**STATE OF SOUTH CAROLINA**
**IN THE**
**COURT OF APPEALS**

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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
***Appellate Case Tracking No. 2014-001247***

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

Respondent.

v.

Donald W. Lancaster,

Appellant.

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# Respondent's Return to Appellant's Petition for Rehearing

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Pursuant to South Carolina Appellate Court Rules 221(a) and 240(e), Respondent Gordon (hereinafter "Gordon") submits his Return to the Petition for Hearing filed by Petitioner/Appellant Lancaster (hereinafter "Lancaster") on November 15, 2016.

This Court issued a published opinion in which it affirmed the Circuit Court's Order and Judgment issued on August 19, 2013, awarding damages to Respondent Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, in a lawsuit Gordon filed to collect on prior judgments he obtained against Lancaster's uncle, Rudolph Robert Drews (hereinafter "Drews"). *Gordon v. Lancaster*, No. 2014-001247, 2016 WL 6471967 (S.C. Ct. App. Nov. 2, 2016). Lancaster appealed the Circuit Court's determination arguing that the prior judgments had expired and therefore, were unenforceable, and challenged the Circuit Court's determination that Lancaster and his uncle engaged in various fraudulent conveyances to hide Drews' assets from creditors. This Court affirmed the Circuit Court's determination that the two judgments that were the subject of this suit were active even though more than ten years had passed since their original award dates due to Gordon's timely actions to collect on them, and that Lancaster and his uncle engaged in fraudulent transactions. Lancaster now seeks a rehearing on all issues decided by this Court. Petitioner Lancaster has not identified any points overlooked or misapprehended by the Court as required by South Carolina Appellate Rule 221(a), but rather seeks to retry his appeal, and have this Court disregard the Circuit Court's credibility determination and other factual findings.

## STATEMENT OF THE FACTS

Respondent hereby incorporates by reference the Statement of Facts in Respondent's Final Brief pages 2 through 13, and all findings of fact made by the Circuit Court in its Order & Judgment dated August 19, 2013, (R. pp. 010-027.)

## ARGUMENT

> A petition for rehearing must show points supposedly overlooked or misapprehended by the court. Its purpose is not to present points the lawyers of losing parties overlooked themselves or to have the case tried in the Court of Appeals a second time. *See Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

*Checker Yellow Cab Co., Inc. v. Checker Cab & Parcel Service, Inc.*, 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986).

### I. THIS COURT CORRECTLY APPLIED THE SUPREME COURT'S HOLDING IN *LINDA MC COMPANY* BY AFFIRMING THE CIRCUIT COURT'S DECISION THAT GORDON TOOK ACTION WITHIN TEN YEARS OF THE JUDGMENTS THEREBY EXTENDING THE JUDGMENTS' ACTIVE PERIODS.

Lancaster contends that this Court incorrectly expanded *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010), by holding that Gordon had timely initiated his enforcement action. Lancaster argues that the *Linda Mc Company* holding should be extremely limited to its exact facts and that this Court should allow a judgment's active period to be extended only when the hearing has been completed, and the creditor is waiting for a court's order regarding execution and levy. Appellant's Petition for Rehearing, p. 12. Lancaster would have this Court rule that even if a judgment creditor has been diligent throughout the ten-year period, and has suffered many delays due to the debtor's and opposing party's actions, he should be severely penalized, and lose his right to collect his judgments. This result would not be consistent with the Supreme Court *Linda Mc Company* opinion.

#### A. The Supreme Court in *Linda Mc Company* Focuses on the Judgment Creditor's Action to Enforce the Judgment During the Judgment's Active Period, and Specifically Warns that the Judgment Creditor Should Not be at the Mercy of the Court to Conclude the Matter Within the Ten-Year Period.

The Supreme Court set forth its specific holding in the *Linda Mc Company* opinion's conclusory paragraph to be broader than Lancaster's restrictive and unfair interpretation:

> . . . if a party ***takes action to enforce*** a judgment within the ten-year statutory period of active energy, the resulting order will be effective even if issued after the ten-year period has expired.

*Linda Mc Co.*, 390 S.C. at 555, 703 S.E.2d at 505 (*emphasis added*). Had the Supreme Court intended its holding to be restricted to only those exact circumstances where the party was merely waiting for a court's action as Lancaster contends, then the Court could have written its conclusion in that manner, but instead the Court focused on the creditor's actions in attempting to enforce the judgment. The Supreme Court also emphasized that where a party trying to enforce his judgment has complied with the applicable statutes, that party should not be "at the mercy of the court system to conclude the matter within the ten-year period." *Linda Mc Co.*, 390 S.C. at 555, 703 S.E.2d at 505. Lancaster would have us ignore this part of the Supreme Court's opinion, and restrict the *Linda Mc Company* holding only to the exact fact pattern set forth in that case.

### B. Gordon Acted Earlier to Enforce His Judgments than the *Linda Mc Company* Plaintiff, and Should Not Lose His Right to Recover Because this Litigation, which Involved Convoluted and Secretive Transactions, Took Longer.

A closer examination of the *Linda Mc Company* opinion shows that Gordon's actions were very similar to the creditor's actions in that case. Gordon filed this action thirteen months prior to the original judgment's expiration while the plaintiff in the *Linda Mc Company* case filed an action approximately eleven months before the expiration of that judgment.[1] When both of these creditors

[1] In *Linda Mc Company*, the judgment in question was entered on June 2, 1995, and on July 29, 2004, approximately ten months prior to the end of the judgment's ten-year active period, the judgment-creditor filed a petition for supplemental proceedings to enforce the judgment. *Linda Mc Co.*, 390 S.C. at 548-549, 703 S.E.2d at 501-502. In this case, the original judgment was awarded to Gordon on December 5, 2001, and on November 2, 2010, approximately thirteen months prior to the end of this judgment's active period, he filed his fraudulent conveyance action to aid in

were diligent in attempting to enforce their judgments and took action within at least ten months prior to the expiration of the judgments' active periods, it would make no sense to allow the judgment's active period to extend for the *Linda Mc Company* plaintiff, yet be extinguished for Gordon. This is especially true when Gordon brought his action several months earlier than the *Linda Mc Company* plaintiff when compared to the judgment extinguishment dates, but this case took much longer to litigate due to the discovery that was required to uncover the complicated, convoluted, and dishonest transactions in which Lancaster and Drews engaged. Lancaster should not be able to benefit from those dishonest acts by arguing that Gordon should be treated differently from the *Linda Mc Company* plaintiff because Gordon was not merely waiting a decision. Gordon also would have been merely waiting a decision if he had a straightforward collection action where the debtor was upfront and produced documents evidencing his assets, instead of this one involving fraudulent conveyances.

Moreover, Gordon actually brought supplemental proceedings to enforce the judgments much earlier than the plaintiff in *Linda Mc Company*: Gordon petitioned the court to open supplemental proceedings to aid him in collecting the judgments in August 2006 – within five years of the original judgments dated December 2001 and March 2002, and within only one year of the September 2005 final modification and award on these judgments by the Court of Appeals when it denied Drews' appeal. However, the timely supplemental proceedings were not fruitful due to Drews' failure to produce requested documents and untimely demise.

Contrary not only to the *Linda Mc Company* holding, but to sound public policy, Lancaster would have this Court issue an unduly restrictive holding which would encourage debtors to

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collecting on these judgments. (This calculation does not even take into account the supplemental proceeding he brought five years earlier to aid in enforcing these judgments.)

engage in unscrupulous behavior, and employ any delay tactics possible to run out a judgment's ten-year active period while the case is being litigated. Such a holding would also put the judgment creditor "at the mercy of the court system to conclude the matter within the ten-year period" which is precisely what the Supreme Court acknowledged would be an unjust outcome. *Linda Mc Co.*, 390 S.C. at 554-555, 703 S.E.2d at 505. Gordon's diligence throughout the ten-year period falls squarely within the *Linda Mc Company* holding, and therefore, this Court should continue to uphold the Circuit Court's finding that the judgments' active periods were extended.

Lancaster also argues that this Court's reliance on *Hardee v. Lynch,* 212 S.C. 6, 46 S.E.2d 179 (1948), is "misplaced." (Appellant's Petition for Rehearing, p. 13). Lancaster argues that as the ten-year period can no longer be extended to twenty years, then the approach in *Hardee* should not apply. Gordon adamantly disagrees: this Court's acknowledgement of *Hardee's* proposition that allows creditors to proceed if they have been diligent and taken action to enforce their judgments before the expiration of the ten years is not misplaced, but even more appropriate under current law where the creditors cannot request an extension, but have only half the time to attempt to collect the money rightfully due them.

The *Hardee* and *Mc Company* approach, rather than Lancaster's unforgiving and stringent one, is especially appropriate under the facts of this case where Gordon attempted to enforce his judgments, but his efforts were frustrated due to factors outside of his control. Gordon faced multiple delays and hurdles during the judgments' ten-year active periods, including:

- Gordon lost almost four years of the judgments' active period as he was defending Drews' appeals of the judgments until the end of September 1995, when Gordon won his appeal and he received the final award and modification of the judgments.
- Gordon had to engage in extensive discovery to uncover the true nature of Drews' and Lancaster's dealings as they were complex and convoluted in nature in order to hide Drews' assets.

- Gordon was unable to rely on the public record and financial documents as Drews and Lancaster did not follow customary business practices, and failed to record several pertinent documents in the public record.

- Gordon's efforts in bringing supplemental proceedings to aid in the collection of his judgments were obstructed as Drews failed to produce records in September 2006 despite a court order to do so.[2]

- Gordon faced further delays in his attempts to collect on his judgment as both the Drewses died during the active ten-year period, and subsequent estate disputes caused further delays in proceeding as it was several years before a final estate accounting was completed.[3]

All of these factors were completely outside of Gordon's control and thwarted his timely efforts to enforce his judgments. Pursuant to *Linda Mc Company* and *Hardee*, this Court should continue to affirm the Circuit Court's determination that Respondent Gordon's judgments are active and enforceable.

### C. Other Jurisdictions also have Recognized that a Judgment's Enforceability Should be Extended where the Judgment Creditor has Brought Action to Enforce the Judgment.

Similar to South Carolina, in both Kentucky and Georgia, the filing of a proceeding to discover assets and/or enforce a judgment extends the period for which the judgment is active. *See Wade v. Poma Glass & Specialty Windows Inc.*, 394 S.W.3d 886, 893-95 (Ky. 2012); *A.B. Farquhar Co. v. Myers*, 194 Ga. 220, 225, 21 S.E.2d 432, 436 (1942). The Kentucky law is similar in that the issuance of a writ of execution or institution of proceedings to discover the judgment debtor's assets "keeps the judgment alive" and tolls the period during which action can be taken upon a judgment. *Wade*, 394 S.W.3d at 893-95. In Georgia, the law dictates that a judgment

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[2] In September 2006, Drews was ordered by the court to appear and produce many documents which would have revealed the nature of these multi-step, convoluted transactions involving Drews' assets. For example, Drews was ordered to produce gift tax returns, and "documents reflecting all property transfers, real or personal, to any relative..." (R. pp. 034-037.)

[3] Drews died on September 25, 2007 and the estate's inventory and appraisement was filed on February 2010, approximately two years and four months later. (R. p. 732.)

becomes dormant seven years after it is rendered, and once dormant, the judgment creditor has three years to revive the judgment or it is extinguished. OCGA § 9-12-60. However, a judgment will remain active if an action to enforce the judgment is filed prior to the expiration of the dormancy period even if the dormancy period would have expired during the pendency of the action. *A.B. Farquhar,* 194 Ga. at 225, 21 S.E.2d at 436; *Gen. Disc. Corp. v. Chunn*, 188 Ga. 128, 131, 3 S.E.2d 65, 67 (1939) (citing *Conley v. Buck*, 100 Ga. 187, 28 S.E. 97 (1897)). In North Carolina, when a judgment creditor brings an action to enforce a judgment within that judgment's ten-year active period, and receives a new judgment in that action, the entry of the new judgment begins a new ten-year period. N.C. Gen. Stat. Sec. 1-47(1) (2013); *Magazian v. Creagh*, 234 N.C. App. 511, 512 n.2, 759 S.E.2d 130, 131 n.2 (2014); *Raccoon Val. Inv. Co. v. Toler,* 32 N.C. App. 461, 463, 232 S.E.2d 717, 718-19 (1977). In these states, the judgment creditor's actions to enforce a judgment extends the time within which he can collect on his judgment. This Court should deny Lancaster's Petition for Rehearing as its affirmance of the Circuit Court's holding is in keeping with South Carolina and other states' legal precedent, as well as sound public policy.

## II. RESPONDENT GORDON WAS ENTITLED TO BRING THE ACTION UNDERLYING THIS APPEAL AS ASSIGNEE OF THE DREWSES' ESTATES.

Lancaster fails to recognize that Gordon also should prevail against Lancaster given the fact that Gordon was assigned the Drewses' estate claims. (Pl. Ex. 58 & 59; 2d. Am. Compl. p. 3, para. 12.) The Estates' rights accrued sometime after the Drewses' deaths in 2007 and 2010 respectively, as assets at issue in this matter should have been included in those Estates.[4] As of November 2011, Gordon had a renewed right to bring suit against Lancaster as a de facto,

[4] See Respondent's Final Brief, Section VIII, at p. 48.

"executor de son tort" of the monies that rightfully belonged in Mr. and Mrs. Drews' Estates.[5] There is no issue as to whether the Estates' claims brought by Gordon were timely. Gordon's assignee status serves as an additional, sustaining ground for this Court to affirm the Circuit Court's Order irrespective of the Appellant's argument that Respondent's Judgment had expired and was unenforceable.

## III. THIS COURT CORRECTLY AFFIRMED THE CIRCUIT COURT'S HOLDING THAT DREWS' AND LANCASTER'S TRANSACTIONS CONSTITUTED FRAUDULENT CONVEYANCES.

Lancaster's arguments that this Court erred in affirming the Circuit Court's determinations that the three appealed transactions are fraudulent conveyances are largely based on credibility issues, and are not proper for a Petition for Rehearing. Rather than demonstrate points to this Court that may have been overlooked or misapprehended, as required by South Carolina Appellate Rule 221(a), Lancaster seeks to have his credibility retried, and to persuade this Court to adopt his self-serving version of events which had been rejected by the Circuit Court. Lancaster would have this Court utterly disregard the Circuit Court's determination that Lancaster's testimony was not "credible" at trial. (R. pp. 024-025, para. 74).[6]

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[5] S.C. Code Ann. § 62-3-619 provides that an "executor de son tort" is "[a]ny 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..."

[6] See Respondent's Final Brief, pp. 12-13, pp. 33-34 and pp. 41-42 for a full discussion of Lancaster's credibility issues.

### A. This Court Correctly Affirmed the Circuit Court's Decision that Drews' $100,000 Payment to Lancaster Constituted a Fraudulent Conveyance.

The Circuit Court correctly found that Drews' and Lancaster's transaction was fraudulent because there were grave credibility issues with Lancaster's testimony, and he was unable to show the bona fides of the transaction.

#### 1. Lancaster's Inconsistent Testimony Regarding Whether there was Contemporaneous Consideration for the $100,000 Given to Him by Drews, Supported the Circuit Court's Finding that the $100,000 was a Fraudulent Conveyance to Hide Assets From Drews' Creditors.

Lancaster goes to great lengths to argue that this Court erred in upholding the Circuit Court's finding that there was no contemporaneous consideration given for the $100,000 transaction, even though Lancaster originally testified that it was a gift. He further testified that he could buy stock with it if he wanted to, (R. p. 418, lines 6-21; R. p. 13, paras. 2-3), that it was important that the $100,000 was a gift so his tax basis in the property would be higher (R. pp. 13-14; R. 336, line 10 - R. p. 337, line 5), and that he prepared a gift tax return for Drews to sign and mailed it to the I.R.S. (R. p. 337, lines 1-10 and lines 18-25.)[7] Lancaster ignores all this testimony and claims this Court erred in upholding the Circuit Court's findings in light of his later, contradictory testimony that the $100,000 was not a gift, but rather consideration for a life estate.[8]

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[7] Lancaster's credibility was further damaged at trial by his inconsistent testimony related to the gift tax return: when asked at trial why he did not produce this tax return, he testified that he could not copy it because the copier was broken the day they prepared it. This testimony was impeached by his 2010 deposition testimony where he stated that he had looked for the copy of the tax return before his deposition. (R. p. 412, line 10 – R. p. 416, line 11).

[8] See Respondent's Final Brief pages 22-23 for a full discussion of Lancaster's discrepancies and credibility problems relating to this $100,000 transaction.

Lancaster would have this Court retry the credibility issues contrary to sound legal precedent[9], and take all the facts in the light most favorable to Lancaster's self-serving testimony. The Circuit Court who observed Lancaster testify, including his trial impeachment with prior deposition testimony, found that there was no contemporaneous consideration for the $100,000 conveyance (R. p. 026, para. ii), and that Lancaster's testimony lacked credibility (R. pp. 024-025, para. 74). This Court did not "misapprehend" facts, but properly gave deference to the trial judge's findings of fact and credibility determinations, and made rulings based on well-supported evidence and case law.

Furthermore, this Court's affirmance of the Circuit Court's finding that the $100,000 paid to Lancaster constituted a fraudulent conveyance is consistent with the Supreme Court's opinion in *Windsor Props., Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998). According to *Windsor Properties*, as Lancaster offered contradictory testimony about whether valuable consideration was given for an interfamilial transfer, and only nominal consideration was cited to in the life estate document (R. p. 665), he failed to demonstrate by clear and convincing evidence that the transfer was for consideration and bona fide. *Windsor Props.*, 331 S.C. at 472-

[9] *Lewis v. Lewis,* 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011) (When conducting a de novo review, the 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.); *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) ("[T]he trial judge is in the better position to assess the credibility of the witnesses."); *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) ("Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal."); *South Carolina Dep't. of Soc. Serv. v. Forrester,* 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) ("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 trial court findings where matters of credibility are involved.") (citations omitted).

73, 498 S.E.2d at 861-62. Therefore, the Circuit Court properly deemed the transfer to violate the Statute of Elizabeth and its ruling was correctly affirmed by this Court.

### 2. Although Lancaster Attacks this Court's Decision to Uphold the Circuit Court's Findings Relating to Drews' Indebtedness at the Time of the $100,000 Payment, He was Unable to Show this Court any Credible Evidence that Drews was Free of Debt.[10]

Gordon cited to several pieces of evidence that supported the Circuit Court's finding that Drews was insolvent and in debt when he conveyed the $100,000 to Lancaster, and throughout his remaining years.[11] Lancaster claims that Drews paid off his debt with proceeds from the sale of the Edgewater house. However, only $5.00 was listed as consideration in the deed and when Drews was asked during the supplemental proceedings about what he actually received from the sale, Drews testified:

> ...I don't think we got that much. That's why I gave Donald the $100,000. Because we took a licking on Edgewater. It was put there. When Hugo came, it knocked me out of my business. I lost a lot of money there. It knocked me out of my house, my dock. Everything went awash in the hurricane. And I would say I lost a half a million dollars almost overnight.

(Supp ROA pp. 1114-1115.) Drews did not say anything about paying off all of his debt. There also was not any documentary evidence presented that Drews' debts had been paid. Rather, the evidence established that Drews' insolvency and indebtedness continued:

- In 1990 and 1991, the Drewses borrowed heavily on their home to operate the Drews Company. (R. p. 764, para. 4.)

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[10] With a voluntary interfamilial transfer, the burden shifts to the transferee to establish the transfer was valid. *Judy v. Judy, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013)* (citing *Windsor Props., Inc.*, 331 S.C. at 471, 498 S.E.2d at 860). "Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony." *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973) (quoting *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814 (1937)).

[11] See Respondent's Final Brief at pp. 25-29 for additional discussion of the evidence presented relating to Drews' indebtedness.

- The Drewses had no income other than social security benefits after The Drews Company failed and were paying their living expenses using credit cards. (R. p. 765, para. 6; R. p. 385, line 21 – p. 387, line 5.)

- In 1992, The I.R.S. was after Drews for unpaid taxes, and Drews was having problems from some failed construction projects. (R. p. 355, lines 6-12.)

- Also in 1992, Drews paid $100,000 to Lancaster from the sale of his Edgewater home which constituted almost all of his money. (R. pp. 764-765, paras. 5 & 6.)

- Lancaster paid Drews money from 1993 to 1995 allegedly because Drews could not pay his living expenses and was incurring debt. (R. p. 355, lines 19-25; R. pp. 692-695; R. pp. 1066-1072; R. p. 385, line 21 - p. 386, line 14.)

- In 1995, 1996, and 1997, the Drewses failed to pay their taxes to the South Carolina Department of Revenue. (R. pp. 927, 928, 933 & 934.)

- In 1999, the Drewses owed $20,000 to two different banks for loans associated with a failed business known as Builder's Station, which had been started in 1996. (R. p. 766, para. 8.)

- Drews lived most of his 90s on his credit card. (R. p. 355, lines 19-21.)

- In 2000, the I.R.S. filed a tax lien of approximately $56,988 for taxes that had not been paid for the years 1995 through 1997. (R. p. 700; R. p. 509, line 15 - p. 510, line 14.)

- At the end of 2001, Drews still owed the I.R.S. money. (R. p. 954.)

- In December 2001 and March 2002, Gordon was awarded judgments against Drews. (R. pp. 1079-1090.)

- Lancaster presented a list of Drews' credit card debt from 2005 totaling $35,000. (R. p. 355, lines 22-25 & R. p. 1072.)

- In September 2006, when Drews appeared at the supplemental proceedings, he allegedly had about $30.00 in cash, about $350 in his checking account, and owned no money orders, cashier's checks, drafts or coins of any value. (Supp ROA 1140.) The only personal property owned that was worth $200 or more was minimal household goods, and a 1995 Buick Sentry. (Supp ROA 1141.) He further represented that he did not own any stocks, bonds, or securities. (Supp. ROA 1142.)

- In 2007, Biller accepted $50,000 from Drews as he was owed "a large sum of money." Drews told Biller that he may need the money back as he was "not doing really well financially." (R. p. 435, line 4 – p. 436, line 4.) Biller never

actually recovered what he was owed from Drews as a month after Biller received this $50,000, Biller began paying back Drews, starting with a $10,000 check. (R. p. 435, lines 18 – p. 436, line 24.)

- Drews died in September 2007, and in February 2010 an inventory and appraisal was filed in his estate indicating that there were no assets in his estate. (R. p. 732.)

Ample evidence establishes that since the early 1990s to his death, Drews never was able to pay his own expenses, and had to borrow from multiple sources just to get by.

Despite this evidence, Lancaster continues to represent to the Court that the evidence showed that the debts had been paid off with the sale of Drews' home even when the evidence did not:

> .... The Drewses sold their Edgewater Park home to satisfy the IRS liens and the outstanding mortgage loans. (R. p. 355, lines 6-12; R. p. 440, lines 11-15; R. pp. 764-765, para. 5.) After ***paying off*** the mortgage loans and the IRS, Mr. and Mrs. Drews were left with $100,000.00 from the sale of their home. (R. pp. 764-765, para. 5).

Appellant's Petition for Rehearing p. 15 (*emphasis in the original).* As specifically demonstrated in Respondent's Final Brief on pages 27 and 28, none of the evidence and testimony referenced shows that these loans were paid off. These portions of the record prove only that Lancaster was on notice of Drews' indebtedness at the time that Drews proposed the large, $100,000 conveyance to him,[12] which triggered Lancaster's duty to further investigate pursuant to the Supreme Court holding in *Coleman v. Daniel*, 261 S.C. at 210-211, 199 S.E.2d at 80. Lancaster also has failed to show why Drews' fraudulent intent in the conveyance should not be imputed to him when he failed to investigate whether those loans and other indebtedness had been paid before accepting this large sum of money.[13]

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[12] For a more comprehensive discussion of how the testimony Lancaster cites does not evidence that the loans were paid off, see Respondent's Final Reply Brief at pp. 27-29.

[13] 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. *Coleman*

Lancaster further argues in his Petition for Rehearing that:

> the mere fact the Drewses were able to sell their home and still have about $100,000.00 left over from the sale shows emphatically there were no outstanding creditor debts. Had there been any recorded liens or judgments then existing, they would have had to be paid off before title could transfer.

Appellant's Petition for Rehearing p. 17. This does not show, much less "emphatically" show, that the Drewses were not in debt as Lancaster represents. This only shows that $100,000 was left over after the recorded liens or judgments on that property were paid off. The Drewses could have had outstanding car loans, lines of credit with businesses, contractual monetary obligations, business debts, credit card debts, personal loans, and non-recorded judgments, none of which would have shown up in the title search unless those debts had been reduced to judgment or recorded as a lien.

It is also somewhat ironic, if not disingenuous, that Lancaster argues that this Court should rely on what the title search showed when much of this case has been about Drews' and Lancaster's irregularities of following customary business practices when it comes to giving adequate notice to creditors and revealing the true nature of the financial status of the owner and property. Some examples include the Bainbridge life estate that was neither created by deed nor recorded (R. pp. 665-666; R. p. 508, line 22 - p. 509, line 3), the Nuffield life estate which was recorded as a "Memorandum of Lease" (R. pp. 677-681), and the $40,000 Meeting Street Mortgage that was not recorded until eight months after it was executed (R. p. 346, line 25 - R. p. 347, line 6). It seems a bit absurd that Lancaster argues that the title search for Drews' property would provide an actual reflection of Drews' financial health, much less prove he was not in debt.

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*v. Daniel*, 261 S.C. at 210-211, 199 S.E.2d at 80. For a complete discussion, see Respondent's Final Brief at pp. 28-29 & Section VI D, pp. 44-46.

Lancaster fails to point this Court to any convincing evidence that Drews was not indebted at the time of the $100,000 transfer, nor has he been able to point to any evidence that indicates that either this Court or the Circuit Court's findings of indebtedness were erroneous. Moreover, Lancaster conceded that in his mind, Drews was in "financial straits" during all of the transfers that occurred with Drews. (R. p. 355, line 6 – p. 356, line 3; R. p. 387, line 20 – p. 388, line 2.) Therefore, this Court's affirmance of the Circuit Court's holdings relating to the $100,000 transfer were correct, and Lancaster's Petition for Rehearing should be denied.

### 3. Multiple Badges of Fraud Surrounded this $100,000 Transfer which Further Supports this Court's Affirmance of the Circuit Court's Holdings.

Aside from Drews' insolvency and indebtedness, there were multiple other badges of fraud surrounding this $100,000 conveyance, which supports the Circuit Court's findings. Gordon showed that Drews was insolvent at the time of the transfer; there was lack of consideration for the conveyance; Drews and Lancaster were related and shared a close relationship, Drews and Lancaster concealed the transaction by failing to follow customary business practices; the $100,000 transfer constituted nearly all of Drews' money; and Drews retained benefit and control of the $100,000 by living in the home purchased with it, selecting the next home largely purchased with this money, and receiving payments from Lancaster whenever he requested them.[14] This Court correctly affirmed the Circuit Court's findings related to the $100,000 conveyance as Gordon established Drews' and Lancaster's fraudulent intent in this and the other transactions between them.

[14] See *Coleman v. Daniel,* 261 S.C. at 209-10, 199 S.E.2d at 79-80, which sets forth the badges of fraud our courts have recognized to frequently accompany fraudulent conveyances, and Respondent's Final Brief, pages 24-32, for a full discussion of the badges of fraud that accompanied the $100,000 Drews conveyed to Lancaster.

### 4. This Court Correctly Affirmed the Circuit Court's Holding that Lancaster's $40,000 in Payments to Drews were Part of a Scheme to Hide Assets from Drews' Creditors and then Return to Drews Money as he Wanted it.

Lancaster again asserts in his brief that Gordon produced no credible evidence demonstrating the Drewses had any unpaid debts or outstanding creditors during the 1993-1995 time period. Appellant's Final Brief at p. 19. He further asserts that:

> Mr. Lancaster made loans to the Drewses in various amounts from **6 February 1993, through 30 January 1995,** and it appears the Drewses were paying off their credit cards in part or in whole on an intermediate basis – essentially somewhat as the credit became due or, at least, not significantly overdue. (R. p. 1065.) (*emphasis in the original)(footnote omitted).*

Although Lancaster cites page 1065 of the record to support his proposition that the Drewses were paying off their credit card debts, all this page contains are notes jotted down by Drews of what money he was receiving back from Lancaster. These notes have nothing to do with what Drews was supposedly doing with the money, or whether these sums were sufficient to pay for Drews' credit cards and other expenses. Lancaster continues to argue conflicting positions by arguing that the Drewses had no income after their company failed except for social security benefits, they were living off of credit cards, and that he had to help them pay off their "mountain of credit card debt", while at the same time claiming that they were debt-free without any evidentiary proof. (Appellant's Petition for Rehearing at p. 19.)

Lancaster also tries to attack this Court's decision upholding the Circuit Court's finding that Lancaster assisted Drews in defrauding his creditors by stating that Lancaster had nothing to do with how these transactions were formed. The Circuit Court, however, specifically rejected this position largely due to Lancaster's inconsistent trial testimony:

> 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.) This Court was correct in affirming the Circuit Court's finding, as it was based on the Circuit Court's determination that Lancaster's testimony was not credible on these issues, and also based on evidence which demonstrated the parties' complete failure to follow customary business practices.

Mr. Dorsey Biller's trial testimony provided additional evidence which supports that the $40,000 in payments were part of a surreptitious scheme to return to Drews money he hid from creditors. Biller's testimony demonstrated that this was not the only time that Drews had given someone close to him a large sum of his money to pay the money back to him a little at a time. Mr. Biller was given a check for $50,000 from Drews. Although purportedly to pay back money he owed to Biller, Drew told Biller that he was not doing really well financially and that Drews may need some of the money back. Drews then asked Biller, beginning the very next month, to return money back to him. (R. 435, lines 4-17.) At Drews' request, Biller made several payments back to Drews, and then once Drews died, Biller made payments to Drews' wife, Effie Drews. (R. p. 435, lines 18 – p. 436, lines 5-13.) Once Effie Drews died, the remaining amount of the $50,000 was paid to her estate. (R. p. 436, lines 14-24.) The evidence also showed that the $50,000 check was originally endorsed by Drews' sister, Jesse Atkinson. Atkinson testified that the Drewses gave her money to open a bank account, and that the money was to be used for the Drewses. (R. p. 1007, line 3 – p. 1008, line 6.) Biller explained in his testimony that Drews tried to give the money to Atkinson first, "but she would not do the deal with him." (R. p. 441, lines 9 – p. 442, line 4.) Although this transaction did not involve Lancaster, it demonstrated Drews' pattern of finding

someone close to him with whom he could park a large number of assets and who would agree to pay the money back to him in partial payments as he requested it. This is the same thing Drews did with the $100,000: he gave a large sum of money to Lancaster, and little by little, asked Lancaster to return the money to him.

Lancaster also failed to refute the several other badges of fraud that surrounded these $40,000 in payments: the lack of valuable consideration, the failure to follow customary business practices, and Drews' control and use of the money.[15] Therefore, this Court correctly affirmed the Circuit Court's decision that the $40,000 in payments Lancaster gave Drews were not legitimate loans, but rather were part of a concerted effort to conceal Drews' assets.

### 5. This Court Did Not Err in Affirming the Circuit Court's Ruling that the $20,000 Meeting Street Mortgage Drews gave Lancaster was a Fraudulent Conveyance.

This Court upheld the Circuit Court's determination that the $20,000 mortgage between Lancaster and Gordon involved actual moral fraud. It is important to note that Gordon was an existing creditor at the time of this transaction, and did not have to show actual moral fraud where no consideration was given.[16] *Windsor Props.*, 331 S.C. at 470-71, 498 S.E.2d at 860 (citations omitted). Therefore, even in the absence of actual moral fraud, this Court should affirm the Circuit Court's ruling that the $20,000 Meeting Street mortgage was a fraudulent conveyance.

In arguing that this Court erred, Lancaster once again seeks to have this Court ignore and disregard the Circuit Court's credibility determinations relating to Lancaster's testimony. As this Court points out in its opinion, the Circuit Court found Lancaster's testimony contradictory in that

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[15] See Respondent's Final Brief, Section V, pp. 34-37, for a full discussion.

[16] See Respondent's Final Brief, Section VI, A, pp. 38-40, for a full discussion of Lancaster's failure to establish there was valuable consideration for this inter-familial transaction, including his testimony that he wasn't initially aware of this mortgage. (R. p. 352, lines 1-6)

he testified that he was not aware of the $20,000 mortgage and then changed his story and testified that he participated in its genesis. (R. p. 019, para. 44.)

Lancaster also seeks to have this Court consider this $20,000 mortgage in isolation. Lancaster continues to ignore the facts presented that this transaction was part of a pattern and scheme to defraud Drews' creditors by representing to the public that there was excessive debt on the Meeting Street property. Lancaster fails to acknowledge, or address in any way, that this $20,000 mortgage was the third mortgage granted to him, way in excess of any money due to him.[17] The first two mortgages on this same property for $100,000 and $40,000 already granted Lancaster security that greatly exceeded the $60,000 plus interest that Lancaster claimed Drews owed him. (R. p. 326, lines 17-23.) As none of these mortgages was satisfied, and the total was excessive of any real debt, creditors were left with the impression that this property was encumbered in excess of its actual debt by at least $100,000. (R. p. 19, para. 45.) Lancaster also cannot refute that the earlier $100,000 mortgage was given after Gordon's cause of action accrued and when there was a pending bank claim on Drews' personal guarantee (R. p. 367, line 23 – R. p. 368, line 3), and that the $40,000 excessive mortgage was given three months after Gordon's fraudulent conveyance suit was filed. Lancaster's testimony that the second mortgage of $100,000 was in case Drews needed more money (R. p. 351, lines 17-22) impeaches his argument that the $20,000 mortgage was to provide security for Drews' bank loans Lancaster paid off for him, (Appellant's Petition for Rehearing, pp. 20-21), as he already had more than sufficient security given the excessive $100,000 mortgage. Lancaster argues that he should be granted a rehearing

[17] See Respondent's Final Brief pp. 7-9 and 41-42 for the facts and arguments relating to these three mortgages. Lancaster failed to appeal the findings related to the first two mortgages so the findings related to them, including that they are fraudulent conveyances and part of a scheme to defraud creditors, are now the law of this case.

as "this Court of Appeals misinterpreted and misapplied the facts of this transaction" in affirming the Circuit Court's holding that this transaction was not supported by consideration and constituted actual moral fraud. Appellant Lancaster's Petition for Rehearing, p. 21. This position is untenable given that Lancaster refuses to acknowledge or address the other two Meeting Street Mortgages that had already provided excessive mortgages on the property, and that the Circuit Court had found Lancaster's testimony inconsistent and not credible relating to this transaction. Lancaster improperly seeks to have this Court retry this issue, and therefore, his Petition for Rehearing should be denied.

## IV. THIS COURT ALSO CORRECTLY AFFIRMED THE CIRCUIT COURT HOLDING THAT GORDON IS ENTITLED TO RECOVERY BECAUSE LANCASTER FAILED TO APPEAL THE FINDINGS OF A FRAUDULENT SCHEME AS WELL AS SEVERAL INDIVIDUAL TRANSACTIONS, WHICH ESTABLISHED HIS FRAUDULENT INTENT.

Lancaster failed to appeal the Circuit Court's finding that these transactions were part of a fifteen-year scheme to defraud his creditors:

> 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)). As fully set forth in Respondent's Final Brief, Issue II at pages 17 and 18, Lancaster appealed only three of the transactions in this scheme, and did not appeal all the transactions, or the finding related to the scheme itself. Therefore, the findings regarding the other transactions[18] being fraudulent, as well as the finding of the fraudulent, multi-step transactions between Drews and Lancaster are the law of this case. *Ex Parte Morris*, 367 S.C. 56, 65, 624

[18] Other transactions that Lancaster did not appeal, and that the Circuit Court found to be fraudulent conveyances include: the substitution of the Nuffield property for the Bainbridge property, the first mortgage of $40,000 on Meeting Street property, the second mortgage of $100,000 on the Meeting Street property, and the assignment of $190,000 mortgage on the Meeting Street property.

S.E.2d 649, 654 (2006) (as a general rule, an unchallenged ruling, right or wrong, is the law of the case).

One of the transactions Lancaster failed to appeal was the $190,000 note and mortgage which Drews received for his Meeting Street Property. This note and mortgage was immediately assigned to Drews' wife who then in turn assigned the mortgage (but not the note) to Lancaster, purportedly in substitution for the excessive $40,000, $100,000 and $20,000 mortgages. Now Lancaster was secured in the amount of $190,000, *three times greater* than the amount Lancaster was allegedly due. 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.) The excessive nature as well as the timing of this last assignment demonstrate the fraudulent nature of these transactions. The Circuit Court correctly found that Lancaster actively participated with Drews in this scheme to create the impression that Drews' property was encumbered in excess of the actual debt so as to avoid creditors. (R. pp. 019-020, para. 47.) Since there was no appeal of the findings related to this transaction, it has become the law of the case, and provides additional support for this Court to uphold the Circuit Court's rulings relating to the fraudulent nature of the three isolated transactions Lancaster appealed.

## CONCLUSION

Appellant Lancaster's Petition for Rehearing should be denied as he failed to show this Court any points supposedly overlooked or misapprehended. He rather argues that the Court should adopt Lancaster's variations of testimony that support his defense, and ignore the remainder of Lancaster's testimony and other evidence, as well as all of the Circuit Court's credibility determinations. As for the judgments' active period, this Court correctly applied *Linda Mc*

*Company* and other controlling case law when affirming the Circuit Court's decision that these judgments were active, as Gordon had been diligent in trying to enforce his judgments, and had brought and pursued this action within the ten-year period. Further supporting the Circuit Court's decision was that Gordon was entitled to collect for these fraudulent conveyances as he had the Estates' assignments which he was pursuing in this litigation. Moreover, Lancaster failed to appeal the Circuit Court's findings of a fraudulent scheme consisting of many transactions over a period of years, so those findings have become the law of the case, and Gordon should be allowed recovery based on those findings.

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 Petition for Rehearing and affirm the decisions of the Circuit Court in all respects.

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Attorneys for the Respondent

January 13, 2017
Charleston, South Carolina

**STATE OF SOUTH CAROLINA**
**IN THE**
**COURT OF APPEALS**

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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

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

Respondent.

v.

Donald W. Lancaster,

Appellant.

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**Proof of Service for Respondent's Return to Appellant's Petition for Rehearing**

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I, Justin O'Toole Lucey, Esquire, hereby certify that on January 13, 2017, I served a copy of the ***Respondent's Return to Appellant's Petition for Rehearing*** 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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January 13, 2017

**BY REGULAR MAIL**
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust v Donald W. Lancaster*
Appeal from the Charleston County, Court of Common Pleas
Case Action No.: 010-CP-10-9096; 2011-CP-10-8840;
Appellate Case Tracking No.: 2014-001247

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of ***Respondent's Return to Appellant's Petition for Rehearing*** in the above-referenced appellate matter. Also enclosed is a ***Proof of Service*** indicating service upon counsel for the Appellants.

I would greatly appreciate you filing the ***Respondent's Return to Appellant's Petition for Rehearing*** s and the ***Proof of Service*** with the Court and returning a date stamped copy of each to my attention in the enclosed self-addressed, stamped envelope. If you need anything else or I otherwise may be of any assistance to you or the Court regarding this matter, please feel free to contact me at your convenience.

Best regards,

Laura W. Knight