

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LAURENS COUNTY

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.

REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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ARGUMENT IN REPLY

This case is about the intention of the grantor in transferring his property and the actual means he used to do so. In response to the Petition for a Writ of Certiorari, Respondents have again urged the Court to analyze the objective evidence without corresponding analysis of how such objective markers would ever be lacking in a case where property owners chose to use a limited liability company to provide liability protection. Similarly, Petitioner asks this Court to focus on the means employed to accomplish the transfer rather than the unquestioned ability for co-owners to structure the transfer differently. For the reasons urged in the Petition for a Writ of Certiorari, and the brief arguments that follow, this Court should grant the Petition.

1. The Court Of Appeals Erred In Concluding That Multiple Badges Of Fraud Were Present To Presume Fraudulent Intent Without Analyzing The Nature Of The Challenged Transfer.

Clifton asserts that he transferred his property for liability protection at the insistence of co-owner Whiteman. To analyze Clifton's intentions for making the transfer in a subsequent attack alleging a fraudulent conveyance, the courts below were necessarily interested in what evidence might establish various badges of fraud.¹ At trial and on appeal, Clifton sought to focus primarily on the timing of the transfer as the most relevant indication of his intention. Indeed, in arguing that evidence of the subsequent transfer was not properly before the Court, the following exchange clarified the nature of the objection:

¹ Specific badges of fraud include (1) The insolvency or indebtedness of the transferor; (2) Lack of consideration for the conveyance; (3) Relationship between the transferor and the transferee; (4) The pendency or threat of litigation; (5) Secrecy or concealment; (6) Departure from the usual method of business; (7) The transfer of the debtor's entire estate; (8) The reservation of benefit to the transferor; and (9) The retention by the debtor of possession of the property. In re Haddock, 246 B.R. 810, 815 (Bankr. D.S.C. 2000) (citing *Coleman v. Daniel*, 261 S.C. 198, 199 S.E. 2d 74, 79 (1973)).

MR. PRUITT: Not the transfer of his interest to Streamline but the deed from Clifton and Whiteman to the LLC. That is all this lawsuit is about.

THE COURT: It is the timing, the timing is the attack.

MR. PRUITT: Sir?

THE COURT: The timing of the deed is the attack.

MR. PRUITT: Yes, sir.

THE COURT: Whether it happened or not is not a question, it happened.

MR. PRUITT: Yes, sir. You are absolutely right.

Tr. p. 68: 6-16, (R. p. 107).

That is not to say, as Respondents suggests, the other potential badges of fraud should be discounted wholesale.² Rather, the error below was in affording weight to potential badges of fraud that would necessarily exist based on the nature of the transaction absent something more. This Court cannot know the subjective intent of a party, nor could the Trial Court or the Court of Appeals. The whole purpose of establishing badges of fraud to aid courts in Statute of Elizabeth cases is to provide an objective framework to glean inferences of fraudulent intent. Petitioner's point here is simple. To the extent a badge of fraud would appear to apply whether the grantor harbored the requisite fraudulent intent or not, the focus of the Court's analysis should be directed towards other potential badges of fraud that are more probative in the case.³ While Respondent nominally addresses this point, they fail to demonstrate how facts that

² Return at p. 15.

³ Petition for Writ of Certiorari at 5.

would always exist in light of the nature of the transaction are probative here and instead suggest, without supporting authority, that suspicions should be heightened.⁴

Furthermore, the circumstances in this case are notably contrast from previous cases analyzing various badges of fraud. For example, in *Judy v. Judy* the Court found that the grantor had made transparent, title-only transfers to family yet retained full possession and income from his former property.⁵ In that case, the inference would have certainly been obvious based on several badges, including retention of benefit, retention of possession, and the relationship between the parties. While *Petitioners* does not mean to suggest that these badges are ONLY relevant in a case like *Judy*, the obvious inference from that factual background is inapposite to situations like the case at bar.

Finally here, the Court of Appeals erred in not applying *Oskin v. Johnson*.⁶ In that case, the co-owner of the property formed a limited liability company to take assignment of the note and mortgage where refinancing the property was not possible.⁷ Respondent is correct that the holding in *Oskin* ultimately rested on the absence of evidence concerning fraudulent intent of the actual grantor, a third-party bank. However, as the Court also explained “the fact that entities can use legal mechanisms to achieve fraudulent ends” did not invalidate a transaction undertaken by a co-owner of the property for a legitimate purpose.⁸ Similarly, in this case a limited liability company formed at the insistence of a co-owner with the legitimate, stated purpose of liability protection should not create an inference of fraud merely because the transaction would eventually carry with it the collateral result of a creditor potentially going

⁴ Return at p. 15

⁵ 742 S.E.2d 672, 403 S.C. 203 (Ct.App., 2013)

⁶ 400 S.C. 390, 735 S.E.2d 459 (2012)

⁷ *Id.* at 401-402.

⁸ *Id.* at 401.

uncompensated. Instead, as Petitioner here argued before the Court of Appeals, his claims may well be stronger than in *Oskin* as the challenged conveyance in that case took place well after a judgment attached to the property.⁹

2. **Division of the Deed is a Novel Issue Worthy of Granting Certiorari.**

There are no reported South Carolina cases concerning setting aside only half a deed. Accordingly, Petitioner requests that this Court address the issue and relies on the arguments presented in the Petition. However, Respondent misstates the issue to point to a seeming inconsistency.¹⁰ The question of a fraudulent conveyance involves Clifton's intent. The question of deed division involves the transaction of the co-owners. As was pointed at the Court of Appeals, Respondent dismissed its civil conspiracy claim against Defendant Whiteman in the absence of any evidence to support that claim.¹¹ The inconsistency between evaluating only one co-owner versus both grantors in a single transaction rests in First Citizen's admission that it had no evidence of Whiteman's intent and dismissing claims against her. In order to invalidate the deed, the Court would have necessarily needed evidence of fraudulent intent as to both grantors. The upshot of that decision is that Respondent lost the ability to set aside the entire deed and created the problem of deed division.

Finally, while Respondent again cites to *Oskin* to point out that an individual with fraudulent intent might "goad" an innocent grantor into defrauding another, that reminder turns the facts here on their head.¹² As Respondent notes, it was the presumably innocent co-owner who goaded Clifton into transferring the property as she "pestered him on a

⁹ App. at 33.

¹⁰ Return at 22-23.

¹¹ App. at 35.


¹² Return at 24.

daily basis to do so.”¹³ While the Court should certainly be cautious about allowing the unscrupulous to insulate their fraudulent conduct by dragging the innocent into their dealings, the record reflects that it was Clifton who was pressed here. To suggest to the contrary ignores the record and the purpose behind the Court’s reminder in *Oskin* that parties may use legal means to pursue illegal ends.¹⁴

CONCLUSION

This Court should focus on the most relevant evidence specific to this transaction, and find that Respondent failed to present evidence of the most prescient badges of fraud here. To the extent sufficient evidence was presented, Petitioner met his burden to overcome. Furthermore, the Court should grant Certiorari to review the novel issue of deed division.

Respectfully Submitted,



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¹³ Return at 21 (citing R. p. 173, lines 9-12).

¹⁴ *Oskin*, at 401.

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Case No. 2010-CP-30-1141
Appellate Case No. 2014-002295

First Citizens Bank and Trust Company, Inc. Respondent,

v.


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

PROOF OF SERVICE

I certify that I have served the **REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, June 5th, 2017, addressed as follows:

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