 344, line 22 – R. p. 345, line 3). Drews did not pay any additional amounts to Appellant for allegedly loaning him the money. (R. p. 451, lines 9-18).

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

In 1996, Drews marketed and sold stock in Builders Station hardware to many investors, including the Respondent (R. pp. 1044-1048). In 1997, the company failed, and on April 16, 1999, Respondent filed suit against Drews in the Charleston County Court of Common Pleas for the illegal sale of stock under S.C. Code § 35-1-1490, alleging violation of the South Carolina securities laws. *Gordon v. Drews, et al.* (Case No. 1999-CP-1001407).

3. The $100,000 Meeting Street Mortgage

On April 15, 1998, after Respondent's cause of action had accrued, Drews granted Appellant an additional $100,000 Mortgage on Drews' 1705 Meeting Street property (hereinafter "$100,000 Mortgage"). (R. pp. 633-637). Once again, Appellant did not give Drews any contemporaneous consideration for the $100,000 Mortgage (R. p. 349 line 25 – R. p. 350, line 8; R. p. 454, lines 4-10), and no note was ever executed on this mortgage (R. p. 324, line 20 – R. p. 325, line 11; R. p. 333, lines 9-22). Even though Appellant testified that the $100,000 mortgage was to replace the $40,000 mortgage, the $40,000 mortgage was not contemporaneously satisfied when the $100,000 mortgage was executed. (R. p. 350, lines 9-14; R. p. 350, line 25 - R. p. 351, line 13). Therefore, the public record showed $140,000 of debt on this property.

4. The $20,000 Meeting Street Mortgage

In July 1999, three months after Respondent filed suit against Drews, Drews granted Appellant a third mortgage on the property, this time for $20,000 property

(hereinafter "$20,000 Mortgage"). (R. pp. 638-642). Drews gave Appellant this mortgage even though he already had at least $60,000 to $100,000 in unused security provided by the $100,000 mortgage Appellant already had. (R. p. 331, lines 15-18). Once again, Appellant did not give Drews any contemporaneous consideration for the $20,000 Mortgage. (R. p. 339, line 19 – R. p. 340, line 3). As with the previous two mortgages, no note was ever executed on this mortgage. (R. p. 324, line 20 – R. p. 325, line 11; R. p. 333 lines 9-22). And no prior mortgages were contemporaneously satisfied.

D. The Assignment of a $190,000 Meeting Street Mortgage to Appellant

In November 2001, *one month* before commencement of the trial in the *Gordon* action, which resulted in the Judgments that are the subject of this suit (R. p. 21, para. 59), the following transactions occurred:

- On November 5 and 6, 2001, Appellant executed satisfactions for the three existing Mortgages ($40,000, $100,000, $20,000) (R. pp. 627-628; R. pp. 631-632; R. pp. 638-642; R. p .20, para. 50);
- The next day, Drews sold the Meeting Street Property and received a $190,000 Note and Mortgage from a third-party purchaser (Charleston Antiques) as consideration for the purchase (R. pp. 719-720; R. p. 20, para. 51);
- Simultaneously, Drews allegedly assigned the $190,000 Meeting Street Note and Mortgage to Mrs. Drews (R. pp. 643-648 and R. pp. 649-650; . p. 364, lines 8-17; R. p. 20, para. 52);
- Mrs. Drews then allegedly gave Appellant a $50,912 Note on the Proceeds of the Sale of Meeting Street Property (R. p. 658; R. p., 20 para. 53); and

- Mrs. Drews then purportedly assigned the $190,000 Mortgage to Appellant (hereinafter "$190,000 Assignment") in full, allegedly as security for the $50,912 Meeting Street Note (R. pp. 651-652).

Importantly, Appellant was not assigned the $190,000 Meeting Street Note. (R. p., 21, para. 58). Moreover, no evidence was presented that Appellant gave any contemporaneous consideration for either the $50,912 Meeting Street Note, or the $190,000 Assignment. (R. p., 21 paras. 54 and 57). Further, Appellant testified that he was not contemporaneously aware of the $190,000 Assignment at the time it was executed on his behalf. (R. p., 21, para. 56).

In 2001 and 2002, Gordon obtained Judgments against Drews.

From 2001 to 2005, Drews (by way of Mrs. Drews) received payments on the $190,000 Note and Mortgage for the joint benefit of Mr. and Mrs. Drews, and passed a portion of these payments on to Appellant for the alleged $50,912 Meeting Street Note. (R. p. 21, para. 61).

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

In September 2005, the Drewses received approximately $130,000 as final payment on the $190,000 Meeting Street Note (R. pp. 721-725) and paid to the Appellant the remaining amount on his $50,912 Meeting Street Note.[4] (R. p. 21, paras, 62 and 63). In 2005, Appellant received more than $40,000 related to this transaction. (R. p. 22, paras.

[4] Appellant issues a satisfaction for the $50,912 Meeting Street Note (R. p. 658) and assigned back to Mrs. Drews the $190,000 Mortgage (R. p. 653-654).

64-65). Notably, the Trial Court found that Appellant and Drews failed to report the alleged $50,912 Meeting Street Note's interest as either income or interest expense on their respective tax returns (R. pp. 812-912); and that failure evidences that they did not actually treat this Note as a legitimate loan and continued to hide evidence of the transaction from the public, creditors included. (R. p. 22, paras. 65-67). As Appellant has not challenged this or any other findings related to the $190,000 Meeting Street transaction, the Trial Court's rulings related to these transactions are the law of this case. *S.C. Coastal Conserv. League v. S.C. Dep't of Health and Envt'l Control*, 363 S.C. 67, 610 S.E.2d 482 (2005).

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

At trial, Respondent presented testimony of certified public accountant Richard Livingston, who was duly qualified as an expert in forensic accounting. (R. p. 446, lines 24-25). Based on his detailed review of extensive financial records relating to all of the above transactions, Mr. Livingston testified to a reasonable degree of certainty in his expertise, that in looking at the transactions in their entirety between Appellant and Drews, they did not make economic or financial sense. (R. p. 447, line 24 – R. p. 448, line 2). Mr. Livingston explained that not only did Appellant's and Drews' transactions deviate from normal business and accounting principles, but they also did not make family or favor sense either, as the parties had consistently chosen to accomplish the transactions in multiple, convoluted steps instead of in one or two simple steps. (R. p. 25, para. 78). He further testified that the transactions created a situation whereby Drews was able to maintain control over and benefit from his assets while keeping them in someone else's name. (R. p. 448, lines 3-5). Based upon his analysis, Mr. Livingston further opined that the only consistent purpose of these transactions was to shelter and hide them from creditors. (R.

p. 448, lines 7-9; R. p. 25, para. 79). The Trial Court found Mr. Livingston to be both knowledgeable and credible. (R. p. 25, para 80).

F. The Trial Court Found that Appellant was Not a Credible Witness

The Trial Court found that Appellant's:

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

(R. p. 24, para 74). The Trial Court based its assessment of Appellant, in part, on his evasiveness in answering Respondent's counsel's questions (as compared to his very direct and knowledgeable answers to his own counsel), his contradictory testimony regarding his transactions with Mr. and Mrs. Drews, and his claimed lack of knowledge regarding these transactions as well as typical business practices. (R. pp. 24-25, para. 74). The trial judge made the following observations on the record at the end of the trial before entering its Order:

> And the court does not find it believable on direct examination[5] the defendant appeared to not understand anything about notes and mortgages or anything else. However, on direct he was very knowledgeable about basis about any question that his defense counsel asked him and even knew the cap on the gift tax at the time of the transfer of the 100,000 dollars, I believe 1.2 million dollars; he was very knowledgeable.

(R. p. 582, lines 11-18).

Appellant's feigned lack of knowledge is in stark contrast to Appellant's testimony that he is a very experienced corporate internal auditor who has worked for two-and-a-half decades auditing businesses (R. p. 320, lines 2-15; R. p. 25, para 74); and to his testimony

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

that he understands financial investments and has handled them all his life. (R. p. 320, lines 18-21). Appellant's detailed records and amortization schedules (R. pp. 1066-1071), as well as his complicated, self-prepared tax returns (R. pp. 889-912), also show Appellant to be a very knowledgeable and sophisticated businessman when it comes to financial matters.

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

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

(R. p. 582, line 19 - p. 583, line 5).

STANDARD OF REVIEW

This appeal involves certain monetary conveyances, made between family members, deemed fraudulent by the Trial Court pursuant to the Statute of Elizabeth. S.C. Code § 27–23–10, *et. seq*. Clear and convincing evidence is the evidentiary standard which governs fraudulent conveyance claims brought under the Statute of Elizabeth. *Oskin v. Johnson*, 400 S.C. 390, 396-397, 735 S.E.2d 459, 463 (2012). These claims are ones in equity, and a de novo standard of review applies. *Id.* at 397, 735 S.E.2d at 463 (citing *Future Group, II v. Nationsbank*, 324 S.C. 89, 97 n. 6, 478 S.E.2d 45, 49, n. 6 (1996)) The *de novo* standard does not relieve an appellant of his burden to demonstrate error in the trial court's findings of fact. *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109

(2012) (citing *Pinckney v. Warren*, 344 S.C. 382, 387-388, 544 S.E.2d 620, 623 (2001); *Eldridge v. Eldridge*, 398 S.C. 113, 728 S.E.2d 24 (2012). Consequently, this Court should affirm the Trial Court's factual findings unless appellant satisfies his burden in establishing that the preponderance of the evidence is contrary to these findings. *Lewin v. Lewin*, 96 S.C. 349, 355, 721 S.E.2d 1, 4 (Ct. App. 2011) ("[W]e will affirm the decision of the trial court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court.") (citing *Lewis v. Lewis,* 392 S.C. 381, 390, 709 S.E.2d 650, 654-655, (2011)).

Moreover, while this court reviews such equitable matters under a *de novo* standard, the *de novo* standard "does not require this court to disregard the factual findings of the trial court nor ignore the fact that the court is in the better position to assess the credibility of the witnesses." *Lewis v. Lewis,* 392 S.C. at 390, 709 S.E.2d at 654–55; *Pinckney v. Warren*, 344 S.C. at 387, 544 S.E.2d at 623. The trial judge's credibility determinations are to be given great deference on appeal. *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.,* 353 S.C. 327, 338, 577 S.E.2d 468, 474 (2003) (citations omitted). "The credibility of testimony is a matter for the finder of fact to judge....Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to the trial court findings." *South Carolina Dept. of Soc. Serv. v. Forrester,* 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) (citations omitted).

ARGUMENT

I. This Court Must Affirm the Trial Court's Ruling That Appellant Failed to Meet His Burden Of Proof since Appellant Did Not Challenge This Ruling.

The Trial Court ruled:

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

(R. pp. 26-27, pp. 17-18). The Trial Court relied on two independent grounds to support its ultimate conclusion that the transfers at issue constituted fraudulent conveyances under the Statute of Elizabeth: 1) Respondent proved violations of the Statute of Elizabeth by clear and convincing evidence; and 2) Appellant failed his burden to prove the bona fides of the voluntary inter-familial transfers by clear and convincing evidence. Appellant's issues on appeal relating to the fraudulent conveyances challenge only the first finding and fail to challenge the second finding. (Appellant's Initial Br., p. 1).

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

"It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998)("unchallenged ruling, right or wrong, is the law of the case and requires affirmance"; *see also Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 692 (2010) ("Fund failed to appeal the single commissioner's finding to the full commission; thus, it is the law of the case."); *Robinson v. Estate of Harris*, 388 S.C. 630, 641 n.8, 698 S.E.2d 222, 228 n.8 (2010) (doctrine of laches became law of case where petitioners failed to raise issue in petition for rehearing or initial brief on appeal).

Here, Appellant's Brief is entirely void of any challenge to the applicability of the interfamilial analysis or the Trial Court's finding that Appellant failed to satisfy his burden under the interfamilial analysis. Therefore, the Trial Court's "interfamilial" ruling is now the law of the case, as Appellant abandoned any argument to the contrary. Appellate consideration is, therefore, precluded, and this Court must affirm the Trial Court's Order.

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

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

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts.

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

As set forth above, the Appellant appeals the Trial Court's determination that "Plaintiff proved the fraudulent nature of these transfers" and not the Trial Court's determination that the "Defendant Lancaster failed to meet his burden" in establishing otherwise. (R. p. 26-27, para. (viii)). Therefore, the Trial Court's unchallenged ruling --

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

II. The Conveyances Appellant Appealed Were Found To Be Part Of Multi-Step Transactions That Were Designed To Defraud Creditors, And As Appellant Failed To Challenge Key Rulings Related To This Scheme, He Has Not Properly Preserved His Issues For Appeal.

Appellant failed to appeal the Trial Court's ruling regarding *all* of Drews' and Lancaster's transactions, which the Trial Court found to be part of a fraudulent pattern and scheme:

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

(R. p. 26 para. (i)). Rather, Appellant appealed only the findings related to the $100,000 transfer from Drews to Appellant; the $40,000 payments to Drews from the line of credit on the property largely purchased with this $100,000; and the third Mortgage for $20,000. By appealing only a few conveyances or "steps," Appellant concedes the rest; thus, the pattern of fraudulent transfers is conceded for purposes of this appeal. As these transactions are intrinsically related, and therefore, inseverable from the Trial Court's Rulings: Drews' $100,000 cash payment to Appellant provides the underlying capital from which Appellant returns money back to Drews through the alleged $40,000 in "loans," which "loans" allegedly later justify the $40,000 mortgage, which together with the $100,000 mortgage and $20,000 mortgage creates the impression that the Meeting Street property is excessively encumbered, and forms the alleged basis for the Assignment of the $190,000 mortgage to the Appellant.

Appellant's failure to challenge the key rulings on all of these transactions has resulted in the Trial Court's ruling that all of these transactions constituted a fraudulent

scheme are the law of the case. *Ex Parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006)(As a general ruling, an unchallenged ruling, right or wrong, is the law of the case).

III. Respondents' December 5, 2001 And March 15, 2002 Judgments Against Drews Are Valid Given The Action Underlying This Appeal To Enforce These Judgments Extend Their Active Period.

Contrary to Appellant's contention, the South Carolina Supreme Court has held that a judgment remains active past ten years where a proceeding to enforce the judgment is pending and that:

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

The Linda McCompany, Inc. v. Shore, 390 S.C. 543, 554-55, 703 S.E.2d 499, 505 (2010). The Supreme Court's rationale applies equally here: the Respondent, who is diligently attempting to enforce his judgments through an enforcement-related proceeding, should not be at the mercy of the court to render a decision in this proceeding within a pre-determined time frame.

Respondent has done what the Supreme Court required in *Linda McCompany*: he sued to enforce the judgments, whereby extending the statutory period of active energy on them: Respondent opened supplemental proceedings in August 2006; and filed this action against the Drewses' estates and Appellant in November 2010. The suit was not brought earlier against Appellant in part due to: Drews' appeal of the judgments; Drews' failure to produce records in contravention of a court order; the Drewses' deaths; disputes within the Drewses' estates; and Appellant's and Drews' effectiveness in hiding assets. Respondent timely brought this suit after he discovered Appellant's involvement in the fraudulent conveyances. Under *Linda McCompany*, the Respondent's diligence in attempting to collect on these judgments by seeking the court's aid through supplemental proceedings

and through this lawsuit, extended these judgments' active energy through when the Court issues a final order in these proceedings.

Appellant confuses the issue of the judgments' active period and enforceability with the issue of whether an action to enforce the judgments can proceed against him. However, the South Carolina Supreme Court has held that Section 15-39-30 is not a statute of limitations.

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

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

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

IV. The Trial Court Correctly Ruled That Drews' $100,000 Payment To The Appellant Constituted A Fraudulent Conveyance, And Appellant Neither Showed By Clear And Convincing Evidence That Valuable Consideration Was Given Nor That The Transaction Was Bona Fide.

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

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

S.C. Code Ann. § 27-23-10(A) (2007). To bring a Statue of Elizabeth claim, a creditor need not show that the debt was reduced to judgment at the time of the transfer. *First Citizens Bank and Trust Co. of S.C. v. Scofield*, 286 S.C. 520, 522, 335 S.E.2d 248, 249 (Ct. App. 1985) (court held son's transfer of residence to mother while indebted to others and while continuing to live in same was fraudulent conveyance). As stated by the *Windsor* Court:

> Existing creditors shall have conveyances set aside under two conditions: First, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration.

Windsor Props, Inc., 331 S.C. at 470-471, 498 S.E.2d at 860 (citations omitted). Similarly, "Subsequent creditors may have conveyances set aside when: (1) the conveyance was "voluntary," that is, without consideration, and; (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors." *Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013) (quoting *Mathis v. Burton*, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995)). Subsequent creditors must show actual, moral fraud through evidence that a party acted with the intent

to delay, hinder, and/or defeat creditors in the collections of their debts. *Judy* at 209, 742 S.E.2d at 675.

With a voluntary interfamilial transfer, the burden shifts to the transferee to establish the transfer was valid.[6] *Id.* at 209, 742 S.E.2d at 675 (citing *Windsor Props., Inc.*, 331 S.C. at 471, 498 S.E.2d at 860); *Coleman v. Daniel II*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973) (transferee has burden to show valuable consideration and bona fides of transaction by clear and convincing evidence when interfamilial transfers are questioned as fraudulent or voluntary)(quoting *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814 (1937)).

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

It is undisputed that Drews was the Appellant's uncle, and the test for interfamilial conveyances applies as set forth in *Judy*, 403 S.C. at 209, 742 S.E.2d at 675. Therefore, in determining whether the Trial Court properly held that the $100,000 mortgage was a fraudulent conveyance, it is the Appellant's burden to establish both valuable consideration and the bona fides of the transaction by clear and convincing testimony. *Id.* at 209, 742 S.E.2d at 675; *Coleman*, 261 S.C. 198, 199 S.E.2d 74). However, regardless of who has the burden, there is clear and convincing evidence in the record that no valuable consideration was given for the $100,000 monetary transfer to the Appellant.

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

In Appellant's 2010 sworn deposition testimony, Appellant unequivocally stated that the $100,000 was a gift, and that he could have bought stocks with it. (R. p. 418, lines 6-21; R. p. 13, paras. 2-3). Appellant explained that it was important that the $100,000 was a gift so that his tax basis in the property would be higher. (R. pp. 13-14; R. 336, line 10 - R. p. 337, line 5). He also testified that he prepared a gift tax return for Drews to sign, and that he and Drews mailed it to the Internal Revenue Service. (R. p. 337, lines 1-10 and lines 18-25). Notably, Appellant did not keep a copy of the alleged tax return. (R. p. 14, para. 3; R. p. 409, line 16 – R. p. 411, line 12 and R. p. 412, lines 10-14).

At trial, Appellant contradicted his earlier representations in sworn testimony (and to the United States Government if his testimony regarding the gift tax returns is believed), and claimed that the $100,000 transfer was bargained for consideration, and not a gift, for granting Drews a life estate in the Bainbridge and then Nuffield properties. (R. p. 322, line 23 - R. p. 323, line 17; R. p. 14, para. 5). He further testified that, even though it was not a gift, he participated with Drews in reporting it as a gift to the Internal Revenue Service. (R. p. 323, lines 1-17; R. p. 337, lines 6-10; and R. p. 337, line 18 - R. p. 338, line 12). When questioned by Respondent's attorney about filing the gift return that he knew was false under penalties of perjury with the United States government, Appellant responded that <u>at the time</u> Appellant thought it was gift. (R. p. 338, lines 13-16). Having to explain this fraudulent act, Appellant testified that it was not until eighteen years later, in 2010, when the lawsuit was filed against him and he saw his attorney in this case, that he decided the $100,000 was not a gift. (R. p. 338, line 20 – R. p. 339, line 16 and R. p. 396, line 18 – R. p. 397, line 10).

At trial, when Appellant was confronted with the anomaly of the failure to keep a copy of any tax return, let alone an important one that he had "required" to be filed, Appellant attempted to claim that Drews' copier was broken that day. (R. p. 412, lines 10-14). Appellant was impeached by his 2010 deposition testimony when he testified that he had "kept an eye out" for the return when he inspected Mr. Drews' desk immediately before his deposition. (R. p. 412, line 15 – p. 117, line 11). Appellant then had to concede he knew the document did not exist when he gave his sworn deposition testimony that he had "kept an eye out" for it. (R. p. 415, line 23 – R. p. 416, line 11).

The Trial Court found that there was no contemporaneous consideration for the $100,000 conveyance (R. p. 26, para. ii), and that the Respondent's testimony lacked credibility (R. pp. 24-25, para. 74). The South Carolina Supreme Court has held that, where a transferee offers contradictory testimony regarding whether valuable consideration was given for an interfamilial transfer, the transferee fails to demonstrate by clear and convincing evidence that the transfer was for consideration and bona fide, and the transfer is deemed to violate the Statute of Elizabeth. *Windsor Properties,* 331 S.C. 466, 472-73, 498 S.E.2d 858, 861-62 (held that transferee's contradictions were a "major problem" in her valuable consideration argument and listing of "nominal" consideration evidenced lack of consideration)[7].

Like the appellant in *Windsor Properties*, the Appellant here contradicted his sworn testimony, was unable to show contemporaneous consideration at the time Drews gave him the $100,000, relied on the "nominal" consideration listed in the life estate document

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

(rather than listing the $100,000 transfer), was unable to show a clear and convincing record of the bona fides of this transaction, and lacked credibility. Therefore, the Trial Court correctly held this transfer violated the Statute of Elizabeth.

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

In determining whether the Appellant has met his burden to show the bona fides of a conveyance, the courts will look to whether there are indicia of badges of fraud:

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

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

South Carolina courts recognize numerous badges of fraud, including:

(1) The insolvency or indebtedness of the transferor;
(2) Lack of, or grossly inadequate, consideration for the conveyance;
(3) Close relationship between the transferor and the transferee;
(4) The pendency or threat of litigation;
(5) Secrecy or concealment;
(6) Departure from the usual method of business;
(7) The transfer of the debtor's entire estate;
(8) The reservation of benefit to the transferor; and
(9) The retention by the debtor of possession or control of the property.

Id.; see also Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 595-96, 524 S.E.2d 621, 622-23 (1999). "A badge of fraud creates a rebuttable presumption of intent to defraud." *Royal Z Lanes, Inc.,* 337 S.C. at 596, 524 S.E.2d at 623; *Coleman,* 261 S.C. at

209-210, 199 S.E.2d at 79 – 80 (evidence of several badges of fraud may warrant inference of fraud) (quoting 37 Am. Jur. 2d *Fraudulent Conveyances* § 10 (1968)).

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

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

Appellant testified that he received $100,000 from Drewses in early 1992 on the alleged condition that he would purchase a house for the Drews to live in for the remainder of their lives. (R. p. 322, line 23 - R. p. 323, line 17). Appellant conceded that in 1990/1991 the Drewses borrowed "heavily" on their home to operate The Drews Company while the IRS filed "various" liens against Drews and the company. (Appellant's Initial Br., p. 23)(emphasis omitted). Yet, Appellant then argues there was no evidence of continuing debts or creditors, and the IRS debts were paid off at the time of the $100,000 conveyance.[8]

Countering this, Respondent presented ample evidence that supported the Trial Court's finding that Drews remained insolvent and indebted when he conveyed the $100,000 to Appellant and throughout his remaining years. According to what Drews told Appellant, and what is reasonably inferred from the other evidence, the $100,000 payment to Appellant constituted a transfer of substantially all of Drews' valuable assets at that time. (R. pp. 764-765, para. 5). After Drews conveyed the $100,000, he left himself with insufficient funds to pay his bills. Appellant's testimony and other documents submitted

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

at trial show Appellant was making payments from 1993 to 1995 back to the Drews to pay Drewses' living expenses; and also show that Drews was living off credit cards. (R. pp. 1066-1072; R. p. 385, line 21 - R. p. 386, line 14). Additionally, Respondent presented a September 2000 notice of federal tax lien for unpaid taxes from 1995, 1996 and 1997. (R. p. 700; R. p. 509, line 15 - R. p. 510, line 9). Respondent also put into evidence correspondence with the I.R.S. and S.C. Department of Revenue dealing with taxes due, penalties, and interests. (R. pp. 925-955; R. p. 510, line 10 - R. p. 511, line 5). Additionally, Appellant's own trial testimony supported the Trial Court's findings relating to Drews' indebtedness.

Q. You all discussed that Mr. Drews had been on hard times when he did the original $100,000 transfer to you, correct? In fact, the I-R-S was after him, correct?
A. Yeah, in '92, yes.
Q. Okay, and he was having creditor problems from some failed construction projects, correct?
A. Yes, that's why he sold the house at Edgewater.
Q. And he'd taken on a partner in his construction business who spent the money and not finished some of the construction projects, correct?
A. Yes.
Q. He was in dire financial straits correct?
A. Yes.
Q. And you later documented that he lived most of his nineties on his credit cards, correct?
A. Yes.
Q. In fact, you presented a list of credit card debt at your deposition, of his credit card debt from 2005 totaling 35,000 dollars, correct?
A. Yes.
Q. So during all these transfers with Mr. Drews, in your mind, he was in financial straits, correct?
A. Yes.

(R. p. 355, line 6 - p. 356, line 3)(*See also* R. p. 387, line 20 - R. p. 388, line 2). Respondent further presented evidence that Drews had personally guaranteed a bank note to help Builders Station open, which Builders Station defaulted on (R. p. 367, lines 16-18). Drews

did not have any way to pay off the loans and had to come to Appellant again for money. (R. p. 389, lines 4-12). The evidence at trial more than supports the Trial Court's findings that the $100,000 transfer was substantially all of Drews' assets at the time (R. p. 583, lines 21-24), and that there was uncontested evidence that at the time of the $100,000 transfer and for the remainder of his life,[9] Drews had pending creditor claims (R. p. 14, para. 6) and the transfers were made with an eye towards defeating future creditors.[10]

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

> the only credible evidence in the record was that Mr. and Mr. (sic) Drews specifically sold their Edgewater Park home to pay off the IRS and satisfy the outstanding loans. (R. p. 355, lines 6-12; R. p. 440, lines 11-15; R. pp. 764-765, para. 5).

(Appellant's Initial Br., p. 27). However, none of Appellants' transcript cites show what Appellant contends.[11] Appellant's first cite is to the following testimony:

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

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[9] Drews signed a sworn affidavit in January 2006, in which he stated his only possessions were: a 1995 Buick with a lien on it by Appellant (a lien which never has surfaced); a life estate in the Nuffield Road Property; and a checking account with approximately $350.00. He also asserted his only income was $943 per month in Social Security benefits. (R. pp. 726-727).

[10] This finding is supported by Drews' testimony that he was wiped out after Hurricane Hugo (which occurred in 1989).

(Supp. R. p 1114, line 24 – Supp. R. p. 1115, line 5.

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

(R. p. 355, lines 6-12). This testimony does not evidence anything about the debts being paid off. Appellant's next cite does not either:

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

(R. p. 440, lines 11-15). These cites evidence Drews' financial problems; they do not provide support for Appellant's contention that the outstanding liens and loans were paid off. Neither does Appellant's cite to his own affidavit support this:

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

(R. pp. 764-765, para. 5). This testimony only supports that Drews had lunch with the Appellant, and told him he was going to pay off his debt; it does not, however, tend to prove anything about whether Drews actually did pay off his debt. And the evidence suggests otherwise.

The evidence cited to by Appellant does, however, prove that Appellant knew of Drews' indebtedness at the time Drews proposed this large conveyance, which triggers a duty for Appellant to investigate further: "Knowledge on the part of the purchaser that the seller is indebted or insolvent has frequently been held sufficient to place a purchaser on notice and to require him to investigate." *Coleman,* 261 S.C. at 210-211, 199 S.E.2d at 80 (citation omitted).[12] Where the grantee has failed to investigate, the grantor's fraudulent intent in making the conveyance may be imputed to him, and will support a finding of a fraudulent transfer. *Id.* There is no indication in the record, whatsoever, that Appellant

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

attempted to verify that Drews had paid off the IRS lien or other debts at the time he accepted the $100,000 payment as a gift.[13]

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

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

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

3. Drews' and Appellant's close relationship is undisputed.

The Appellant is Drews' nephew. (R. p. 763, para. 2). Appellant was very close to the Drewses. (R. p. 387, lines 5-10; R. pp. 763-764, para. 3). Appellant worked for Drews during summers in college (R. p. 321, lines 12-14; R. p. 386, lines 20-25). After college, the Appellant would call or stop by. (R. p. 387, lines 1-4). Appellant held a real estate investment with Drews (R. p. 321, lines 15-19) and performed accounting services for one of Drews' entities (R. p. 321, lines 20-23). Appellant's multiple financial

[13] At the time Appellant accepted the $100,000, he admits that he thought it was a gift. (R. p. 338, lines 13-16).

transactions with Drews (R. p. 322, lines 13-16) and his regular contact with Drews established this badge of fraud, which Appellant does not refute.

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

In contravention to customary business practices, Appellant and Drews did not create the Bainbridge Property life estate by deed, and did not record the life estate in the public records. (R. pp. 665-666; R. p. 508, line 22 - p. 212, line 3; R. pp. 14-15, para. 9). Additionally, the document memorializing this interest was not labeled a life estate but rather an "Agreement" with no mention of Drews' life estate interest in the caption. By failing to properly create and record this life estate, Drews' creditors were misled and were neither on notice of the life estate's existence nor the $100,000 transfer. (Id).

Drews and the Appellant also disguised and misled creditors regarding Drews' interest in the Nuffield Property. In contravention of typical business practices, Drews and Appellant again failed to create the Nuffield Property life estate by deed and instead memorialized it by a "Memorandum of Lease." (R. pp. 677-681; R. p. 509, lines 4-9). Even though this document was filed, Drews and Appellant mislabeled the document a "Lease," and did not reveal in its initial text Drews' life estate interest. Therefore, this document misled creditors, and failed to provide them notice as to Drews' true interest in the property. Creating this misleading document is a further deviation from typical business and legal practices.

Respondent's expert Richard Livingston, C.P.A. opined that not only was the $100,000 transfer in deviation from normal business and accounting principles, but it did not make family or favor sense either as the parties had chosen to accomplish the

transactions in multiple, convoluted steps what could have been accomplished in one or two simple steps. (R. pp. 25, para. 78) Livingston explained that the easiest way to accomplish this transfer was for Appellant to loan Drews the $60,000 to purchase the house and for Drews to give him a mortgage back. Instead, Drews and Appellant structured this transaction so that the house was put into Appellant's name and Drews' creditors could not reach it. (R. p. 450, lines 3-15). Appellant offered no credible explanations as to why usual business practices were not followed in creating the alleged life estates, much less for the misleading titles and lack of public notice. The Trial Court found that no legitimate reason existed for Appellant to have purchased the Drewses' residence with the Drewses' monies and then incrementally pass those monies back through multiple convoluted steps, and that the evidence presented showed the only reason for Appellant to have done this was "to allow Drews to distance himself from ownership of his own residences, thereby giving Drews the appearance of having no assets in order to defraud his creditors." (R. pp. 17, para. 27).

As further evidence that Appellant is not credible, and acted in concert to defraud Drews' creditors, is the fact that the consideration language in the life estates, as fully set forth in Section IV(A) above, does not mention the $100,000 conveyance whatsoever. The lack of a mention of this large monetary conveyance from Drews to the Appellant in the documents is contrary to customary legal and business practices, and is further evidence of the Appellant's and Drews' actions to defraud Drews' creditors. Either the life estate was not given in consideration of the $100,000 as Appellant now claims, or they were hiding this large monetary conveyance from creditors by failing to disclose it.

The occasional use (or nonuse) of licensed attorneys by Appellant and Drews did not negate that they regularly deviated from normal business and legal practices in their transactions, but rather tends to show that these transactions were purposely structured. Appellant was unable to reasonably explain at trial why customary legal and business practices were not adhered to.

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

Evidence of this $100,000 transaction's fraudulent nature is that Drews continued to control, use, and enjoy this money and any benefits derived from the $100,000. Although Drews "gave" $100,000 to the Appellant, Appellant used this money for Drews' benefit to purchase the Bainbridge Property for the Drews to live in. The Drews had full use and enjoyment of the home. The Drews also had use and benefit of the equity obtained in the house with that $100,000. Appellant obtained a $40,000 line of equity on the Bainbridge property from which he returned approximately $40,000 to Drews whenever Drews needed it to pay his expenses. (R. pp. 696-699; R. p. 328, lines 9-10). Drews only paid the interest the bank charged for the line of credit, the same amount he would have paid if he had taken the line of credit out himself. (R. p. 344, line 22 - R. p. 345, line 3). Respondent's expert Livingston explained that Appellant was "allowing Mr. Drews to access that 100,000 dollars of equity that was his money at the cost of borrowing, as if it were his money." (R. p. 451, lines 15-18).

Drews continued to derive the benefits from the original $100,000 as the majority of equity in the Nuffield property was funded by borrowing against the equity in the Bainbridge property. (R. pp. 667-671; R. pp. 701-704; R. p. 381, lines 5-13). Drews even

picked out the Nuffield Property (R. p. 360, lines 13-15; R. p. 380, lines 4-6), and signed the agreement to purchase it on Appellant's behalf (R. pp. 672-676). Drews once again had full use and enjoyment of the Nuffield home until his death. These facts are similar to those in the *Judy* case where the grantor continued to enjoy the benefits and ownership of the property he conveyed by continuing to farm it, receive income from it, and borrow money against it. *Judy v. Judy*, 403 S.C. at 209-210, 742 S.E.2d at 676. The court found that these facts constituted clear and convincing evidence of the grantor's intent to transfer title only, not benefits, in an effort to hinder creditors. *Id.* The grantees, family members, failed to rebut the presumption of fraud, and the court affirmed the special referee's finding that the conveyance violated the Statute of Elizabeth. *Id.*

Like the grantor in *Judy*, Drews continued to use and enjoy the benefits of the $100,000 and the benefits derived from it even though he gave the $100,000 to Appellant, and even though both of the properties were held in Appellant's name. Appellant has not rebutted with any, let alone clear and convincing evidence, this badge of fraud, or the multiple other badges of fraud that attend this conveyance. Instead, Appellant's explanations have been contradictory and not credible.

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

Further evidencing that the $100,000 conveyance was fraudulent is the Appellant's testimony, which was not credible given his inconsistencies, contradictions and evasiveness. Despite the Appellant being an experienced corporate internal auditor, as well as a sophisticated investor, Appellant was unable to show by clear and convincing evidence

that the $100,000 conveyance was bona fide and in keeping with sound business practices. As noted above, the Trial Court found Appellant's testimony "lacked credibility" and evidenced that the transfers at issue were "in furtherance of Drews' scheme to conceal his assets from present and subsequent creditors." (R. p. 24, para. 74). The Trial Court also noted Appellant's:

> claimed lack of knowledge regarding these transactions as well as typical business practices was not credible in light of his forthright responses and demonstrated knowledge in answering [his own] Counsel's questioning on these issues.

(*Id.*, R. pp. 24-25, para 74).

Appellant's false explanations and conflicting statements constitute evidence of his guilty knowledge and intent and support a reasonable inference that Appellant is covering up some wrongful purpose. *Town of Hartsville v. Munger,* 93 S.C. 527, 77 S.E. 219 (1913) False and conflicting statements . . . have always been regarded as some evidence of guilty knowledge and intent."); *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147, 120 S. Ct. 2097, 2108, 147 L.Ed.2d 105 (2000) (Court can infer wrongful purpose based on disbelief of defendant's proffered excuse in the face of a prima facia case). Given the multiple indicia of fraud shown through the testimony and exhibits at trial, and the Appellant's utter failure to provide a satisfactory and credible explanation to rebut the presumption of fraud, the Trial Court properly found not only that Appellant failed to meet his burden to show the legitimacy of the transactions, but also that there was actual moral fraud surrounding the $100,000 transfer. (R. p. 26, para. vii).

V. The Circuit Court Correctly Ruled That The $40,000 Payments Made By The Appellant To Drews During The 1993-1995 Time Period Were Part Of A Concerted Effort To Conceal Assets, And Constituted Fraudulent Conveyances.

The Trial Court correctly found that Drews' *inter vivos* transfers involved actual moral fraud and were made "in a concerted effort to conceal" Drews' assets and "defraud his current and subsequent creditors." (R. p. 26, para. vii).

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

In approximately June 1992, shortly after the Bainbridge Property was purchased largely with the $100,000 Drews gave Appellant, Appellant obtained a $40,000 open-end mortgage from South Carolina National Bank on the Bainbridge Property. (R. p. 696-699; R. p. 342, line 11 - R. p. 343, line 11). This line of credit was obtained for Drews' benefit. From 1993 to 1995, Appellant paid Drews checks totaling $40,000 drawn from this line of credit, which effectively returned to Drews a portion of the $100,000 Drews had provided Appellant. (R. p. 324, lines 20-23; R. p. 343, line 12 - R. p. 344, line 21). Further evidencing that this line of credit was for Drews' benefit and the payments were to return Drews' money to him, was the fact that Drews paid the interest incurred on the line of credit. (R. p. 344, line 22 - R. p. 345, line 3).

Appellant's contention that these payments were loans and not just payments of Drews' original $100,000 further fails as Appellant did not make any money off the $40,000 transaction: neither principal nor interest was paid to Appellant for "lending" him the money. (R. p. 344, line 18 – R. p. 345, line 3 and p. R. p. 451, lines 6-18). There were no notes of indebtedness or other form of "IOUs". Appellant presented no evidence of discussions with Drews about terms to repay these "loans" at the time he began making these payments to Appellant. Appellant presented no evidence of arrangements with Drews regarding the time Drews had to pay the loans back, whether Drews would make

payments to Appellant, whether Drews would owe Appellant interest, or consequences if Drews could not pay these "loans" back. [14]

Instead, the Appellant's testimony supports the inference that Appellant did not believe these to be loans, as he knew Drews would not be able to pay the money back.

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

In addition to the lack of valuable consideration, several other badges of fraud surrounded the $40,000 payments to Drews that supported the Trial Court's finding that they were fraudulent. As noted in IV (B) above, the failure to follow customary business practices is an indicia of fraud. As previously discussed, Appellant did not have Drews sign a note for any of the eight payments or charge Drews additional interest on this alleged loan. (R. p. 325, lines 5-11; R. p. 344, line 22 – R. p. 345, line 3).

Drew's insolvency and indebtedness (set forth above in Section IV(B)(1)) also evidenced the fraudulent nature of the scheme of the original $100,000 payment, the line of credit deriving from that $100,000, and the return of these funds. Despite Appellant's claims, Respondent presented clear and convincing evidence demonstrating that Drews was insolvent or indebted at the time of the transfers, and was facing other creditor claims. (R. p. 26, paras. (iv) and (v)).

Another indicia of fraud was that Drews exhibited control and use of this money: whenever Drews needed money for living expenses, Appellant wrote him a check from the line of credit. (R. p. 328, lines 7-12). The $40,000 in payments made back to Drews

[14] The two contradicting amortization schedules presented by Appellant were found by the Trial Court to "impeach Defendant Lancaster's claim that his detailed, personally-maintained schedules were contemporaneously made and recorded." (R. p. 18, para. 33).

without entering into any notes for their repayment established that Appellant along with Drews, was secreting Drews' assets, while Drews maintained beneficial use of the funds derived by the original $100,000 conveyance and properties substantially purchased with his funding. Also, the uncontroverted evidence of Appellant's and Drews' close, personal relationship is yet another indication of fraud.

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

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

Appellant had the burden to rebut the presumption in this interfamilial conveyance (and the other Badges of Fraud) by showing with clear and convincing evidence that there was valuable consideration given for these payments. As fully discussed in section V(A) above, there was no evidence of any meaningful terms related to these payments. Rather, the evidence demonstrates that when he made these payments totaling $40,000 to Drews, there was no bargained-for, valuable consideration given him, but rather they were part of a concerted effort to return part of the initial $100,000 and Drews' interest in the Bainbridge, and then Nuffield, properties.

VI. The Circuit Court Correctly Ruled That The $20,000 Mortgage Drews Gave The Appellant Was A Fraudulent Conveyance And The Appellant Failed To Satisfy His Burden To Show It Was Based Upon Valuable Consideration And That It Was Bona Fide.

In July 1999, Drews granted Appellant a $20,000 Mortgage on the property located at 1705 Meeting Street (hereinafter "$20,000 Mortgage"). (R. pp. 638-642). This $20,000

mortgage was in addition to the $40,000 and $100,000 mortgages that Drews already had given to Respondent on this same property.[15] (R. pp. 629-630; R. p. 633-637; R. p. 325, line 21 – R. p. 326, line 16). Respondent is an existing creditor as to this conveyance as his cause of action against Drews had already accrued, and he had filed suit against him three months earlier. *Matthews v. Montgomery*, 193 S.C. 118, 133, 7 S.E.2d 841, 848 (1940) ("It is only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer.") As an existing creditor, Respondent is not required to show actual fraud where no consideration was given. *Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. at 470-471, 498 S.E.2d at 860 (citations omitted).

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

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

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

Black's Law Dictionary, (10th ed. 2014)(emphasis added), *available at* Westlaw BLACKS. Appellant argues that the valuable consideration for this $20,000 mortgage (as well as the other mortgages and transactions) was based on past consideration. This position is contrary to the long-recognized law of this state: "It is elementary that a promise founded

[15] Although the $40,000 and $100,000 Mortgages allegedly relate to the $40,000 cash conveyance, they are distinct. They both, separately and collectively, form part of Appellant's and Drews' scheme to hide Drews' assets from his creditors.

upon a past consideration cannot be enforced, unless it be shown to be supported by a new legal consideration, growing out of and connected with the original contract." *Henderson and Dempsey v. Skinner*, 146 S.C. 281, 281, 143 S.E. 875, 876 (1928) (citations omitted).

The evidence overwhelmingly supports the Trial Court's ruling that there was no consideration for the $20,000 mortgage. Appellant testified he did not receive any money from Drews at the same time he was given the mortgage. (R. p. 339, line 19 - p. R. p. 340, line 3; R. p. 354, lines 10-13). Rather, Appellant claims this $20,000 mortgage was given to him for past consideration of his paying off loans Drews had obtained to finance the failed Builders Station. Appellant testified to two separate payments: a $5,000 payment made on June 2, 1999 to First Citizens, and a $15,000 payment made on June 7, 1999 to South Trust Bank. (R. p. 389, lines 2-24, R. p. 1073). These payments were made approximately one month before the July 1999 mortgage was given to him. (Appellant's Initial Br., p. 33, para. 2; R. p. 389 lines 2-24; R. p. 1073; R. p. 766, para. 8).

Not only were the payments made in advance of the $20,000 mortgage, but there was no testimony whatsoever that the mortgage was something Appellant bargained for which induced him to pay the banks for Drews, which is the very definition of consideration. He rather argues that he made the payments before any mortgage was executed because of the exigent circumstances surrounding the banks' demands. (R. p. 353, line 18 - R. p. 354, line 13). During trial, when asked to confirm that he gave no contemporaneous consideration for the mortgages, Appellant responded "[t]he money was given first; these came later after I asked for some security for the 40,000." (R. p. 339, line 17 - R. p. 340, line 3). He further testified that he "wasn't involved in securing the loans other than asking for some security after the length of time went on and [Appellant] wasn't

being paid for the first 40,000 and then the 20." (R. p. 325, lines 15-18). Appellant concedes that he "was initially unaware of this last mortgage, as Mr. Drews did it without his knowledge and told him about it sometime after the fact." (Appellant's Initial Br., p. 32, para. 2; R. p. 352, lines 1-6). It is ridiculous to assert that Appellant did not know about the $20,000 Mortgage, while arguing he gave valuable consideration for it.

In the case of *Swearingen v. Hartford Ins. Co.*, the Supreme Court specifically rejected that a party could rely on an original agreement's past consideration to claim valuable consideration for another transaction that occurred sometime after the original agreement. *Swearingen v. Hartford Ins. Co.*, 52 S.C. 309, 29 S.E. 722 (1898). Here, Appellant is trying to rely purely on the payments he made in the past for Drews to prove that there was valuable consideration for the mortgage Drews gave him. Moreover, Appellant's testimony proves there was no inducement or bargained-for consideration relating to the later mortgage. Appellant testified to the exigent circumstances that required he make the payments immediately, that he had no knowledge of the $20,000 mortgage when it was executed, and that it resulted from his requests for security sometime after his payments to Drews were already made. Under *Swearingen*, the Appellant fell far short of meeting his burden of proving by clear and convincing evidence that there was valuable consideration for the $20,000 mortgage, but rather proved by clear and convincing evidence that there was none. As an existing creditor, Respondent has met his burden to demonstrate that there was no consideration given for the $20,000 Mortgage, and therefore, the Trial Court's rulings related to this conveyance should be affirmed.

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

Even if there were valuable consideration for the $20,000, Respondent, as an existing creditor, still proved a fraudulent conveyance by presenting clear and convincing evidence of Drews' actual fraud which can be imputed to the Appellant. Although Appellant would like this Court to consider the $20,000 Mortgage in isolation, the circumstances surrounding and the existence of the other two Meeting Street mortgages demonstrate the fraudulent nature of these transactions.[16] Appellant testified that there were three mortgages on the Meeting Street property: one for $40,000, one for $100,000, and the mortgage at issue here for $20,000. (R. p. 325, lines 12 - R. p. 326, line 16). The $20,000 mortgage was the third mortgage Drews granted Appellant on this property, all without contemporaneous consideration. (R. p. 339, line 19 - R. p. 340, line 21; R. p. 350, lines 1-8; R. p. 354, lines 10-13; R. p. 454, lines 4-10; R. p. 583, lines 7-9). These mortgages totaled $160,000, even though Appellant can only show being allegedly owed $60,000 plus interest. (R. p. 326, lines 17-23). The excess mortgages created the impression to the public and creditors that the Meeting Street Property was encumbered in excess of its actual debt by at least $100,000. (R. p. 19, para. 45).

Appellant's testimony attempting to justify the second and third mortgages fell apart at trial. Appellant again provided contradictory evidence to the Trial Court, first testifying that he was not involved in securing the $100,000 Mortgage (R. p. 348, line 20 - R. p. 349, line 3) while later testifying that the $100,000 Mortgage had been intended to

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

replace the $40,000 Mortgage. (R. p. 350, lines 9-14). Appellant then testified that the $40,000 mortgage was not even satisfied[17] with the $100,000 Mortgage, further impeaching his own testimony. (R. p. 350, line 25 - R. p. 351, line 13).

Respondent's expert testified that he was unable to find economic significance of any kind in the evidence and other financial records he reviewed for Drews to give the excessive $100,000 mortgage to Appellant. (R. p. 454, lines 11-21). Appellant claimed that the excess amount of the $100,000 Mortgage was in case Drews needed more money (R. p. 351, lines 17-22). If this is taken as true, then there was simply no reason for Drews to give the third $20,000 mortgage to the Appellant as his earlier $5,000 and $15,000 payments already were more than adequately secured by that $100,000 mortgage. Therefore, Appellant's testimony is simply not believable, and falls far short of providing clear and convincing evidence that the $20,000 mortgage was bona fide.

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

Drews gave Appellant these excessive mortgages when they knew that there were potential claims against Drews. Drews' illegal sale in Builders Station stock to Respondent occurred in September 1996 (R. p. 1044-1048), and Builders Station failed in 1997, rendering that stock worthless. In April 1998, the $100,000 Mortgage was given to Appellant without satisfying the prior $40,000 Mortgage. In addition to Respondent's claims having accrued, there also was a pending bank claim on Drews' personal guarantee. (R. p. 367, line 23 - R. p. 368, line 3).

[17] This mortgage was eventually satisfied in 2001 when 1705 Meeting Street was sold. (R. p. 350, line 25 - R. p. 351, line 6).

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

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

(R. p. 20, para. 48).

This Assignment of the $190,000 Note, which Drews received in consideration for the sale of his Meeting Street property, occurred one month before the December 2001 trial of Respondent's underlying stock fraud action from which he obtained these judgments against Drews. (R. p. 21, para. 59). Specifically, in November 2001, Drews received a $190,000 note and mortgage on his sale of the Meeting Street property, and immediately voluntarily assigned both the note and mortgage to his wife, who immediately assigned the $190,000 mortgage (but not the note) to Appellant, in substitution for the prior fraudulent $40,000, $100,000, and $20,000 mortgages, which were then marked satisfied.

Remarkably, Appellant was only allegedly due less than one-third of the $190,000 for which he received the mortgage. Therefore, because of the Appellant and Drews' convoluted transactions, the assignment of the $190,000 mortgage to Appellant gave the appearance to debtors that Drews did not own the $190,000 note on this property (which Drews still held). (R. p. 21, para. 60; *see also* R. p. 457, line 13 - R. p. 458, line 21). Respondent's expert, Livingston, testified that this scheme was principally the same as done with the prior three Meeting Street Mortgages in making it appear that Drews had no

real interest in the property because of the large amount of debts that appeared to encumber it. (R. p. 458, line 5 – R. p. 459 line 1).

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

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

(R. p. 22, para 68). Notably, the Appellant did not appeal the Trial Court's finding that the $190,000 Assignment constituted a fraudulent conveyance, or that the $20,000 Mortgage was part of a scheme to hide Drews' assets, and he is therefore bound by that finding on appeal.[18]

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

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

> The transaction is subject to attack if at the time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for

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

> which the transfer was being made, which would disclose the fraudulent intent of the maker. *Hudnal v. Teasdall*, 1 McCord 227 (S.C. 1821).

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

The facts here are more compelling than in *Coleman* to impute fraudulent intent to Appellant. Appellant admitted at trial that he and Drews both knew that South Trust Bank was after Drews' guarantee for the Builders Station loan when the 1998 $100,000 mortgage was executed with no loan being extended. (R. p. 367, line 23 - R. p. 368, line 3). He further acknowledged he then accepted the new $20,000 mortgage, and did nothing to stop Drews from assigning him the mortgages in excess of what he was due. (R. p. 368, lines 4-19). Appellant then testified it was "all right" by him if Drews wanted to report another $100,000 mortgage lien on his property, and he "wasn't going to object". (R. p. 368, lines 12-19; *see also* R. p. 349, lines 19-24).

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

(R. p. 368, lines 12-19 (emphasis added)) (*See also* R. p. 349, lines 19-24). Appellant did not explain why he failed to inquire of Drews' intent in these conveyances, even in light of

his actual knowledge that Drews had a creditor trying to collect on a guarantee. Under *Coleman*, this evidence is more than sufficient to impute Drews' intent to defraud his creditors to Appellant, and to find this transaction was fraudulent. Appellant's testimony, however, goes much further and shows Appellant's active and knowing participation in a plan to conceal Drews' assets by making it appear the property was encumbered in excess of Drews' actual debt. As Appellant failed to meet his burden to provide clear and convincing evidence of the bona fides of this conveyance, the Trial Court correctly found that Appellant actively participated with Drews in this scheme to create the impression that Drews' property was encumbered in excess of actual debt so as to avoid creditors. (R. p. 19-20, para. 47).

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

VII. The Circuit Court Correctly Denied Appellant's Motion for a Directed Verdict under Rule 50 (A), *South Carolina Rules of Civil Procedure*, And Appellant's Post-Trial Motion under Rules 52(B) and 59 (E), *South Carolina Rules Of Civil Procedure.*

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

suit under Rule 41, South Carolina Rules of Civil Procedure. *Paragon, Inc.* at 458, 536 S.E.2d at 880

When ruling on motions for involuntary non-suit, the trial court is required to view the evidence, and all reasonable inferences from that evidence, in the light most favorable to the party opposing the motion. *Crapps v. Spivey*, 271 S.C. 29, 30, 244 S.E.2d 520, 521 (1978). The motion should be denied if more than one reasonable inference can be drawn from the evidence, or the inferences to be drawn from the evidence are in doubt. *Brown v. Reynolds*, 266 S.C. 41, 221 S.E.2d 396 (1975)

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

Here, Appellant again fails to set forth the correct burden of proof. Once the evidence established an interfamilial conveyance, badges of fraud, and/or moral fraud, the burden shifted to Appellant to establish valuable consideration and bona fides of the transaction by clear and convincing evidence. The Trial Court's denial of these motions should be upheld if any evidence, or any inference from the evidence, supports Appellant's failure to carry this burden.

For the reasons briefed, the Trial Court correctly ruled during and at the end of trial; and there was no error supporting Appellants' post-trial motions. When the evidence and inferences are taken in the light most favorable to Respondent, Respondent has established

his case, and Appellant's position that the Trial Court's findings are unsupported by the evidence is without merit. Therefore, the Trial Court's holdings and findings related to Appellant's directed verdict and post-trial motions should be upheld.

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

The record reflects that, as of November 2011, Respondent was the assignee and judgment creditor of the Drewses' Estates, and thus had a renewed right to bring suit against Appellant as a de facto, "executor de son tort" of the monies that rightfully belonged in the Estates of Mr. and Mrs. Drews.[19]

On November 16 and 17, 2011, respectively, Respondent became the assignee of the Estate of Rudolph Robert Drews, Case No. 2007-ES-00-1518, and assignee of the Estate of Effie D. Drews, Case No. 2010-ES-00-0494. (Pl. Ex. 58-59). Each Assignment entitles Respondent to have any monies owed to the Drewses' Estates collected to satisfy Respondent's original judgment and the Estates' *Confessions of Judgment*. Respondent's assignee status serves as an additional, sustaining ground for this Court to affirm the Trial Court's Order irrespective of the Appellant's argument that Respondent's Judgment had expired and was unenforceable.

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

CONCLUSION

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

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

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

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

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November 16, 2015
Mount Pleasant, SC

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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SC Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2011-CP-10-8840

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

Respondent.

v.

Donald W. Lancaster,

Appellant.

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

Signed: _____
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Mount Pleasant, SC
November 16, 2015

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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And 2011-CP-10-8840

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I, Justin O'Toole Lucey, Esquire, hereby certify that on November 16, 2015, I served a copy of **Respondents' Final Brief and Certificate of Compliance with Rule 211(B), SCACR** submitted by the Respondent, Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, on counsel for Appellant, Donald W. Lancaster, via the United States Mail, postage pre-paid, and addressed as follows:

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