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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY

Court of Common Please
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5469 (S.C. Ct. App. filed February 15, 2017)
Appellate Case No. 2017-000979

First Citizens Bank and Trust Company, Inc.....Respondent,

v.

Park at Durbin Creek, LLC; Kenneth E. Clifton;
and Linda G. Whiteman .....Defendants,

Of whom Park at Durbin Creek, LLC and Kenneth E. Clifton are the Petitioners.

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Respondent, First Citizens Bank & Trust Company, Inc. hereby opposes Petitioners Park at Durbin Creek, LLC and Kenneth E. Clifton's Petition for Writ of Certiorari (*hereinafter* "Petition") for review of the Court of Appeal's Opinion No. 5469 filed February 15, 2017 (*hereinafter* "Opinion"). The Court of Appeals correctly decided this case, and the Petitioners have presented no issues that warrant further review. Therefore, the Petition should be denied.

II. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals properly find clear and convincing evidence in the record to establish an inference of fraudulent intent on the part of Clifton to set aside the conveyance of his 50% interest in the Property under the Statute of Elizabeth?

2. Did the Court of Appeals properly set aside Clifton's 50% interest in the Property that he owned as tenants in common when both co-owners conveyed their respective interests through a single deed?

III. STATEMENT OF THE CASE

First Citizens Bank & Trust Company, Inc., (*hereinafter* "Respondent" or "First Citizens") commenced an action against the Defendants Park at Durbin Creek, LLC ("PDC"), Kenneth E. Clifton ("Clifton") (*hereinafter collectively* "Petitioners" or "Clifton") and Linda G. Whiteman ("Whiteman") on October 20, 2010 seeking relief under South Carolina's Statute of Elizabeth, S.C. Code Ann. § 27-23-10, *et seq.*, and alleging causes of action for fraudulent conveyance, civil conspiracy, and partition. The lawsuit involved the conveyance of a 370 acre tract of land in Laurens County, South Carolina that Clifton owned as tenants in common with Whiteman (*hereinafter* "Property"). All Defendants timely answered and asserted general denials.

A non-jury trial was held before The Honorable Eugene C. Griffith, Jr. on June 26, 2014. Thereafter, the Circuit Court entered an Order to Set Aside Conveyances regarding the subject Property on April 5, 2014 (*hereinafter* "Order"). (R. pp. 1-11). The trial court found the evidence established sufficient "badges of fraud" to infer Clifton possessed fraudulent intent when he transferred his interest in the Property to PDC on September 18, 2008. (R. pp. 8-10). In light of that finding, the trial court deemed Clifton's conveyance of his 50% interest in the Property to PDC null and void pursuant to the Statute of Elizabeth. (R. p. 10).[1]

Petitioners timely appealed to the Court of Appeals which affirmed the trial court's decision, holding in part that the Circuit Court properly concluded Clifton's conveyance of his 50% interest in the Property to PDC was fraudulent under the Statute of Elizabeth and, therefore, null and void. (App. pp. 6-8). The Court of Appeals further held that while the transfer of Property to PDC was accomplished by a single deed, the conveyance of Clifton's 50% interest in the Property and the conveyance of Whiteman's 50% interest in the Property were two distinct mutually exclusive transfers and therefore, the invalidity of one did not invalidate the other. (App. pp. 8-9). Accordingly, whether or not Whiteman acted with fraudulent intent was inconsequential to the court's determination and finding that Clifton acted with the fraudulent intent required to set aside the transfer of his 50 % interest under the Statute of Elizabeth. (App. pp. 8-9). Petitioners filed for rehearing on

[1] The trial court also held that a later attempted transfer by Clifton of his 50% interest in PDC, a company whose only asset was the Property, to Streamline Management, LLC was improper and invalid. (R. pp. 10-11). Specifically, it was held that the attempted transfer was void *ab initio* as Streamline did not exist until months after the purported transaction. (R. pp. 10-11). The trial court further held that even if Clifton could have contracted with and transferred his interest in PDC to a non-existent entity, his failure to obtain Whiteman's consent to the admission of new members into PDC as a member-managed LLC invalidated the Streamline transaction under S.C. Code Ann. § 33-44-404(7). (R. pp. 10-11). The Court of Appeals upheld the decision of the trial court, and this holding is not an issue raised by the Petitioners in their Petition.

February 28, 2017, which was denied by Order dated March 16, 2017. (App. pp. 11-19). Petitioners have now petitioned this Court for review.

IV. STATEMENT OF THE FACTS

In 1995 Clifton and Whiteman purchased the Property as tenants in common for retirement purposes. (R. p. 221; R. p. 187, lines 6-9). They owned the Property in their individual names as tenants in common for over twenty years until September 18, 2008 when it was conveyed to a newly formed limited liability company Park at Durbin Creek, LLC ("PDC"). (R. pp. 225-27). In addition to the subject Property, Clifton and Whiteman owned two other tracts of land purchased in 1992 and 1993 respectfully. (R. pp. 233, 236-38). They owned these properties as tenants in common in their individual names until July 31, 2008 and September 18, 2008 when each was transferred into separate limited liability companies. (R. pp. 234-35, 239-41).

Clifton is in the real estate business and was actively engaged in real estate development until 2009. (R. p. 121, lines 2-4; R. p. 145, lines 13-24). He typically purchased and/or transferred property he planned to develop into limited liability companies which either he or his office staff organized. (R. p. 146, lines 4-9). Over the course of his career Clifton organized in excess of forty limited liability companies. (R. p. 191, line 25 - p. 192, lines 1-2). He commonly owned personal investment property, such as the subject Property, in his individual name. (R. pp. 80-81; R. p. 124, lines 2-15).

In order to finance his real estate development business Clifton routinely borrowed money from third party lenders, including First Citizens. Beginning in October 2002, Clifton entered into three loans with First Citizens in which he personally borrowed and/or guaranteed loan obligations to finance three different real estate development projects –

Edge Water Subdivision, Plantation Holdings, and Shellbrook Plantation. (R. pp. 49-52). The Edge Water loan originated in October 2002 and both Shellbrook Plantation and Plantation Holdings loans in 2006. (R. p. 49, line 25 – p. 50, line 1; R. p. 50, lines 22-25 – p. 51, lines 1-4; R. p. 58, lines 5-8). The original principle amount of the three loans totaled Three Million Eight Hundred Seventy-Three Thousand and 00/100 ($3,873,000.00) Dollars. These development loans were never intended to be long term, each having maturity dates one to two years from origination. (R. p. 51, lines 23-24). Over the years First Citizens renewed the loans, extending the maturity dates as progress payments were made. (R. p. 51, lines 23-25- p. 52, lines 1-2).

On or around January 2008, two of Clifton's loan obligations with First Citizens neared maturity. At this time, he sought loan modifications from First Citizens, requesting an extension on the maturity dates. (R. p. 53, lines 1-15). Before deciding on Clifton's requested modifications First Citizens asked him to provide a personal financial statement. (R. pp. 53-54). Clifton presented a financial statement dated January 23, 2008 (*hereinafter* "Financial Statement") to the bank reflecting a personal net worth of approximately Fifty Million Dollars ($50,000,000.00). (R. pp. 247-53). Clifton's real estate assets comprised over Forty-Eight Million Dollars ($48,000,000.00) of his claimed net worth. (R. p. 250). One of the assets listed on the Financial Statement was Clifton's fifty percent (50%) interest in the subject Property. (R. p. 247). According to the Financial Statement, the Property was unencumbered and valued at One Million Five Hundred Seventy Thousand and no/100 ($1,570,000.00) Dollars. (R. p. 247). First Citizens relied upon the Financial Statement in evaluating Clifton's financial condition to determine whether or not to modify and/or extend the loans. (R. p. 52, lines 4-25 - p. 53 lines, 1-23; R. p. 152, lines 18-25 - p.

153, lines 1-18). Relying on the information set forth in the Financial Statement, First Citizens agreed to extend the maturity date on the two loans to January 2009.

Clifton's third loan was set to mature on July 12, 2008. Sometime in the spring or early summer of 2008, the real estate market declined and sales in Clifton's development projects significantly slowed or ceased altogether. (R. p. 74, lines 2-12). First Citizens became increasingly concerned regarding the loans and Clifton's ability to pay as he was becoming slow in making payments. (R. p. 55, lines 2-24; R. p. 74, lines 2-25 – p. 75, lines 1-13). Clifton was unable to pay the third loan when it became due on July 12, 2008 and he requested another extension. First Citizens granted his request on September 22, 2008, extending the maturity date to January 2009 to coincide with the other two loans. According to the bank, Clifton's payments started to get slow around September 2008. (R. p. 52, lines 12-15).

On September 18, 2008, while Clifton and First Citizens were engaged in negotiations over modifying the third loan, he and Whiteman transferred their interests in the Property to PDC. (R. p. 221; R. pp. 225-27). Clifton and Whiteman were each 50% owners and members of PDC whose only asset was the Property. (R. p. 82, lines 16-19; R. p. 221; R. pp. 270-72). Clifton testified that he transferred his interest in the Property to PDC at the insistence of Whiteman for liability protection because it was being leased to third parties for recreational hunting. (R. p. 172, lines 4-24). Whiteman testified that she asked Clifton to put the Property in an LLC for years due to her liability concerns to no avail. (R. pp. 87-90). Clifton and/or his office prepared the organizational documents for PDC and unilaterally decided when to transfer the Property. (R. p. 82, lines 20-25 – p. 83, lines 1-4; R. p. 119, lines 1-6). Whiteman also testified that while she wanted the

Property transferred into PDC for liability purposes, she does not know what actually motivated Clifton to do so. (R. p. 96, lines 7-11).

On or around the same time the Property was conveyed to PDC, Clifton was in the midst of transferring other personally held property out of his name as set forth below:

a) July 31, 2008, Clifton and Whiteman transferred ownership of property they owned in their individual names since 1993 to Gardens at Fourteen, LLC.

b) September 15, 2008, Clifton transferred ownership of four tracts of land which he owned individually since 2004 (or earlier) to Pawley Investments, LLC.

c) September 18, 2008, Clifton and Whiteman transferred ownership of property they owned in their individual names since 1992 (or earlier) to Pelham at Boiling Springs, LLC.

d) September 19, 2008, Clifton transferred ownership of his office building which he owned individually since 1997 to Central Office, LLC.

(R. p. 221). Clifton did not disclose these transfers to First Citizens nor update his January 23, 2008 Financial Statement which reflected him owning these properties. (R. p. 74, lines 18-25 – p. 75, lines 1-17; R. pp. 247-53).

In September 2008, while Clifton was undertaking a campaign of transferring property out of his name, his loan payments had slowed and the bank was concerned about his continued ability to pay the loans when due. (R. p. 52, lines 12-15; R. p. 55, lines 2-24; R. p. 73, lines 20-25 – p. 74, lines 1-12). Clifton again requested another loan modification to extend the three loans' maturity dates past January 2009, which was actively being negotiated in September 2008. (R. p. 171, lines 19-21). First Citizens advised Clifton that he needed to bring his interest payments current and provide a business

plan detailing how he planned to pay down the balances. (R. pp. 52-55; R. pp. 73-75; R. pp. 256-67). The bank also requested he provide additional collateral to secure repayment. (R. pp. 52-55; R. pp. 73-75). The information and documents requested were necessary for First Citizens to evaluate the propriety of again modifying the loans' terms by extending the maturity dates. Clifton failed to bring the loans current, provide a business plan or pledge additional collateral as requested. (R. p. 55, lines 18-24; R. p. 74, lines 18-25 – p. 75, lines 1-17; R. pp. 256-67). As a result, First Citizens elected not to modify the three loans, accelerated the loans and commenced foreclosure proceedings in February 2009. (R. p. 55, lines 18-24; R. p. 75, lines 1-17). On October 2009, deficiency judgments were entered against Clifton in the total amount of $745,317.86 plus interest. (R. pp. 216-220).

While First Citizens was in the process of obtaining judgments against Clifton he entered into yet another transaction to further distance himself from his interest in the Property. Specifically, on August 5, 2009 Clifton and his two daughters entered into an Assignment of Interest in Park at Durbin Creek, LLC ("Assignment"), wherein Clifton agreed to disassociate from PDC and transfer his membership interest to Streamline Management, LLC ("Streamline"). (R. pp. 228-30). The members of Streamline Management were Clifton's two daughters, Rene Gilreath and Leah Winton, and his ex-wife. (R. p. 124, lines 20-25- p. 125, lines 1-21). Clifton testified that he transferred his interest in PDC to Streamline to repay his daughters a rather sizeable debt owed to them that he negotiated down to approximately $27,000. (R. pp. 178-88). Streamline did not exist at the time Clifton and his daughters executed the Assignment and was not organized until months later on January 12, 2010. (R. pp. 228-231; R. p. 128, lines 14-25- p. 130, lines 1-13). PDC is a member-managed limited liability company. (R. pp. 270-72; R. p.

83, lines 6-10). Whiteman, the other member of PDC, did not authorize or consent to Clifton's transfer or assignment of his membership interest to Streamline. (R. p. 83, lines 19-23; R. p. 87, lines 3-8).

In October 2010, Plaintiff started supplemental proceedings against Clifton in an effort to try and collect on the judgments. By this time, Clifton did not own any of the assets listed in his Financial Statement. (R. pp. 277-78). All of those properties had been foreclosed upon (or a deed in lieu of foreclosure issued), transferred by Clifton to business partners in exchange for forgiveness of debt, or otherwise disposed of by him. (R. pp. 277-78). Clifton no longer had remaining assets to pay his debt to First Citizens. As a result, First Citizens instituted the underlying action to set aside the conveyance of his interest in the Property to PDC.

V. LEGAL ARGUMENTS

A. The Court of Appeals properly held that there was clear and convincing evidence in the record to find that Clifton acted fraudulently when transferring his interest in the Property and that the conveyance should be set aside under the Statute of Elizabeth.

The central issue in this case is whether or not Clifton had the requisite fraudulent intent when he conveyed his interest in the Property to PDC to warrant setting aside the deed under the Statute of Elizabeth. (Pet. p. 4). The answer is yes; a conclusion correctly reached by both the trial court and Court of Appeals. The Petitioners' contention otherwise, and their alternative argument in which they claim to present countervailing evidence satisfactory to rebut any presumption of fraudulent intent, are without merit.

An action to set aside a conveyance under the Statute of Elizabeth is an equitable action subject to *de novo* review on appeal. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459 (2012); S.C. Const. art. V § 5. Under a *de novo* standard of review, the appellate

court has jurisdiction to find facts in accordance with its own view of the evidence but is not required to disregard the findings of fact by the trial court nor ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses.[2] *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). The Court of Appeals correctly affirmed the trial court's finding that Clifton possessed the requisite fraudulent intent to set aside the conveyance due to the presence of numerous badges of fraud. Petitioners' arguments do not warrant this Court's review and the Petition should be denied.

1. ***The Oskin v. Johnson holding is inapplicable to the present case and, therefore, it was proper for the Court of Appeals not to apply it.***

At the forefront of Petitioners' argument is the assertion that the Court of Appeals "overlooked the nature of the transaction at issue" in reaching its conclusion. (Pet. at 4). Specifically, the Petitioners claim that the Court of Appeals erred by failing to apply the holding of *Oskin v. Johnson* to the facts of this case. However, their reliance on the *Oskin* decision is both erroneous and misguided.

Clifton cites *Oskin* for the general proposition that "a transaction that is legitimate on its face made to protect a bona fide interest in property does not become fraudulent merely because the ultimate upshot is an uncompensated creditor." (Pet. at 7). *Oskin* does not stand for this proposition and Petitioners' submission tellingly lacks citation to any specific portion of that opinion to support their erroneous statement. In actuality, *Oskin* found the Statute of Elizabeth to be inapplicable under the facts of that case. The Court

[2] The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See South Carolina Cable Television Ass'n v. Southern Bell Telephone and Tele. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). Further, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. *See e.g., Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154 (1996); *Wallace v. Milliken and Co.*, 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

held that since there were no allegations that the actual grantor, a third-party bank, intended to defraud the appellant-creditors when it assigned a note and mortgage, there was "no basis for applying the Statute of Elizabeth." *Oskin*, at 388.[3] If there is any general conclusion that can be gleamed from the *Oskin* decision it is that the South Carolina Supreme Court is "cognizant of the fact that entities can use legal mechanisms to achieve fraudulent ends." *Oskin*, at 401. In the dissenting opinion, Justice Hearn reiterated this point and stated that "[t]he facial legality of the conveyance should have no bearing on whether it was intended to defraud another. Suggesting otherwise ignores the reality that entities can use perfectly legal transactions to achieve nefarious ends." *Id.* at 406.

Petitioners' misstatement of inapplicable law cannot sufficiently rebut the presumption of fraudulent intent established at trial and affirmed by the Court of Appeals' *de novo* review of the record. More to the point, it has no bearing on that evaluation. Petitioners wish the Court to find error by consideration of a fact that is present in every Statute of Elizabeth analysis – an asset that has been transferred beyond the creditor's reach

[3] In the *Oskin* case, a non-debtor purchased oceanfront property as tenants in common with the debtor. The property was secured by a first note and mortgage and then later a second mortgage was added, that the non-debtor both co-signed and personally guaranteed. The debtor had been assisting with the loan payments but became unable to continue making payments shortly before a judgment was entered against him. The non-debtor then took over making the loan payments in full. The note owed to the first bank was maturing with a large balloon payment due. The non-debtor approached the first bank about refinancing. Due to decreased property values, the bank refused to refinance the loan without requiring the non-debtor to put up significant marketable securities as collateral. The non-debtor's wife then formed a limited liability company and obtained a loan from a different bank that was secured by investment accounts and guarantees from both she and the non-debtor. The loan proceeds were used to pay off the first bank in exchange for an assignment of the note and mortgage to the limited liability company. The second mortgage remained on the property. In the meantime, a judgment was entered against the debtor, which attached to the debtor's interest in the property but behind both the first and second mortgages. The judgment creditor brought suit against the debtor, the non-debtor, the wife, and the LLC. After finding that the Statute of Elizabeth was inapplicable to the facts of the case since the challenged conveyance was the assignment by the bank (who was not a party to the action) to the LLC, the court went on to consider an alter-ego claim in effort to pierce the corporate veil. In that regard, the court found, after weighing the totality of the evidence, that there was no inequity or fraud with the actions of the non-debtor and his wife in this particular instance where the transaction did not impact or change the priority of the judgment creditor. *Oskin*, at 401-02.

– without consideration of whether the evidence established one or more badges of fraud. They imply the Court of Appeals affirmed voiding the conveyance simply because it placed assets out of First Citizen's reach. The Court's opinion relied upon the existence of numerous badges of fraud, and the fact Clifton's conveyance of the Property put it out of the bank's reach was a foregone and uniform circumstance present in all Statute of Elizabeth cases.

Here, the challenged transfer was set aside by the Court of Appeals evaluation of Clifton's intent in transferring the Property as revealed by the objective evidence establishing numerous badges of fraud. The law provides that when an uncompensated creditor establishes the debtor harbored the requisite fraudulent intent when they transferred assets out of that creditor's reach, the debtor must provide sufficient evidence to overcome that presumption to uphold the conveyance. This is what the Court of Appeals evaluated in rightfully affirming the trial court's holding to set aside the conveyance. The Petitioners' argument in reliance on *Oskin* is nonsensical, inconsequential, and was rightfully not taken into account by the Court of Appeals in its opinion.

The truth of the matter is that the Petitioners are merely seeking review of the Court of Appeals' decision when, after performing a proper Statute of Elizabeth analysis, it did not interpret the evidence in their favor in light of what the Petitioners believe to have been a satisfactory explanation for Clifton's conveyance of his interest in the Property. To accept this position would require the Court to view and consider only a part of the evidence in the record through an overly narrow analytical prism, rejecting the overwhelming circumstantial evidence which clearly established sufficient badges of fraud warranting an inference of fraudulent intent on the part of Clifton. Petitioners' argument relies upon

misstatement of inapplicable law and the acceptance of a radically altered Statute of Elizabeth analysis that would eviscerate that legislation's entire purpose – to prevent debtors from transferring assets to defraud their creditors. The Court of Appeals rightfully looked to the overwhelming objective evidence establishing numerous badges of fraud and found that Clifton's self-serving testimony claiming innocent intent could not rebut the fraudulent intent presumption.

2. ***The Court of Appeals properly found the clear and convincing evidence presented at trial and contained in the record established numerous badges of fraud sufficient to create a rebuttable presumption of fraudulent intent.***

When determining whether or not a conveyance is fraudulent under the Statute of Elizabeth, fraudulent intent may be inferred upon the debtor when one or more of the following "badges of fraud" exist:

(1) The insolvency or indebtedness of the transferor;

(2) Lack of consideration for the conveyance;

(3) Relationship between the transferor and the transferee;

(4) The pendency or threat of litigation;

(5) Secrecy or concealment;

(6) Departure from the usual method of business;

(7) The transfer of the debtor's entire estate;

(8) The reservation of benefit to the transferor; and

(9) The retention by the debtor of possession of the property.

In re Haddock, 246 B.R. 810, 815 (Bankr. D.S.C. 2000)(*citing Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973). (*See also* Pet. at 4) The debtor's intention is demonstrated, first, by examining the circumstantial evidence surrounding the challenged

transfer and considering what badges of fraud are established. *Id.* If a badge of fraud is found to exist, it creates a rebuttable presumption of intent to defraud. *Id.*

The Court of Appeals properly found clear and convincing evidence in the record to establish the existence of six (6) of the nine (9) enumerated badges of fraud. (App. pp. 6-7). In fact, the Court went through the laborious task of identifying each of the six badges of fraud they found to exist and set forth the specific evidence in the record upon which they relied to reach its conclusion. *Id.* While the Petitioners claim there is no evidentiary support to establish two of the six badges of fraud, (Pet. at 6), a proper analysis does not require that all nine badges of fraud be established in order to create a presumption of fraud. *See Coleman* S.C. at 209-210 ("[W]hile one circumstance recognized as a badge of fraud may not alone prove fraud, where there is a concurrence of several badges of fraud an inference of fraud may be warranted."); *In re Haddock*, 246 B.R. at 815 (holding that the pendency or threat of litigation constitutes but one of some nine recognized badges of fraud courts consider in determining whether it can infer fraudulent intent). The fact that the Court of Appeals found several however, is more than enough to warrant a presumption of fraudulent intent on the part of Clifton.

a. The Insolvency or Indebtedness of the Transferor.

There is no question that Clifton was indebted to First Citizens on September 18, 2008, by virtue of the existence of the three loans. That fact is not in dispute. (App. p. 6). However, the Petitioners contend that even though Clifton was indebted to the bank he was not insolvent when the Property was transferred. (Pet. at 5-6 fns 5-9). The focus on this fact, however, is misplaced and ultimately irrelevant because of Clifton's admission that he was indebted at the time of the conveyance. To establish "the insolvency or the

indebtedness of the transferor" badge of fraud, all that is required is a showing that the debtor was *either* insolvent or indebted.[4] Again, the Petitioners admit Clifton's indebtedness.

Even if it were necessary to show Clifton was insolvent in September 2008, there is clear and convincing evidence in the record upon which the Court of Appeals could rely to find he was insolvent and establish this badge of fraud. Thus, Clifton's assertion to the contrary, as with his other arguments, fails in light of the objective evidence. (*See* App. pp. 61-65). Specifically, the undisputed evidence establishes the following: (1) due to the massive downhill slide in the real estate market, Clifton's real estate developments had come to a halt; (2) one of Clifton's three loans had matured in July 2008 which Clifton could not repay; (3) Clifton requested First Citizens to extend the maturity date for the loan that was then due and owing, as well as the other two loans; (4) negotiations for the loan extensions were ongoing in September 2008; (5) Clifton had become slow in making loan payments in September 2008; and (6) Clifton was concerned about the loans, he could not repay the loans under their current terms, and he was completely reliant upon the bank approving the modifications.[5] *Id.* (R. p. 52, lines 12-15; R. p. 55, lines 2-24; R. p. 74, lines

[4] Where there is lack of valuable consideration, the plaintiff does not have to establish actual intent; rather, a transfer may be set aside as fraudulent if (1) the grantor had existing debt owing to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness in full - not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. *Future Group, II v. NationsBank*, 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996).

[5]Additional evidence presented at trial showed that Clifton found himself in a dire financial condition prior to the transfer in September 2008. Specifically, the bank submitted an August 1, 2008 Agreement between Clifton and Whiteman under the terms of which Whiteman allowed Clifton to pledge his interest in jointly held property as collateral for a $125,000 loan he needed to make interest payments on loan debt with Cornerstone Bank. (R. pp. 273-76). This Agreement shows that in August 2008 Clifton was reliant upon borrowing money just to make interest payments on a debt to another bank and could not obtain credit without pledging significant collateral.

2-25; R. p. 75, lines 1-13; R. p. 170, lines 13-19). The only piece of countervailing evidence offered by Clifton concerning this badge of fraud is his own testimony in which he claimed to have access to credit sufficient to satisfy his loan obligations. (Pet. at 5). Clifton's self-serving testimony in this regard was overcome by a mass of reliable, objective indicators established by clear and convincing evidence. The Court of Appeals properly relied upon such objective evidence in the record in affirming the existence of this first badge of fraud.

b. Relationship Between the Transferor and the Transferee, Reservation of Benefit, and Retention of Possession

The relationship between the transferor and the transferee, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property are three separate badges of fraud that the Court of Appeals properly found to exist in this case. (App. p. 7). The undisputed evidence in the record established the following: Clifton, the transferor, was one of two members of PDC, the transferee. Clifton owned a 50% interest in PDC, the only asset of which was the Property. By virtue of his ownership interest in PDC, Clifton not only had a relationship with the transferee, but also retained possession of the Property and reserved a benefit in the Property subsequent to its transfer. (Pet. at 4-5). The fact these three badges of fraud may exist in most situations wherein a debtor conveys his interest in property to a newly formed LLC of which he is also an owner does not warrant the wholesale discount of these badges of fraud as the Petitioners suggest. (Pet. at 4-5). If anything, it heightens the suspicion of fraud "as to the bona fides of a challenged conveyance" which the debtor must then satisfactorily explain away something which Clifton failed to do. *Coleman*, at 209. Petitioners' argument in this regard is another red

herring and transparent attempt to claim the Court of Appeals erred by considering the presence of long-recognized badges of fraud.

c. The Pendency or Threat of Litigation

The Court of Appeals also found clear and convincing evidence of the existence of an imminent threat of litigation to establish yet another badge of fraud. (App. p. 7). It is undisputed Clifton knew that if he did not pay his loan obligations when due or failed to successfully negotiate a loan modification with First Citizens that litigation was inevitable. (Pet. at 5). It is also undisputed that Clifton was behind on his loan payments in the Fall of 2008 with those payments still outstanding in late November of that year. (R. p. 170, lines 13-19; R. p. 256, p. 259, pp. 261-63). Clifton wants the Court to believe that in September 2008 he did not know litigation would be forthcoming because he had no reason to think First Citizens would deny the requested loan modifications. (Pet. at 5-6). However, he ignores his own admissions at trial that he was concerned about making the payments and was dependent upon modification of the loans. (R. p. 170, lines 16-19). More telling is the fact there is absolutely no evidence in the record to establish that First Citizens ever "assured" or guaranteed Clifton that his loan modifications would be renewed despite Petitioners' claim such assurances were made. (Pet. at 5). Rather, the evidence clearly shows that First Citizens advised Clifton that he needed to bring his interest payments current and provide a business plan detailing how he intended to pay down the loan balances in order for the modifications to be approved. (R. pp. 52-55; R. pp. 256-67). The bank also requested that Clifton provide additional collateral to secure repayment. (R. pp. 52-55; R. pp. 75). None of this was done.

d. Secrecy or Concealment

It is undisputed that Clifton never told First Citizens of his plans to convey the Property to PDC, or the fact that it was done. This is true even though Clifton and the bank were actively engaged in negotiations to extend the loan dates at the time the Property was transferred. Clifton had previously provided First Citizens with a personal Financial Statement, which Clifton knew was used to analyze his financial condition in determining his ability to repay the loans. (R. pp. 53-54; R. p. 75; R. p. 147, lines 21-25; R. p. 148, lines 1-8; R. p. 152, lines 18-25). The Financial Statement reflected that Clifton had extensive real estate holdings, one of which was his interest in the subject Property. (R. pp. 247-252). Based on his Financial Statement, in September 2008 First Citizens believed Clifton had sufficient unencumbered assets available to pledge as collateral and further secure his loan obligations. (R. pp. 53-54; R. p. 75). Petitioners contend that First Citizens never requested that Clifton provide an amended or updated Financial Statement. (Pet. at 6). However, it is undisputed that First Citizens asked Clifton to pledge additional collateral as security for the loans, as well as provide a business plan that included current asset information. (R. pp. 53-54; R. p. 75). Rather than provide the requested information, Clifton remained silent and began divesting himself of his interest in the subject Property as well as all other personally held property. (R. pp. 221-246; R. pp. 277-78).[6] Accordingly, it was proper for the Court of Appeals to consider all the evidence and conclude that it established the secrecy badge of fraud. The Petitioners' claim otherwise is just another example of one of their many inconsequential arguments that does not warrant further review.

3. *Petitioners failed to offer evidence sufficient to rebut the presumption of fraud imputed by the numerous badges of fraud in this case.*

"A badge of fraud creates a rebuttable presumption of intent to defraud." *In re Haddock*, 246 B.R. 810, 815 (Bankr. D.S.C. 2000) *citing Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973). Accordingly, upon finding the existence of a badge of fraud, a debtor must then come forward with sufficient evidence to satisfactorily explain the circumstances surrounding the transfer. *Coleman*, 261 S.C. at 209. Failure to offer a satisfactory explanation warrants an inference of fraud.

The Petitioners contend that Clifton met his burden to rebut an inference of fraud. The evidence upon which the Petitioners rely in rebuttal is the testimony of Clifton, Whiteman, and Renee Gilreath who all purportedly testified that Clifton transferred his interest in the Property to PDC at the insistence of Whiteman due to her longstanding liability concerns. (Pet. at 6-7). In making their argument, the Petitioners suggest that since these three witnesses are the ones with "direct knowledge of the transfer," their testimony constitutes the only definitive and determinative evidence of Clifton's intent, thus warranting reversal. (Pet. at 6). However, the witnesses' claims of "legitimacy" regarding Clifton's conveyance are substantially overcome by contrary objective evidence which the Petitioners have not and cannot explain.

As detailed in subsection A.2. *supra*, the clear and convincing evidence before the trial court and the Court of Appeals established the existence of six badges of fraud. (App. pp. 1-8). At a minimum, the undisputed evidence established that: (1) when Clifton transferred his interest in the Property to PDC in September 2008, his development projects had come to a halt; (2) he was slow in making loan payments (if not already behind); (3) he knew that failure to pay his loans would result in litigation; (4) he was actively negotiating loan modifications with First Citizens; (5) he was concerned about paying the

loans and was relying on First Citizens to extend the maturity dates; (6) the bank had requested he provide updated asset information; which was never done; (7) First Citizens never guaranteed the loan modifications; and (8) amidst the foregoing, Clifton was actively transferring the Property and numerous other properties he personally owned out of his name. *See supra* pp. 12-18. The explanation offered by the three witnesses does not even begin to overcome the mass of countervailing objective evidence and cannot explain away these remarkable facts.

Without question, Clifton's testimony is both biased and self-serving. Of course he denied any act of wrongdoing, which is why the court must consider the existing badges of fraud. *In re Haddock*, 246 B.R. at 815. Evaluating the veracity of Clifton's claims of legitimacy are exactly what the various recognized badges of fraud considerations are for. They provide objective guideposts for a court to make an evidence-based determination as to the debtor's true intention. This holistic evidence-based approach provides an objective check on the debtor's stated motives. Those objective checks are much more reliable and probative than the debtor's testimony as to his stated intention. Therefore, a debtor's denial of fraud can and should be overcome when rebutted by objective evidence to the contrary. In this case, Clifton's self-serving denial of untoward motives are belied by the established facts and circumstances, and both the trial court and the Court of Appeals properly held his testimony to be incredulous.

As for the testimony of Renee Gilreath and Whiteman, the Petitioners contend that there was no basis for disregarding their testimony "whose interest were unrelated to business dealings with Respondent." (Pet. at 7). While Whiteman may not have had any

communication with First Citizens regarding Clifton, that certainly is not true for Ms. Gilreath.

Ms. Gilreath is Clifton's daughter. In addition, she (1) worked in Clifton's office; (2) had personal knowledge of Clifton's financial condition; (3) knew that he was late on his loan payments to First Citizens; and (4) personally met with and communicated with First Citizens regarding the loan modifications on behalf of Clifton. (R. p. 115; R. p. 119, lines 1-5; R. p. 123, lines 18-20; R. p. 180, lines 5-12; R. p. 183, lines 14-25; R. pp. 256-267). Ms. Gilreath was also familiar with and assisted Clifton with the transfer of his assets. (R. p. 115; R. pp. 277-278). In fact, she is the one who handled the paperwork to create PDC and, together with Clifton, decided when to transfer the Property. (R. p. 82, lines 20-25; R. p. 83, lines 1-4; R. p. 119, lines 1-6). Furthermore, Ms. Gilreath was part owner of Streamline, the limited liability company that Clifton attempted to assign his interest in PDC to when First Citizens was in the process of obtaining deficiency judgments. (R. p. 124, lines 16-25; R. p. 86, lines 1-2; R. pp. 128-130). Accordingly, she had a vested interest in seeing to it that Clifton's conveyance to PDC remained intact, as she would have been part owner of the Property through her membership in Streamline. Therefore, to call Ms. Gilreath a disinterested witness is simply bogus and, like with her father, supports a decision to discredit her testimony.

As for Whiteman, while she testified that *she* conveyed her interest in the Property to PDC out of liability concerns that *she* personally had, she unequivocally testified that she had no idea what motivated Clifton to do so. (R. p. 94, lines 20-25; R. pp. 7-11). Furthermore, Whiteman testified that she had asked Clifton to put the Property in an LLC for years to no avail. (R. pp. 87-90). In fact, according to Clifton, she had been pestering

him on a daily basis to do so. (R. p. 173, lines 9-12). And then suddenly, at a time when Clifton is not making his loan payments and his financial wherewithal is dwindling, his office created PDC. (R. pp. 96-97). Ms. Whiteman claims to have had no knowledge of Clifton's financial condition, as this was something that was never discussed. (R. p. 51, lines 3-18). By virtue of her apparent lack of knowledge in this arena, coupled with the fact that she had no clue as to Clifton's true motivations, her testimony becomes less convincing.[7]

B. The Court of Appeals properly set aside only Clifton's 50% interest in the Property as fraudulent even though both he and Whiteman conveyed their respective interests through a single deed.

The Petitioners contend that the Court of Appeals misunderstood their argument regarding the setting aside of Clifton's transfer of his 50% interest in the Property that he owned as tenants in common with Whiteman when he and Whiteman both conveyed their respective interests through a single deed. (Pet. at 7-8). Specifically, they claim that the Court should have "reviewed the actual decision and transaction of the co-owners" as opposed to the "ability to structure the transaction differently," and determine whether "a single deed and conveyance is susceptible to piecemeal attack." (Pet. at 8). This argument, however, makes no sense, as it is obvious from merely reading the Opinion that the analysis performed by the Court was the very issue which the Petitioners are complaining was overlooked.

The Court of Appeals was asked to determine whether "the circuit court's decision to set aside [Clifton's] conveyance to PDC was improper because Whiteman and Clifton

[7] Further, Petitioners cannot deny the long history of joint interests and property ownership between Clifton and Whiteman. (R. pp. 79-42). Whiteman's allegiance naturally was with Clifton as her longtime friend and business partner, rather than First Citizens – Clifton's creditor who wanted to take half of the ownership of the Property in which Whiteman holds a 50% interest and which she wanted to own with Clifton. (R. p. 87).

transferred the Property in a single deed." (App. pp. 8). Petitioners' primary argument was "voiding the sale as to Clifton effectively divided the deed, which is error when Respondent failed to prove Whiteman acted with any fraudulent intent when she transferred her interest in the Property to PDC." (App. pp. 8; App. pp. 13-15; App. pp. 93-94). The Court of Appeals ultimately concluded that the intent of Whiteman was irrelevant to a Statute of Elizabeth analysis as to whether or not Clifton acted fraudulently since the Property was owned as tenants in common. (App. pp. 8-9). The Court further explained that since they owned the Property as tenants in common it was immaterial that they conveyed their interest through a single deed. (App. p. 9). In reaching this conclusion, the Court relied on well-established legal principles regarding tenants in common. (App. p. 9). In fact, Petitioners agreed with the Court that (1) a cotenant cannot convey an interest in property greater than what he actually owns; (2) a cotenant may transfer, mortgage, or otherwise dispose of his individual interest in property without consent of the co-owner; and (3) a creditor of a debtor-cotenant may reach and pursue his respective interest in property owned as tenants in common. (Pet. at. 7; App. pp. 91-93). In the same breathe, they turn around and wrongfully claim that the foregoing legal principles are irrelevant or inapplicable when analyzing a conveyance of co-tenants made through a single deed. (Pet. at. 7-8).[8] As with other arguments, Petitioners offer no contradictory legal authority to challenge the veracity of that relied upon by the Appellants and the Court of Appeals.

While Petitioners contend on one hand that it is the actual decision and transaction of the co-owners which should be reviewed, (Pet. at 8), on the other they have stated that

[8] Petitioners also incorrectly state that the Appellants "relied exclusively on citations to secondary authority concerning the general nature of cotenancies." (Pet. at 7 fn11). Addressing this issues in their Final Brief, Appellants cite to three South Carolina cases in support of their position. (*See* App. pp. 69-70, including fn6).

it is only Clifton's intent in transferring the property that is the key issue. (Pet. at 4). These seemingly inconsistent statements set forth in the Petition reveal the fallacy of the Petitioners' argument, as they know tenants in common each own a distinct and proportionate yet undivided interest in the property and do not have privity of estate with each other. 6 S.C. JURIS. COTENANCIES § 5 (2014). You simply cannot remove the fact that Clifton and Whiteman were tenants in common from the equation.

It is undisputed that (1) Clifton and Whiteman each owned a 50% undivided interest in the Property separate and apart from the other; (2) they each conveyed their respective 50% interest in the Property to PDC; and (3) each conveyance was a separate and distinct transfer although accomplished through a single deed, as neither Clifton nor Whiteman could convey more property than what each of them actually owned. As mutually exclusive conveyances, the Court of Appeals properly held that the invalidity of Clifton's conveyance does not invalidate Whiteman's conveyance, and further, does not require that her conveyance also be set aside. This holds true regardless of how the transaction was structured. (App. p. 9).

Lastly, the Petitioners contend that the lack of precedent on this issue warrants review by this Court. (Pet. at 8). That is not true. While there may not be a reported case analyzed under the Statute of Elizabeth addressing a conveyance made by tenants in common through a single deed when only one of them had the requisite fraudulent intent, as set forth above, there is ample South Carolina law on point that is controlling on this issue and which the Court of Appeals properly relied in support of its holding. The Petitioners have offered no compelling reason, nor cited any authority to suggest that a

conveyance of property by tenants in common should be viewed any differently under the Statute of Elizabeth if accomplished through a single deed.

The Statute of Elizabeth is designed to protect "creditors and others from fraudulent conveyances and, therefore, should be construed liberally in favor of the class of persons designed to be protected from fraud." *Oskin*, at 406. Otherwise, "an individual can goad an innocent grantor into conveying an interest in property to defraud another with impunity." *Id.* Here, Clifton is trying to escape liability by attempting to lump his fraudulent transfer with Whiteman's presumably valid one. By setting aside Clifton's conveyance without finding similar fraudulent intent on Whiteman or otherwise invalidating her conveyance the Court issued a proper remedy that not only complies with well-established legal principles, but also carries out the intended purpose of the Statute.

VI. CONCLUSION

The clear and convincing evidence presented to and relied upon by both the trial court and the Court of Appeals established that when Clifton transferred the Property to PDC in September 2008 his development projects had come to a halt, he was behind on loan payments, actively negotiating modification, and in the midst of a concerted effort to divest himself of all assets held in his name. The trial court properly found, and the Court of Appeals affirmed, that this reliable and substantial evidence established the presence of multiple badges of fraud that Clifton could not satisfactory explain, which warranted an inference of fraudulent intent on the part of Clifton necessary to set aside the conveyance of his 50% interest in the Property to PDC under the Statute of Elizabeth. Even though both Clifton and Whiteman conveyed their respective interests in the Property to PDC by a single deed, each conveyance constituted a separate and distinct transfer analyzed

independently of the other under the Statute of Elizabeth since the Property was owned as tenants in common. Therefore, despite Clifton's contentions to the contrary, it was proper to set aside only his conveyance.

None of the factors set forth in Rule 242 which warrant review exist in this case. Accordingly, for all the reasons set forth above, the Petition should be denied and the Court of Appeals' Opinion upheld.

Respectfully Submitted,

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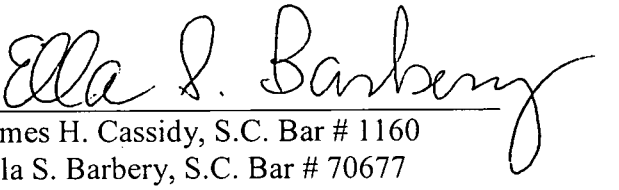

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May 26, 2017

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY

Court of Common Please
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5469 (S.C. Ct. App. filed February 15, 2017)
Appellate Case No. 2017-000979

First Citizens Bank and Trust Company, Inc.....Respondent,

v.

Park at Durbin Creek, LLC; Kenneth E. Clifton;
and Linda G. Whiteman .....Defendants,

Of whom Park at Durbin Creek, LLC and Kenneth E. Clifton are the Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** was served upon all counsel of record in the above-referenced action this 26th day of May, 2017, by depositing same in the United States Mail, sufficient postage affixed thereon, and addressed as follows:

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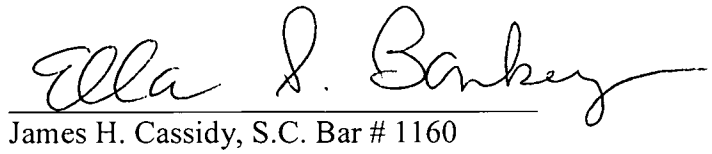

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