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**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**APPEAL FROM LAURENS COUNTY**

**S.C. SUPREME COURT**

**Eugene C. Griffith, Jr., Circuit Court Judge**

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

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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.

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**BRIEF OF PETITIONER**

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## **QUESTIONS PRESENTED**

Did the Court of Appeals err in affirming the trial court's order to set aside half the allegedly fraudulent conveyance thereby dividing the deed?

## **STATEMENT OF THE CASE**

This is an appeal from a bench trial in a fraudulent conveyance case. The trial court dismissed the only cause of action against Defendant Linda Whiteman, a co-owner of the subject property and a member of the limited liability company formed to hold the property. The trial court ruled that Defendant Clifton's transfer of his undivided one-half interest in the property was a fraudulent conveyance, and set aside only Clifton's transfer. The Court of Appeals affirmed.

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

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

157). At the time of the transfer, Clifton was current on his loan obligations. Tr. p. 120:20 – p. 122:8. (R. pp. 159-161).

As Clifton's loans to First Citizens became due, he requested renewals for each loan. Tr. p. 121:16-23, (R. p. 160). Clifton had previously received renewals for the same loans, and as late as November, 2008, had no reason to doubt that the loans would again be renewed. Tr. p. 120:1-5; Tr. p. 128:14 – p. 129:25, (R. p. 159; pp. 167-168); Defendants Exhibit 1, (R. p. 214). However, First Citizens ultimately declined to approve renewal, accelerated the loans, and commenced foreclosure proceedings against Clifton and the collateral associated with each of the three loans. Tr. p. 16:18-24, (R. p. 55). First Citizens also sought and obtained deficiency judgments against Clifton. Following unsuccessful attempts to enforce the deficiency judgment against Clifton, First Citizens initiated the instant action.

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

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

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

## **ARGUMENT**

### **The Court Misapprehended Clifton's Argument Regarding a Novel Issue under South Carolina Law.**

The Statute of Elizabeth provides

Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. S.C. Code Ann. 27-23-10(A).

In this case, two co-owners of property transferred their respective interests in an undeveloped parcel of property to a limited liability company created for that purpose. It is that transfer, and not the nature of the parties' interests as tenants in common, that is subject to review by this Court.

As was undisputed at trial or on appeal, there is no reported South Carolina case whereby the court set aside half of a deed. Clifton's position has been consistent: either the transaction was fraudulent or it was not. While Clifton agrees with the Court of Appeals regarding the well-

settled right of a co-tenant to transfer his interest independent of a co-owner, that correct statement of law misses the issue here.<sup>1</sup> The question presented, as it was at trial and to the Court of Appeals, is not whether Whiteman's admittedly valid purpose could affect Clifton's intention or whether the parties could have independently transferred their respective interests; rather, the question is whether a single deed and conveyance is susceptible to piecemeal attack. In this case, the trial Court concluded and the Court of Appeals ostensibly agreed that a deed may be half-fraudulent. It is similarly irrelevant that either owner may have transferred their interest independent of the other. The Court of Appeals should have reviewed the actual decision and transaction of the co-owners rather than their admitted right to have arranged their transfer in a different way. When these co-owners decided to transfer their property to a company created for that purpose, the entire transaction is subject to review. Stated differently, it is the transfer itself rather than the hypothetical ability to structure the transaction differently that is subject to review.

In order to successfully challenge the actual transfer at issue in the case, Respondent would have necessarily had to prove the fraudulent intent of the Grantor. As the text of the deed itself clarifies, Ken Clifton and Linda Whiteman were collectively the "Grantor" in the deed. (R. pp. 225-226). As the Court of Appeals pointed out, it is certainly possible for a party with

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<sup>1</sup> The Court of Appeals summarized the rights of cotenants, and the ability of each cotenant to freely transfer their distinct interests.

"As tenants in common, each person owned a 50% undivided interest in the Property. See 6 S.C. JURIS. Cotenancies § 5 (1991) ("Tenants in common each own a distinct and proportionate but undivided interest or estate in the property and do not have privity of estate with each other."). As tenants in common, each cotenant may transfer his or her separate ownership interest in the property without consent or participation of the other. See 6 S.C. JURIS. Cotenancies § 37 (1991) ("In the absence of a contrary contractual provision, one cotenant may sell, lease, or mortgage his share or interest in the property to . . . third parties."). If one cotenant conveys his or her interest to a third party, the third party—as grantee—becomes a tenant in common with the remaining cotenants. See 6 S.C. JURIS. Cotenancies § 39 (1991) ("A conveyance by one cotenant to a third party . . . conveys only the interest of the cotenant, and thus his grantee becomes a tenant in common with the other cotenants."). Because "[t]he interest of a tenant in common is freely alienable . . . [it] is subject to the claims of creditors." 6 S.C. JURIS. Cotenancies § 6 (1991)."

fraudulent intent to lump his fraudulent transfer together with another party with a presumably valid purpose for making a transfer. This Court could certainly craft a remedy to address such an attempt to insulate fraudulent conduct from subsequent attack. However, in this case both co-owners sought the conveyance at issue and did so through a single transfer. Linda Whiteman's testimony reflected that the transfer originated at her urging and for a valid purpose. (R. pp. 87-90).<sup>2</sup> Simply put, the factual background of this case would provide a poor example from which to craft a rule regarding use of an innocent cotenant to attempt concealment of fraudulent intent. The parties envisioned and accomplished a single transaction and a single deed. While courts below were correctly focused on Clifton's intention, in failing to address the intention of Linda Whiteman both the trial court and the Court of Appeals failed to review the intent of the Grantor. Regardless, having determined Clifton's intentions were fraudulent, the court below improperly attempted to alter the nature of the transfer before attempting to set aside only a portion. In doing so, the trial court impermissibly divided the deed.

### **CONCLUSION**

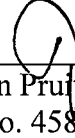
In the absence of evidence related to fraudulent intent on the part of Whiteman, setting aside half the deed was an error of law. This Court should review the actual nature of the transaction and transfer at issue, declare that the Statute of Elizabeth does not empower a court to divide a deed, and ultimately REVERSE the Court below.

[signature page to follow]

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<sup>2</sup> This Court denied certiorari as to the first Questioned Presented. Petitioner is not seeking to argue the bona fides of Clifton's intention as to that question. However, the intention of both parties is relevant to their chosen methodology.

Respectfully Submitted,



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