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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

Case No. 2010-CP-30-1141
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 .....Appellants/Petitioners.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals correctly affirm the trial court's Order to set aside Clifton's fraudulent conveyance of his 50% interest in the Property he owned as tenants in common when both cotenants simultaneously conveyed their respective interests in the Property through a single deed?

II. 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 July 30, 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. Upon hearing the case, the Court of Appeals issued an opinion on February 15, 2016 affirming the trial court's Order setting aside Clifton's conveyance of his 50% interest in the Property to PDC as fraudulent under the Statute of Elizabeth (*hereinafter* "Opinion"). (App. pp. 1-10). Petitioners filed for rehearing on February 28, 2017, which was denied by Order dated March 16, 2017. (App. pp. 11-19). Thereafter, they filed a Petition for Writ of Certiorari, seeking review of the Court of Appeal's decision on the following issues: (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; and (2) whether the Court of Appeals properly set aside Clifton's conveyance of his 50% interest in the Property that he owned as tenants in common when both cotenants conveyed their respective interests through a single deed. (Pet. for Cert. p. 1). By Order dated December 13, 2017, the Supreme Court of South Carolina denied the Petitioners' request to review the first issue but granted review as to the second issue. Therefore, the only question before this Court is whether or not the manner in which the lower court set aside Clifton's fraudulent conveyance under the Statute of Elizabeth was a proper exercise of its discretionary power.

[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. (Pet. for Cert. p. 1).

III. 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 the Shellbrook Plantation and

Plantation Holdings loans originated 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 had 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 did 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 them 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).

Unbeknownst to First Citizens and while it 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 the real estate he owned, including the subject Property, 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.

IV. LEGAL ARGUMENTS

A. The manner in which the trial court voided Clifton's fraudulent transfer of his 50% interest in the Property was a proper exercise of its discretionary powers that cannot be reversed absent a showing of clear abuse.

The Statute of Elizabeth requires fraudulent conveyances be set aside, stating that "[e]very...transfer and conveyance of lands...for the intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures *must be deemed and taken . . . to be clearly and utterly void . . . .*" S.C. Code 27-23-10(A)(*emphasis added*). Clifton's transfer of the Property was fraudulent and ran afoul of the Statute of Elizabeth. This fact was established at trial, affirmed by the Court of Appeals, and not accepted for review by this Court. Thus, this Court is faced with an unlawful transfer that violated the Statute and, consequently, must be "clearly and utterly void" under the law.

The Petitioners contend that the setting aside of Clifton's fraudulent conveyance by the trial court resulted in an impermissible division of the deed. (Br. of Pet'rs p. 6). In doing so, they (impliedly) seek *de novo* review of the lower court's ruling by characterizing their challenge as a "novel issue" based upon a "misunderstanding of the law."[2] By declining to review the lower courts' findings that Clifton transferred his interest in the Property with the intent to delay, hinder or defraud creditors in violation of the Statute of Elizabeth, the narrow issue before this Court is whether or not setting aside the conveyance was an appropriate remedy for the statutory violation. Simply stated, the singular issue for this Court to decide is whether the trial court employed the proper means to reach the statutorily mandated end of voiding Clifton's fraudulent conveyance. As such, Petitioners' claim of err before this Court is one challenging the lower court's exercise of discretion and therefore subject to an abuse of discretion standard of review. *Johnston v. Standard Oil Co.*, 155 S.C. 179, 152 S.E. 176 (1930)(The ruling of the trial court, if based upon the exercise of its discretion as to a matter that is within its discretion, will not be disturbed on appeal unless it reflects an abuse of discretion.).

"An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). Abuse of discretion must be clear and manifest to warrant reversal. *See Edens v. Cole*, 261 S.C. 556, 561-62, 201 S.E.2d 382, 384 (1973); *Mauro v. Clabaugh*, 299 S.C. 184, 190, 383 S.E.2d 244, 249 (Ct. App. 1989). As explained in detail in Section B, *supra*, Respondent contends the means

[2] "When reviewing a novel question of law, we are free to decide the issue with no particular deference to the lower court." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 372, 635 S.E.2d 97, 102 (2006).

employed by the trial court and affirmed by the Court of Appeals to reach the statutorily required ends of voiding Clifton's conveyance were proper and based on well-established legal principals and facts in the record. Not only did the lower courts simply follow the explicit language of the Statute of Elizabeth in declaring Clifton's conveyance null and void in light of his unequivocal fraudulent intent in transferring the Property,[3] but they also properly exercised their discretionary powers to fashion a remedy sufficient to ensure that just results were reached in light of Clifton's fraudulently conduct.[4] Accordingly, there was no abuse of discretion and their rulings should be affirmed.

Should this Court find that the trial court was not empowered to fashion the remedy it did, reversal of its decision as the Petitioners' request is not an option. Rather, in light of the fraudulent nature of Clifton's actions in clear violation of the Statute of Elizabeth, modification or remand are the only rulings available to remedy any alleged abuse of discretion and not run afoul of the Statute which mandates that Clifton's fraudulent conveyance be "clearly and utterly void."[5] It is just a matter of this Court clarifying the

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[3] "If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Key Corp. Capital, Inc. v. Cty. of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007)(interpreting S.C. Code Ann. § 12-51-150 and finding that since it provided a clear remedy if a tax sale was voided the bidders were limited to only the statutory remedy of the return of the purchase price without interest). "[I]t is beyond this Court's power to effect a change in the statutes enacted by the Legislature." *Id.* (internal quotations omitted)(citing *Keyserling v. Beasley,* 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996)(this Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly")).

[4] In the absence of an adequate remedy at law, a court may exercise its discretionary powers to grant equitable relief. *Key Corp. Capital, Inc., infra*, at 63. *See also Jones v. Leagan*, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct. App. 2009)("Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible."). "An adequate remedy at law is one which provides the plaintiff with 'the full end and justice of the case. It is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity.'" *Key Corp. Capital, Inc., infra*, at 63 (*quoting Chisolm v. Pryor,* 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945)).

[5] *See Key Corp. Capital, Inc., infra,* at 679-680 (Toal, J. and Pleiconas, J. dissenting)(The dissenting justices disagreed with the majority opinion which reversed the decision of the lower courts to award the respondents interest as an additional remedy when S.C. Code Ann. § 12-51-150 only provided for the return of the purchase price when a tax sale is voided. Under the facts of the case, Justice Toal and Justice Pleiconas

allowable means to that end so that either it or the lower court may abide by the Statute's mandate.

B. The Court of Appeals properly affirmed the trial court's order to set aside Clifton's fraudulent conveyance of his 50% interest in the Property even though both he and Whiteman conveyed their respective interests in the Property to PDC through a single deed.

As previously stated, the Petitioners claim that the Court of Appeals "misapprehended" their argument regarding this "novel issue under South Carolina law," and erred when affirming the trial court's decision to set aside Clifton's conveyance. (Br. of Pet'rs at pp. 4-6). Petitioners' argument opposing the setting aside of Clifton's conveyance is and has always been that "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; Pet'rs Reply to Resp't Return in Opp'n to Pet. for Writ of Cert. p. 4). A mere cursory review of the Opinion entered by the Court of Appeals, however, quashes all allegations that the Court of Appeals somehow misunderstood the issue before it. It is apparent from the Opinion that the Court of Appeals applied well-established legal principles concerning the ownership and conveyance of property held as tenants in common to the facts of this case to conclude the trial court properly set aside Clifton's fraudulent conveyance. (App. pp. 8-9). The absence of applicable South Carolina case law to this particular factual scenario may make the issue "novel" but it does not undermine the sound legal basis and reasoning utilized by the Court of Appeals in

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opined that the statutory remedy was inadequate and failed to provide the respondents with complete relief and believed a more appropriate remedy would be that the case be remanded to the trial court with instructions to determine the "amount of unjust enrichment the County must disgorge".).

reaching its decision on the issue. Petitioners have offered no legal authority to challenge the veracity of the law relied upon by the Court of Appeals in reaching its decision. Likewise, Petitioners have failed to provide any substantive argument undermining the lower court's reasoning based upon those unchallenged legal principles. Simply put, Petitioners' argument is a bare accusation of alleged misapprehension by a learned panel of appellate judges whose Opinion reflects nothing but a clear understanding of the pertinent law and its application to the facts of this case.

Petitioners fault the Court of Appeals for failing to review the transfer of the Property from both Clifton and Whiteman to PDC in its entirety and focusing instead on "the nature of the parties' interests as tenants in common." (Br. of Pet'rs pp. 4-5). Petitioners' argument, however, is grounded in fallacy and based on an improper characterization of the parties as a single "Grantor" for the purpose of a Statute of Elizabeth analysis. It is undisputed that Whiteman and Clifton owned the Property as tenants in common. While the Petitioners want to skirt around and ignore this critical fact, the truth of the matter is that "the nature of the parties' interests as tenants in common" is the very reason why Clifton's conveyance could properly be set aside.

As accurately pointed out by the Court of Appeals, since Clifton and Whiteman owned the property as tenants in common, it is immaterial that they conveyed their respective interest in the property through a single deed. (App. p. 9). The reason being is that the well-established legal principles concerning ownership of the Property as tenants in common, with which the Petitioners agree, make it clear that:

(1) **Clifton and Whiteman each owned a fifty percent undivided interest in the Property separate and apart from the other.** 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."); (App. p. 9).

(2) **Clifton and Whiteman could each transfer their separate ownership interest in the Property without consent or participation of the other.** 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 other cotenants or third parties."); (App. p. 9).

(3) **Clifton and Whiteman as tenants in common could only transfer their respective 50% ownership interest in the Property and could not convey more than what he or she owns.** 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."); (App. p. 9).

There is absolutely no legal principle the Petitioners can rely upon or point to in support of their position that since Clifton and Whiteman transferred their separate property interests to PDC through a single deed that it somehow severed or negated the distinct and mutually exclusive ownership interest each of them possessed in the Property and conveyed through that deed. The fact is that regardless of the mechanism used to convey their respective interests, the analysis and the outcome remains the same. Petitioners' argument invites the Court to tilt its head at windmills when, in reality, the method of Clifton's conveyance is irrelevant and the lower courts both properly focused their Statute of Elizabeth analysis on his intent. Finding that intent to be fraudulent, the trial court utilized its discretionary

powers to fashion an appropriate remedy and the Court of Appeals rightly upheld that decision.

Notwithstanding the foregoing and in an apparent desperate attempt to find some justification for their unfounded argument, the Petitioners claim that since the September 18, 2008 deed in question refers to Clifton and Whiteman as a single "Grantor" then the intent of both of them must necessarily be fraudulent as the "Grantor" under a proper Statute of Elizabeth analysis. (Br. of Pet'rs p. 5). The fact that Clifton and Whiteman may have been referred to as "Grantor" in the deed does not in any way mean or suggest that each of them possessed and were conveying anything more than his or her separate, distinct and mutually exclusive 50% ownership interest in the Property so that they become a single, unified grantor for purposes of a Statute of Elizabeth analysis. In fact, in the deed's derivation clause there is a second reference to Clifton and Whiteman where they are referred to as "the Grantors herein". (R. p. 225). Despite Petitioners' contention to the contrary, the only clarification to this issue that can be gleaned from the use of the word "Grantor" in the deed is that Clifton (or his office) made a scrivener's error when he prepared it – not that the conveyances of Whiteman and Clifton's separate and distinct property interests constituted a single transfer necessitating a review of Whiteman's intent. Her intent remains irrelevant and Petitioners fail to present any authority to the contrary.

By virtue of this Court's refusal to review the sufficiency of the evidence surrounding Clifton's intent when he transferred his 50% interest in the Property to PDC, the Court of Appeals' decision stands and the final ruling remains that Clifton acted fraudulently when transferring the Property. (App. p. 8). Since the Property was owned as tenants in common, Clifton's conveyance to PDC was a mutually exclusive conveyance

separate and apart from that of Whiteman's such that the invalidity of one does not invalidate the other. (App. p. 9). Additionally, as a mutually exclusive conveyance, the Court of Appeals properly held that it was wholly irrelevant that Whiteman may have transferred her share of the Property to PDC for a valid purpose, as her intent has no bearing on whether or not Clifton's conveyance was fraudulent under the Statute of Elizabeth. (App. p. 9). The reason being is that Whiteman was not the "grantor" of Clifton's share as would be necessary to trigger a Statute of Elizabeth analysis of her intent. *Oskin v. Johnson*, 400 S.C. 390, 398, 735 S.E.2d 459, 464 (2012)("The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land."). As such, it was well within the power of the trial court and the Court of Appeals to invalidate only Clifton's conveyance of his interest in the Property without regard to the validity of Whiteman's transfer of her share or her intent in making the conveyance.

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 doing nothing but trying to escape liability by attempting to lump his fraudulent transfer with Whiteman's presumably valid one. Petitioners have acknowledged that it is proper for the Court to "craft a remedy to address such an attempt to insulate" fraudulent conduct, (Br. of Pet'rs pp. 5-6), and the facts of this case provided the Court of Appeals a perfect scenario to do just that. Clifton's conveyance was fraudulent, and it cannot be cloaked in legitimacy simply because it was accomplished through a single deed in which his cotenant conveyed her interest in the Property. The law

says these are distinct transfers, and the lower courts properly analyzed Clifton's conveyance as one separate and apart from Whiteman's. In setting aside Clifton's conveyance without finding Whiteman harbored similarly fraudulent intent or otherwise invalidating her transfer, the Court of Appeals rightly affirmed the trial court's ruling which is supported by well-established legal principles and reflects a fair and just exercise of the court's discretionary powers to fashion an appropriate remedy to carry out the intended purpose of the Statute.[6]

V. CONCLUSION

Clifton acted with fraudulent intent when he conveyed his interest in the subject Property to PDC. The Statute of Elizabeth requires this fraudulent conveyance be set aside, and Petitioners have failed to establish the means employed to reach that mandated end were inappropriate or otherwise an abuse of discretion. Should this Court find the lower courts acted inappropriately in voiding Clifton's unlawful conveyance, then the ruling should be modified or remanded so that an appropriate remedy can be fashioned to properly invalidate Clifton's fraudulent conveyance as required by the Statute of Elizabeth.

Further, well-established and unchallenged legal principles concerning tenants in common supports the lower court's analysis and conclusions in this case. Although the Property was owned by Clifton and Whiteman as tenants in common and they each transferred their respective interests in it to PDC through a single deed, the fact remains

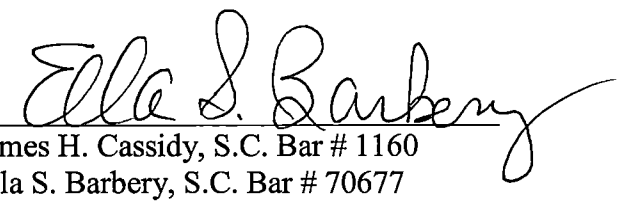
[6] The setting aside of Clifton's conveyance results in him becoming cotenants with PDC. *Garret v. Wienberg*, 43 S.C. 36, 20 S.E. 756 (1895); 6 S.C. JURIS. COTENANCIES § 39 ("A conveyance by one cotenant to a third party that purports to convey the entire interest conveys only the interest of the cotenant, and thus his grantee becomes a tenant in common with the other cotenants."). First Citizens, as a creditor of Clifton, may then reach his 50% interest in the Property. 6 S.C. JURIS. COTENANCIES § 6 (1991)("The interest of a tenant in common is freely alienable by either inter vivos conveyance, devise, or descent and is subject to the claims of creditors."); (App. p. 9).

that the controlling legal principles dictated that these were two separate, distinct, and mutually exclusive property transfers merely accomplished through a single deed. As two distinct transfers of the parties' respective property interests, the invalidity of one did not upset or invalidate the other. Whiteman was not the Grantor of Clifton's 50% interest in the Property, thereby making her presumably valid intent in transferring her interest irrelevant when reviewing the validity of Clifton's conveyance under the Statute of Elizabeth.

Therefore, based upon the foregoing authorities and arguments, the Respondent respectfully requests that this Court AFFIRM the Court of Appeals proper affirmation of the trial court's Order setting aside Clifton's fraudulent conveyance of his 50% interest in the Property pursuant to the Statute of Elizabeth.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.



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February 19, 2018

Greenville, South Carolina

RECEIVED

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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

Case No. 2010-CP-30-1141
Opinion No. 5469 (S.C. Ct. App. filed February 15, 2017)
Appellate Case No. 2014-000979

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..... Appellants/Petitioners.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent complies with Rule 211(b), SCACR.

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February 20, 2018
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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF RESPONDENT was served upon all counsel of record in the above-referenced action this 20th day of February, 2018, by depositing same in the United States Mail, sufficient postage affixed thereon, and addressed as follows:

J. Calhoun Pruitt, Jr.
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(signature page to follow)

Respectfully submitted,

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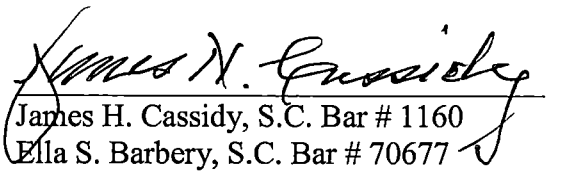

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