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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case Nos.: 2010-CP-10-9096 and 2011-CP-10-8840

Appellate Case Tracking No. 2017-00640

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

Respondent.

v.

Donald W. Lancaster,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

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December 21, 2018
Mt. Pleasant, South Carolina

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules (“SCACR”), Respondent respectfully files this Petition for Rehearing of this Court’s decision filed November 21, 2018 (Opinion No. 27847) (“Opinion”). Respondent seeks a rehearing because this Court overlooked and misapprehended points of law and fact in reversing the decision of the Court of Appeals and Circuit Court.

QUESTIONS TO REHEAR

1. Whether fraudulent conveyance actions are separate actions that allow for independent execution;
2. Whether Gordon had the right to bring this action against Lancaster as executor de son tort of the Drews Estate;
3. Whether Gordon inherited the additional right as the special administrator’s assignee to commence his second, separate action against Lancaster and prosecute it through judgment and execution pursuant to S.C. Code § 15-39-460;
4. Whether allowing fraudulent conveyors to avoid responsibility is against public policy;
5. Whether Section 15-39-30 has multiple interpretations;
6. Whether overturning *Linda Mc Co.* was faithful to legislative intent; and
7. Whether *Linda Mc Co.* should apply prospectively, rather than retrospectively, to Gordon assuming this Court concludes *Linda Mc Co.* is, in fact, overturned.

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E.2d 234 (1933). The purpose of such a petition is to aid the court in deciding correctly a case heard by it and a properly drawn rehearing petition must state “the points...overlooked or misapprehended by the court.” *Arnold*, 168 S.C. at 172-73, 167 S.E.2d at 238.

ARGUMENT

A. **This Court Erred in Treating the Drews Action and Lancaster Action as the Same Action**

This Court erred in treating Gordon's action against Lancaster as purely a continuation of Gordon's action against the Drews, Lancaster's deceased aunt and uncle. Opinion at *3; *see also* Opinion at *10, n. 5. In fact, after the Drews supplemental proceeding, Gordon brought two actions: one directly against Lancaster and one against the Drews Estate, both of which were eventually consolidated for trial. The Lancaster Action was not a continuation of the suit against Drews, but a separate action arising from Lancaster's fraudulent conveyances from the Drews Estate. Gordon was originally empowered to bring this separate action against Lancaster as the executor de son tort who had fraudulently conveyed money from the Drews Estate. Moreover, Gordon inherited the additional right as the special administrator's¹ assignee to commence his second, separate action against Lancaster and prosecute it through judgment and execution. These actions involved separate claims, separate parties, separate trials, and separate judgments. This Court's analysis, which is seemingly limited to a three-sentence footnote, ignores these critical facts and South Carolina law:

1. **This Court Ignored Critical Facts Establishing "Separate" Actions**

The Drews Action – to which Lancaster was not a party – was commenced by Gordon against Drews on April 16, 1999 for Illegal Sale of Securities, Misrepresentation, and Breach of

¹ Courts across the country have held that in probate, a special administrator and a receiver hold the same position with like duties and function. 3B Debtor-Creditor Law § 36.02 (2018) (collecting cases); *see also Robards v. Lamb*, 127 U.S. 58, 61, 8 S. Ct. 1031, 1032 (1888) (special administrators hold same position as a receiver); *Lorenz v. Shea* (In re Estate of Lorenz), 22 Neb. App. 548, 550, 858 N.W.2d 230, 234 (2014) ("Special administrators are also known as an administrator ad litem or a receiver."); *Jersak v. Risen*, 1944 OK 278, ¶ 1, 194 Okla. 423, 424, 152 P.2d 374, 375 (functions of special administrator and receivers are the same).

Duty (“Drews Action”). R. p. 54. The Drews Action ended with a judgment against Drews being enrolled in March 2002. R. pp. 171-172. In 2003, Gordon executed on the Drews Judgment. R. p. 1078. The execution was returned by the Sheriff unsatisfied and marked *nulla bona*. R. p. 62. Supplemental proceedings regarding this Judgment were opened in 2006. R. pp. 33-37, 62-66, 1078. In 2010, Lancaster was deposed in these proceedings and during this deposition, Gordon discovered he had separate claims against Lancaster. R. p. 11 (“During Lancaster’s deposition, Plaintiff became aware of the fraudulent transfers between Drews and Lancaster that rendered Drews insolvent.”).

Within six months of discovering the fraud, and within ten years of the Drews Judgment, Gordon initiated an action against Lancaster on November 2, 2010 for Fraudulent Conveyance, Civil Conspiracy, and Negligence/Aiding and Abetting (“Lancaster Action”). R. pp. 119, 150. Thus, unlike the Drews Action, the Lancaster Action was a separate action based on Lancaster’s fraudulent conveyances from the Drews estate and resulted in a separate judgment against Lancaster in 2013. R. p. 10. Lancaster’s counsel admitted as much during the trial of the Lancaster Action:

Your Honor, **the plaintiff did not have a judgment against Mr. Lancaster**, the defendant in this case. The **plaintiff was seeking to set aside transfers involving Mr. Lancaster and his uncle based on a fraudulent conveyance claim**, the debt being the underlying judgment from 2001 and 2002, which we believe had expired. In other words, Judge, **the plaintiff wasn’t enforcing his judgment by execution and levy on Mr. Drew’s assets. This was an independent action against Mr. Lancaster. It wasn’t an action with regard to Mr. Drews. He had no judgment against Mr. Lancaster, Your Honor.**

R. p. 596:2-19 (emphasis added);² *see also Southern Ry. Co. v. Routh*, 161 S.C. 328, 159 S.E. 640 (1931) (Issue conceded at trial may not be argued on appeal); *Collins v. Bisson Moving & Storage*

² *See also* R. pp. 523:21-524:3 (Lancaster arguing the Lancaster Action was a different suit).

Inc., 332 S.C. 290, 303, 504 S.E.2d 347, 354 (Ct. App. 1998) (discussing attorney’s trial admission and holding “Acts by an attorney are binding on clients through principles of agency law.”). This Court should hold Lancaster to his admission and find the Drews Action was a separate and independent action from the Lancaster Action and was not an action to execute on the Drews assets. Rule 220, SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

2. This Court Ignored South Carolina Law Recognizing Fraudulent Conveyance Actions as “Separate” Actions

South Carolina law recognizes that fraudulent conveyance actions are distinct actions – a point this Court clearly overlooked in reaching its conclusion.³ In fact, this Court acknowledges a judgment creditor must exhaust its remedies against its judgment debtor before attacking a fraudulent conveyance. *Tuller*, 276 S.C. at 672, 281 S.E.2d at 476 (“Numerous cases have held that the right to attack a voluntary conveyance on the grounds of legal or unintentional fraud belongs solely to a pre-existing creditor and such creditor is required to reduce its debt to judgment and have execution issued and returned *nulla bona* before proceeding to void a transfer as a fraudulent conveyance.”) (emphasis added). As this Court held in *Tuller*:

[T]he law requires in an action by a creditor solely to set aside his debtor’s [fraudulent conveyance], allegation and proof that the debt was reduced to

³ While there is debate as to what requirements, if any, must be satisfied prior to filing a separate, fraudulent conveyance action, there is no debate that these actions are independent proceedings. *Compare Tuller v. Nantahala Park Co.*, 276 S.C. 667, 673, 281 S.E.2d 474, 477 (1981) (enumerating the proper steps in bringing a fraudulent conveyance action and stating: “[F]or a creditor to prevail in an action to set aside a conveyance for legal fraud, he must obtain a judgment, execute a judgment, and receive a *nulla bona* return from the sheriff.”) *with S.C. Nat’l Bank v. Halter*, 293 S.C. 121, 126, 359 S.E.2d 74, 76-77 (Ct. App. 1987) (analyzing the contrary rulings this Court has issued on whether a judgment creditor must obtain an execution and *nulla bona* as a condition precedent to commencing a fraudulent conveyance action and finding this Court has caused “much confusion at the bar over the years” before deciding there was no need for an execution and return prior to bringing such an action).

judgment, execution issued to enforce collection of the judgment, and a *nulla bona* return on the execution by the Sheriff.

In this case, the banks have not met these essential requirements. There has been no action to reduce the debt owed to the banks to judgment. . .

Tuller, 276 S.C. at 672, 281 S.E.2d at 476-77 citing *Temple v. Montgomery*, 157 S.C. 85, 153 S.E. 640 (1929). Under *Tuller*, the Drews Action is separate from the Lancaster Action – the Drews Action was the action which “reduced the Drews debt to judgment;” whereas, the Lancaster Action was the action which “sought to set aside Lancaster’s fraudulent conveyance.”

3. This Court Misapprehended Limited Drews Suit References

This Court claims Gordon’s “amended complaint [against Lancaster] demonstrates that he still seeks to execute upon the 2001 judgment, noting ‘By these assignments, Plaintiff does not seek to enlarge or change the judgment upon which he is suing; Plaintiff is still collecting on the 2001-2002 Trial Judgments.’” Opinion at *10 n.5. This is a misunderstanding. The full Complaint in question, as well as Lancaster’s counsel’s admission, makes clear Gordon was suing Lancaster for fraudulent conveyance.

Not only did this Court err in relying on one paragraph of the Complaint⁴ versus the record as a whole, the Court misconstrued that paragraph’s purpose – to describe the genesis of Gordon’s

⁴ The full paragraph states: “This civil action arises out of events relating to the recovery on a judgment obtained in Charleston County, South Carolina, in Plaintiff’s favor. Additionally, Plaintiff is the assignee of the Estate of Rudolph Robert Drews, Case No. 2007-ES-00-1518 (“Drews Estate”) and the Estate of Effie D. Drews, Case No. 2010-ES-00-0494 (“Mrs. Drews Estate”) **by way of the Confession of Judgment, Assignment and Settlement Agreement with the Estate of Rudolph Robert Drews (attached hereto as “Exhibit A”) and Assignment and Settlement Agreement with Jessie Atkinson, Individually and as Personal Representative of the Estate of Effie Drews (attached hereto as “Exhibit B”) respectively. Plaintiff is therefore entitled to have any monies owed to Drews’ Estate or Mrs. Drews’ Estate collected to satisfy Plaintiffs judgment.** (By these assignments, Plaintiff does not seek to enlarge or change the judgment upon which he is suing; Plaintiff is still collecting on the 2001-2002 Trial Judgments and will grant a credit or offset for the Amount paid by Jessie Atkinson, Individually and as Personal Representative of the Estate of Effie Drews.)” R. pp. 150-151; *see also* R. pp. 625:3-8.

suit against Lancaster. When Gordon obtained the Confession of Judgment and assignment from the Drews Estate, he inherited the additional right as the estate's assignee and judgment creditor to collect his judgment from Lancaster, the executor de son tort who had fraudulently conveyed money from the Drews Estate, in a second action. By "Plaintiff does not seek to enlarge or change the judgment upon which he is suing," Gordon was addressing the amount of the Drews Judgment, not subverting any future collection rights he had against Lancaster to recover the funds fraudulently conveyed from the Drews Estate. R. pp. 150-151.

B. Carr v. Guerard Is Further Distinguishable From, and Inapposite To, This Case

This Court's reliance on *Carr* is further misplaced for the following reasons:

1. This Case is More Like Brock Than Carr or its Predecessor Cases

First, this action is more like *Brock* than either *Carr* or its predecessors, *Hardee* or *Garrison*.⁵ The proceeding in *Brock versus Kirkpatrick* was to enforce the collection of a decedent's judgment obtained against an executor based upon a note given by the decedent in her lifetime. *Brock*, 60 S.C. at 352, 38 S.E. at 790. Importantly, the Court found a deceased, judgment debtor's property that is rightfully due to a judgment creditor can only be reached by execution if the property is not in the hands of a third party. If the third party has possession of the property at issue, the property may only be reached by a separate action where the third party would, of course, be a necessary party. *Id.*⁶ In *Hardee*, this Court analyzed its prior decision in *Brock* and found that there were two distinguishable points:

⁵ *Carr v. Guerard*, 365 S.C. 151, 154, 616 S.E.2d 429, 431 (2005); *Garrison v. Owens*, 258 S.C. 442, 445, 189 S.E.2d 31, 32 (1972); *Hardee v. Lynch*, 212 S.C. 6, 16, 46 S.E.2d 179, 183 (1948); *Brock v. Kirkpatrick*, 72 S.C. 491, 492, 52 S.E. 592, 592 (1901).

⁶ *Cf. Carr*, 365 S.C. at 154, 616 S.E.2d at 431 (dealing with a fraudulent conveyance suit between the original debtor and original creditor).

1. *Brock*, unlike *Hardee*, was brought “for the benefit of the plaintiffs as creditor of the decedent”; and
2. *Brock*, unlike *Hardee*, was brought “against the heirs of the decedent who were not parties to the action where judgment was entered.”⁷

Hardee, 212 S.C. at 6, 46 S.E.2d at 183 (emphasis added).

The same is true here as to the Lancaster Action – it was brought by the creditor of a deceased couple (the Drews) against their heir (Lancaster) who was not a party to the Drews Action. In other words, the facts this Court found distinguished *Brock* from *Hardee* are the same facts that distinguish this case from both *Hardee* and *Carr*,⁸ and, in *Brock*, this Court did not preclude the creditors from collecting the monies owed. For this Court to have reached a different result here, despite the obvious similarities in distinguishing factors, makes no sense. *Brock v. Kirkpatrick*, 60 S.C. at 352, 38 S.E. at 790 (The plaintiffs’ right to pursue judgment in a separate action accrued when they held a past due obligation of the decedent when remedies against the original party had been exhausted).

2. *Carr* Did Not Involve an Estate, Deceased Debtors, AND Fraudulent Conveyance by Decedents’ Heirs

Further distinguishing *Carr* is the fact that it did not involve deceased debtors and a fraudulent conveyance by an heir of the deceased, debtors’ property. By South Carolina statute, actions involving the property that is in the hands of a third party can proceed to a second judgment and execution. S.C. Code § 15-39-460. It is clear the legislature intended to treat such judgments,

⁷ *Cf. Garrison*, 258 S.C. at 445, 189 S.E.2d at 32 (dealing with a repealed statute and living defendants).

⁸ As mentioned above, *Hardee* is *Carr*’s predecessor. The *Carr* Court followed the *Hardee* Court’s lead because, like *Hardee* and unlike here, *Carr* involved an action between the original judgment creditor and debtor.

like the one obtained here against Lancaster, as a separate judgment subject to a separate ten-year collection period. See Section C below discussing S.C. Code § 15-39-460.

C. This Court Misconceived Gordon's Right to Collect in a New Action Against Lancaster as Executor De Son Tort

Contrary to this Court's holding, Gordon received rights against Lancaster from the adjudication of the Drews Action which allowed Gordon to collect on the monies owed to him. R. pp. 150-164. According to the South Carolina Code:

If it appears that a person...alleged to have property of the judgment debtor...claims an interest in the property adverse to him...such interest...**shall be recoverable only** in an action against such person...by the receiver. But the judge may, by order, forbid a transfer... of such property...until a sufficient opportunity be given to the receiver to **commence the action and prosecute it to judgment and execution....**

S.C. Code § 15-39-460 (emphasis added). Gordon alleged, in his Verified Petition for Supplemental Proceedings, that he "is informed and believes he is entitled to the appointment of a receiver..." R. pp. 62-64;⁹ BLACK'S LAW DICTIONARY (8th ed. 2014) (defining a "receiver" as "a disinterested person appointed by a court...for the protection or collection of property that is the subject of diverse claims."). Thereafter, Shirrese Brockington ("Brockington") was appointed the special administrator/receiver of the Drews Estate; and, on November 9, 2011, Brockington assigned her rights to Gordon, giving Gordon a separate right to proceed upon against Lancaster, the Drews estate executor de son tort (e.g., improper receiver). R. pp. 11; 151-152; 158-164; BLACK'S LAW DICTIONARY (5th ed. 1979) (defining "an executor de son tort as "a person who assumes to act as executor of an estate without any lawful warrant or authority, but who, by his intermeddling, makes himself liable as an executor to a certain extent.").

⁹ See also R. p. 527:6-23 (trial transcript noting that Judge Scarborough indicated supplemental proceedings and related discovery should be merged with the administration of the Drews Estate).

Consider a hypothetical: A judgment creditor files his claim with the receiver of a deceased, judgment debtor's estate. The receiver accepts the judgment creditor's claim subject to available funds; however, during her inventory, the receiver learns that a second cousin of the deceased, judgment debtor unlawfully interfered with the estate, stealing over two million dollars from the estate for his own use. The receiver files her own claim against the executor de son tort to recover the stolen assets; however, the executor de son tort argues that he is entitled to retain his stolen money because the judgment creditor's claim is now more than ten years old. Would this Court allow the receiver an opportunity to commence her action against the executor de son tort and prosecute it to judgment and execution? Or, would this Court allow the executor de son tort to keep his ill-gotten gains? Is the original judgment the form of the debt? Or, did new obligations arise as a result of the specific facts?¹⁰

1. As Executor De Son Tort, Lancaster Was an Improper Receiver

The law on executor de son tort responsibility provides:

Any person who obtains, receives, or possesses property of whatever kind, belonging to the decedent, by means of fraud or without paying valuable consideration equivalent to the value of the property, shall be charged and

¹⁰ The expiration of a judgment does not clear all debt; independent obligations survive after expiration of a judgment. Consider the case of *Transouth Fin. Corp. versus Cochran*, wherein a trial judge held that "if the form of your debt is a judgment, it becomes extinguished [after ten years], not simply unenforceable." *Transouth Fin. Corp. v. Cochran*, 324 S.C. 290, 295, 478 S.E.2d 63, 66 (Ct. App. 1996). However, the Court of Appeals overruled the trial judge after considering that under a debtor's two separate obligations – a guaranty and a judgment – the judgment was not the "form of the debt." *Id.* The debt was still collectable due to the debtor's separate obligations, which survived the expiration of the judgment. *Id.*; see also *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 31, 647 S.E.2d 214, 215 (2007) (creditor was allowed to pursue a foreclosure action notwithstanding the fact that its judgment against the owner was extinguished by virtue of the statute of limitations); *Nichols v. Briggs*, 18 S.C. 473, 478 (1883) ("[T]he fact that the debt secured by the mortgage was barred by the statute of limitations did not extinguish the mortgage security or prevent the maintaining an action to enforce it.") (emphasis added). Such is the case here: the judgment Gordon holds against Drews is only relevant to Lancaster because Lancaster illegally trespassed between the obligations the Drews Estate owed to Gordon, creating separate and unrelated obligations for himself as executor de son tort.

chargeable as executor of his own wrong (executor de son tort) with respect to the goods and debts... Acting sua sponte or upon the petition of any interested person, the probate judge of the county in which a deceased person was domiciled at the time of his death may **order the executor de son tort to account for the property in his possession.**

S.C. Code §§ 62-3-619-20; *see also* *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011); *Haley v. Thames*, 30 S.C. 270, 9 S.E. 110, 111 (1889) (“When a man has so acted as to become in law an executor de son tort, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but to be sued as executor by a creditor of the deceased or by a legatee; for an executor de son tort has all the liabilities, though none of the privileges, that belong to the character of an executor.”). “An executor de son tort, as the term implies, is a trespasser,” availing himself of property that is not his. *Jones v. Jones*, 39 S.C. 247, 255, 17 S.E. 587, 591 (1893).

The record evidences that Lancaster received property he was not entitled to and transferred it fraudulently for a profit. *See, e.g.*, R. pp. 10-27 (finding fraud in Lancaster’s transfer of the Nuffield property and identifying Lancaster’s illegal profits from April 2010 sale of the Nuffield residence). Lancaster’s actions thus made him liable under South Carolina’s De Son Tort Statute. *See, e.g., Judy*, 393 S.C. at 170, 712 S.E.2d at 413; *Greenfield v. Greenfield*, 245 S.C. 604, 614, 141 S.E.2d 920, 926 (1965) (discussing the precursor to Section 62-3-620 and stating “the statute authorizes the entry of a judgment against the executor de son tort for the value of such assets as may have been wasted or lost by the illegal interference.”).

2. Additionally, as Assignee of the Rightful Receiver, Gordon Was Entitled to Pursue his De Son Tort Action Against Lancaster

Section 15-39-460 of the South Carolina Code describes a receiver’s right to recover against those who allegedly possess a judgment debtor’s property:

If it appears that a person or corporation alleged to have property of the judgment debtor or indebted to him claims an interest in the property adverse to him or denies the debt such interest or debt **shall be recoverable only** in an action against

such person or corporation by the receiver. But the judge may, by order, forbid a transfer or other disposition of such property or interest until a sufficient opportunity be given to the receiver to **commence the action and prosecute it to judgment and execution**. Such order may be modified or dissolved at any time by the judge granting it on such security as he shall direct.

S.C. Code § 15-39-460. Under South Carolina law, “[a]n assignee stands in the shoes of the assignor.” *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 549 (2012); *Twelfth RMA Partners, L.P. v. Nat’l Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999) (“When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor.”).

When the Drews Estate’s special administrator/receiver assigned Gordon her rights, Gordon was empowered with the receiver’s right to bring an action against Lancaster under Section 15-39-460. R. pp. 158-164. The Court took judicial notice of the Assignments as well as Gordon’s Judgment, confessed by the Drews Estate in November of 2011, which acknowledged the Estate was insolvent because of fraudulent transfers by Lancaster in an effort to avoid judgment creditors. R. pp. 170-179; *see also* R. pp. 518:21-519:2; 611:8-612:4; 615:14-24. On this basis, Gordon had the additional right to bring a separate, de son tort claim against Lancaster, and the Court’s failure to recognize this ground was error.

D. The Court Erred in Finding that S.C. Code § 15-39-30 is Not Capable of Multiple Interpretations

This Court erred in finding that Section 15-39-30 “clearly” indicates that judgments expire after ten years. Opinion at *3.

First, the fact that this Court’s current interpretation of Section 15-39-30 conflicts with this Court’s prior interpretation of Section 15-39-30 shows that this statute is capable of multiple interpretation. *See* Opinion at *3-4 *citing Linda Mc Co.*, 390 S.C. at 555, 703 S.E.2d at 505 (This

Court acknowledging that the statute has been read in at least two ways – one which extends the active energy period beyond ten years and one which does not).

Second, multiple ambiguities exist within the “plain language” of Section 15-39-30. For example, Section 15-39-30 is silent on judgments, judgment expiration, and judgment renewal. Rather, Section 15-39-30 deals directly with executions and indicates they “may”, as opposed to “must”, issue “at any time within ten years of a judgment.” Section 15-39-30 goes on to provide that executions shall have active energy during “such period” without defining what “such period” constitutes:

Executions may issue upon final judgments or decrees at any time within ten years from the original entry thereof and shall have active energy during **such period**, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

S.C. Code § 15-39-30.

This leads to at least two interpretations of the statute, one of which is that executions have active energy “during such period” after issuance if issued “at any time within ten years of a judgment.” Had the legislative intent been to otherwise limit an execution’s power, it likely would have used language providing that executions **must be issued and resolved** within ten years of a judgment instead of executions **may issue at any time within ten years and remain active during “such period” (after issuance)**. *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (Holding the consistent use of the permissive “may” and the absence of language referring to other enactments touching upon the subject indicate that the General Assembly did not intend to occupy the field); *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996) (The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the Legislature).

What makes no sense is why this Court believes the legislature drafted a statute allowing executions to issue “at any time within ten years of a judgment,” that then takes away the “active energy” of an execution issued during “such period.” To hold such would produce the absurd result where a judgment creditor could have an execution issued on the last day of the ten-year period and that execution would expire on the day of its issuance. That was clearly not the legislature’s intent.

Moreover, Section 15-39-30 must be read with the intent of other statutes governing executions. According to this Court in *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 607, 576 S.E.2d 150 (2003), South Carolina recognizes the canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*, which holds:

[T]o express or include one thing implies the exclusion of another, or of the alternative.” BLACK’S LAW DICTIONARY 602 (7th ed. 1999)... The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed. Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 at 227 (5th ed. 1992) (citations omitted).

Under this canon of construction, it becomes clear the legislature specifically intended for actions brought pursuant to S.C. Code § 15-39-460 to have as much time as needed to commence and fully prosecute the action.¹¹ Properly construing Section 15-39-460 and 15-39-30 together requires holding the legislature intended to treat actions pursuing debtor property in the hands of third parties as separate actions subject to a separate, ten-year collection period.

E. *Linda Mc Co.* Followed South Carolina Legislative Intent

¹¹ See discussion on S.C. Code § 15-39-460, *supra*.

This Court’s decision to overturn *Linda Mc Co.* is erroneous because *Linda Mc Co.* was in line with the legislative intent of the governing statutes and allowed the statute to operate as intended. In holding “the proper approach is to leave the policy concerns regarding this provision to the General Assembly,” this Court ignores the fact that the South Carolina legislature has been aware of the *Linda Mc Co.* holding and embedded it in our law since 2011. Opinion at *9. The South Carolina Code Commissioner is charged with ensuring that the “Notes of Decisions” by South Carolina Courts are referenced in the Code. S.C. Code § 2-13-60. The code commissioner has done so, and *Linda Mc Co.* is embedded in all ‘Notes of Decisions’ archives from 2011 through 2018.¹² Further, if the legislature felt that this Court in *Linda Mc Co.* got it wrong, it has had eight years to make a change and no such change has been enacted.

In *Linda Mc Co.*, this Court considered the collective intent behind all statutes within Title 15, Chapter 39. Read together, those statutes make clear that an execution – whether successful or returned – is the first, not last, step of collecting a judgment. For example, Section 15-39-20 provides:

...The party in whose favor judgment has been given and, in case of his death, his personal representatives duly appointed may at any time within ten years after the entry of judgment proceed to enforce such judgment as prescribed by this Title.

S.C. Code § 15-39-20 (emphasis added).

Section 15-39-20, like Section 15-39-30, can be interpreted to mean that a creditor can “proceed to enforce” a judgment so long as the enforcement process starts “any time within ten years” after a judgment. In fact, that is how this Court has interpreted this statute. *Linda Mc Co.*, 390 S.C. at 555, 703 S.E.2d at 505 (analyzing Section 15-39-20 and Section 15-29-30 and holding if a party takes action to enforce a judgment within the ten-year period of active energy, the

¹² See, e.g., <https://www.scstatehouse.gov/Archives/CodeofLaws2018/t15c039.docx>.

resulting order will be effective even if issued after the ten-year period expired.). Further, the legislature's inclusion of the words "proceed to" execute shows that the legislature did not intend to require enforcement actions be "concluded" within ten years of a judgment. The holding in *Linda Mc Co.* harmonized Section 15-39-20 and Section 15-39-30 and was faithful to the legislative intent behind them.

By filing the Drews Execution against Property on December 12, 2003, Gordon set in motion all the steps needed to proceed to the other code provisions applicable to collection, some of which provide that property in disputed ownership must be adjudicated in a separate action with sufficient time given to "**commence the action and prosecute it to judgment and execution.**" S.C. Code § 15-39-460. Section 15-39-460, and statutes like it, recognize that execution against the original debtor is not always the final step, and therefore, allow a creditor "to proceed" against a third-party holding the original debtor's funds in a separate action.

By requiring creditors time to commence such third-party actions within ten years, *Linda Mc Co.* was arguably stricter than the above statute, yet it mirrored the way other, related statutes operate.¹³ By overturning *Linda Mc Co.*, this Court has now caused confusion amongst the statutes, which clearly is not in alignment with legislative intent.

By overturning *Linda Mc Co.*, this Court has also read the statute to treat in-state collections even more harshly than out-of-state collections. The statute utilized for actions upon foreign judgments, S.C. Code § 15-3-600, states: "An action for relief not provided for in this chapter must

¹³ See, e.g., *A Fast Photo Express, Inc. v. First Nat'l Bank of Chi.*, 369 S.C. 80, 86, 630 S.E.2d 285, 288 (Ct. App. 2006) ("The Specters are correct in asserting that the ten-year enforcement period expired on September 30, 2004. However, the master issued an order on September 23, 2004, directing the personal representative of Paul's estate to distribute Jay's interest to M.P.H. Holdings. The Specters filed a notice of appeal on September 27, 2004. Thus, the order transferring Specter's inheritance and notice of appeal were both filed prior to the judgment's expiration.").

be commenced within ten years after the cause of action shall have accrued.” This causes the absurd result that in South Carolina, a foreign creditor could bring a fraudulent conveyance action arising from the non-payment of a foreign judgment in South Carolina within ten years of original judgment pursuant to S.C. Code § 15-3-600, at which point the foreign judgment would then be valid for an additional ten (10) years after enrollment in South Carolina. *See Payne v. Claffy*, 281 S.C. 385, 315 S.E.2d 814 (1984) (The limitation period prescribed by Section 15-3-600, the statute for actions upon a foreign judgment, did not begin to run until Claffy moved to South Carolina and the courts of this state became empowered to adjudicate between the parties upon the particular cause of action.)¹⁴ It is unfair — and clearly not within the intent of the legislature — to hold South Carolinians to a higher standard than foreign creditors. *Linda Mc Co.* cured this anomaly by attempting to level the playing field in the same way by reading that under Section 15-39-30, actions on a judgment could proceed to execution if commenced within ten years of original judgment.

This Court’s opinion claims “extending *Linda Mc* thwarts the public policy of this state that limits the life of a judgment to ten years;” however, this Court should measure that public policy against the countervailing public policies that would be implicated by not enforcing this judgment. Sometimes creditors are tirelessly trying to collect and the courts are tied up. *Linda Mc Co.* was a “real world” application of Section 15-39-30 and the South Carolina Supreme Court in *Linda Mc*

¹⁴ *But see Home Port Rentals, Inc. v. Moore*, 369 S.C. 493, 497, 632 S.E.2d 862, 864 (2006) However, even in *Home Port*, where the Court held execution could not issue on the original judgment after ten years, the Court stopped short of applying this to any subsequent action even tangentially related to an already obtained judgment holding: “While the limitations period for bringing an action may be tolled if the defendant is absent from the state [under Section 15-3-30], the period for executing an already obtained judgment may not.” *Id.*

*Co.*¹⁵ was correct in declining to read the statute so strictly as to “put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.” *Linda Mc Co.*, 390 S.C. at 555, 703 S.E. 2d at 505. If this Court sustains its overruling of *Linda Mc Co.*, it will undoubtedly be flooded with debtors abusing the legal system to stall enforcement on their property until the statutory period expires.¹⁶ This Court should reconsider its overruling of *Linda Mc Co.*

F. South Carolina Debtors Should Not be Allowed to Abuse the Court System to Avoid Paying Judgments

In line with well-established public policy principles, South Carolina Courts should ensure fairness, justice, and efficiency and act in the best interest of South Carolina residents. This Court’s Opinion does none of these things, and instead, rewards a fraudster who has abused the legal system for over a decade. The practical effect of this Court’s holding means that a person or corporation indebted to a South Carolina resident, or class of residents, no longer has any motivation to pay the money they owe. Rather, these debtors will now be motivated to continually appeal a case, clogging up our already clogged courts, in hopes to delay enforcement of the

¹⁵ Since this legal precedent has remained unchanged in eight years, and not overruled by legislation, one must look to the only variation since 2010, which is a change in the makeup of our Supreme Court. *Compare Linda Mc Co.* Justices (Toal, Moore, Waller, Beatty, and Pleicones) *with Gordon* Justices (Hearn, Beatty, Justice Kittredge, Few, James). It is patently unfair that a change in judiciary membership is the only reason well-settled precedent is overruled.

¹⁶ *See also* Respondents’ Brief on Certiorari on p. 22 *citing Hensen v. Peter*, 95 Wash. 628 (1917) (“[O]ne shall not, by waging unfounded litigation, be rewarded at the expense of his unwilling opponent. It is based upon the equitable principle that a party will not be permitted to avail himself of an unconscientious advantage obtained by his own wrongful act and without fault on the part of his adversary. It is sustained by the wholesome consideration that a party should not be permitted to profit by the abuse or misuse of legal process or by imposing upon judicial tribunals litigation without merit. It is also fortified by that sound public policy which sets its face against putting a premium upon unrighteous and vexatious litigation commenced and prosecuted by a party for the ulterior purpose of obtaining by indirection an advantage which in equity and good conscience he is not entitled to enjoy.”).

judgment for at least ten years until it expires. *Taney v. Penn Nat'l Bank*, 232 U.S. 174, 179, 34 S. Ct. 288, 288 (1914) (“Appearances must agree with the real state of things, and the real state of things must be honest and consistent with public policy, affording no unnecessary facility for deception.”). Not only is this an unfair result, it is contrary to decades of South Carolina law which provides individuals who have no option but to enforce judgments on unknown, third parties to proceed against those third parties, once known, in a separate action.

Beginning with the Statute of Elizabeth, which shaped U.S. common law and is still good law here in South Carolina, a transferee who fraudulently receives property is ultimately liable for this fraud.¹⁷ S.C. Code § 27-30-10, *et seq.*; *see also Bean v. Smith*, 2 F. Cas. 1143, 1159, 1821 U.S. App. 257, *50 (1821) (“All the reasons of public policy command the court to be rigid in denying to those, who are guilty of bad faith, any such indulgence. Let them reap the due reward of their own misconduct.”). Now, with this Court’s ruling, a judgment creditor has no recourse if a swindler can hide assets and delay enforcement of the judgment for at least ten years. This is an abomination of South Carolina precedent holding that a transferee that is a party to actual fraud has no rights to the transferred property and that such transfers are void.

Further, the facts of this case and Lancaster’s executor de son tort liability are so unique that it would be unjust and against South Carolina jurisprudence to allow Lancaster to avail himself of the frauds perpetuated against the Drews’ estate and Gordon. Gordon has tirelessly pursued his actions since the inception of the original case against the Drews and to hold that his efforts were

¹⁷ Conveyances intended to cheat creditors have been a form of actual fraud since the sixteenth century affording relief for “covinous and fraudulent transfers designed to delay, hinder or defraud creditors and others.” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540 (1994) *quoting* 13 Eliz. ch. 5 (1571). Because such transfers were made with “actual fraudulent intent,” they were “infected by actual fraud.” *Id.* at 535, 540-41 *citing Twyne’s Case*, 3 Coke Rep. 80b, 76 Eng. Rep. 809 (K.B. 1601); O. BUMP, *FRAUDULENT CONVEYANCES: A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS* 31-60 (3d ed. 1882).

futile will give future litigants a clear path to debt relief via abuse of the judicial system. *Shapiro v. Wilgus*, 287 U.S. 348, 356, 53 S. Ct. 142, 145 (1932) (“Never is a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality.”).

G. Alternatively, the Court’s Ruling Should Not Apply to Gordon Since He Falls Squarely Within *Linda Mc Co.* as Recognized by Justice James

Alternatively, this Court should hold *Linda Mc Co.* applies prospectively, rather than retrospectively, to Gordon. The Court noted that its ruling, which eliminates a narrow exception to the ten-year rule set out in *Linda Mc Co.*, is prospective and offers protection to pending cases; yet, it rules that Gordon “cannot fall” within the *Linda Mc Co.* exception because his facts are not identical to those in *Linda Mc Co.* Opinion at *10 n.6.

This is a clear misreading of *Linda Mc Co.*’s proclamation that, for its exception to apply, a judgment collector’s efforts should be similar to those in *Linda Mc Co. Id.* As Justice James points out, this Court has departed from this “clear dictate in *Linda Mc*” by holding Gordon to a higher standard that was never required under *Linda Mc Co.*¹⁸ Opinion at *13-17. Like the Respondent in *Linda Mc Co.*, Gordon, too, “complied with the applicable statutes.” He complied with the statute in the Drews Action by filing an Execution Against Property against Drews, which was signed by the Charleston County Clerk of Court on December 12, 2003, well before the tenth anniversary of his judgment. R. p. 1078. Section 15-39-310 necessitates an execution’s issuance before entering supplemental proceedings, so upon the execution’s *nulla bona* return, Gordon

¹⁸ Justice Few’s concurrence incorrectly treats some portions of *Linda Mc Co.*’s conclusions as dicta. Opinion at *10-13. The language in *Linda Mc Co.*’s conclusion was not incidental to the question before the court; rather, it bore directly on the issue at hand: “if a party takes action to enforce a judgment within the ten-year statutory period of active energy, the resulting order will be effective even if issued after the ten-year period has expired.” *Linda Mc Co.*, 390 S.C. at 555, 703 S.E.2d at 505.

continued to follow the statute by seeking supplementary proceedings within the time period. R. pp. 62-64. In accordance with Section 15-39-310, the Circuit Court entered a 2006 order for supplemental proceedings to aid Gordon in satisfaction of his judgment. Notably, those proceedings included an order barring the transfer of any further assets, which Lancaster ignored.¹⁹ It is patently unfair that this action should apply retrospectively to Gordon despite complying with all the applicable statutes.

Linda Mc Co.'s construction of Section 15-39-30 has been a proper interpretation of the legislature's intent and offered an exception that would allow Gordon relief because his collection efforts are, in fact, "similar" to those in *Linda Mc Co.* Justice James is correct that Gordon "took action to enforce his judgment" by commencing his supplemental proceedings within the ten-year active energy of the judgment, and the Circuit Court order granting him relief was "the result of the supplemental proceedings filed during the ten-year period." Opinion at *15. Gordon's circumstances undeniably fall within the confines staked out in *Linda Mc Co.*

Further, it is unconscionable to apply *Linda Mc Co.*'s overruling prospectively to Gordon, who relied on it as good law when this case went to trial. *See generally* R. pp. 307-588 (Trial Transcript). As cited in this Court's Opinion, "decisions creating new substantive rights should be applied prospectively." Opinion at *10, n.6. Additionally, as argued during trial, Lancaster is not the original debtor, and his fraud in helping Drews hide assets was not discovered until years later, so Lancaster should not be able to avoid liability due to Section 15-39-30's ten-year rule. R. pp. 609:23-617:11. The Court of Appeals affirmance of the Circuit Court's holding was in keeping

¹⁹ Compare the conspicuous language at the end of the Supplemental Proceeding Order at R. pp. 33-37 with R. p. 126 (November 2010 Complaint alleging Lancaster was still fraudulently transferring assets from the Drews Estates' into 2010) and R. pp. 10-27 (trial judge finding fraud in the Nuffield property transfer and noting that in April 2010, Lancaster sold the Nuffield Property residence for his own profit).

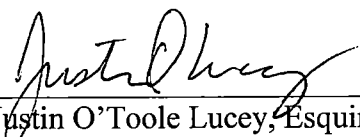
with South Carolina's and other states' legal precedent, and sound public policy. Gordon's award should be reinstated or otherwise considered on remand if this Court concludes *Linda Mc Co.* is overruled.

CONCLUSION

For the foregoing reasons, this Court should modify its Opinion to recognize (i) fraudulent conveyance actions and actions against an executor de son tort, involving separate parties, separate claims, and separate judgments are independent actions; (ii) Gordon was entitled to commence a separate de son tort action against Lancaster by virtue of the Drews Estate's assignment of right; (iii) S.C. Code. § 15-39-460 entitled Gordon to prosecute Lancaster to judgment and execution; and (iv) S.C. Code § 15-39-30's plain language is subject to multiple, conflicting interpretations which *Linda Mc Co.* properly resolved in accordance with the South Carolina legislature's intent and this State's public policy. Moreover, this Court should vacate its overruling of *Linda Mc Co.*; or, alternatively, apply *Linda Mc Co.*'s overruling prospectively to Gordon, given both Gordon's similar circumstances as well as his reliance on this previously prevailing decision.

Respectfully submitted,

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December 21, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case Nos.: 2010-CP-10-9096 and 2011-CP-10-8840

Appellate Case Tracking No. 2017-00640

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

Respondent.

v.

Donald W. Lancaster,

Petitioner.

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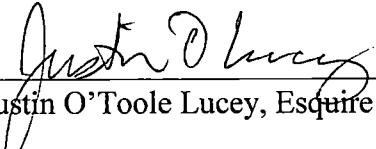
December 21, 2018
Mt. Pleasant, South Carolina

I, Justin O'Toole Lucey, Esquire, hereby certify that on December 21, 2018 I served a copy of the ***Respondents' Petition for Rehearing*** Submitted by the Respondent, Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, on counsel for Petitioner Donald W. Lancaster, via the United States Mail, postage pre-paid, and addressed as follows:

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