

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM LAURENS COUNTY

Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED  
MAY 01 2017  
S.C. SUPREME COURT

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

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

J. Calhoun Pruitt, Jr., SC Bar No. 4588  
Joshua B. Raffini, SC Bar No. 10338  
PRUITT & PRUITT  
101 N. Murray Ave.  
Anderson, SC 29625  
(864) 224-3121  
Attorney for Appellants

**INDEX**

CERTIFICATE OF COUNSEL ..... 1

QUESTIONS PRESENTED ..... 1

STATEMENT OF CASE ..... 1

ARGUMENTS ..... 4

    1.    There was insufficient evidence to infer fraudulent intent, and to  
          the extent the evidence might permit such inference Appellants  
          met his burden to rebut.....4

    2.    The Court Misapprehended Clifton’s Argument Regarding a Novel  
          Issue under South Carolina Law.....7

CONCLUSION ..... 8

## **CERTIFICATE OF COUNSEL**

The Court of Appeals issued its opinion on February 15, 2017 (App. p. 1). Petitioner filed for rehearing on February 28, 2017. (App. p. 13). The Court of Appeals denied rehearing on March 16, 2017.

### **QUESTIONS PRESENTED**

1. Should this Court grant certiorari to consider whether the Court of Appeals erred when it affirmed the trial court's determination that clear and convincing evidence established a fraudulent conveyance despite failing to analyze the nature of the underlying transfer?

2. Should this Court grant certiorari to consider whether the Court of Appeals erred 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<sup>1</sup> 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).

---

<sup>1</sup> The transcript incorrectly identifies Ms. Gilreath as Renee Gilree.

## ARGUMENT

- 1. There was insufficient evidence to infer fraudulent intent, and to the extent the evidence might permit such inference Appellants met his burden to rebut.**

In order to set aside a conveyance supported by adequate consideration, the Plaintiff must prove by clear and convincing evidence the grantor's intent to defraud. *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." citing S.C. Code Ann. § 27-23-10(A) (2007) (additional citations omitted)).

Accordingly, the key issue at trial and in this appeal is Clifton's intent in transferring the property. Our courts have identified specific badges of fraud that, if found to exist, create a rebuttable presumption of fraudulent intent.<sup>2</sup> In this case, to the extent any particular badge of fraud applies, Clifton presented sufficient evidence to rebut the presumption of fraud.

Respectfully, both the trial court and the Court of Appeals overlooked the nature of the transaction at issue in affirming that several badges of fraud attached to the subject transfer.<sup>3</sup> In this case, Clifton decided to transfer ownership of the property at issue into a limited liability company for an equivalent ownership interest in the newly formed company. Against that backdrop, it is difficult to imagine how a property owner might avail himself of the legitimate desire to satisfy a co-owner's concerns about liability

---

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

<sup>3</sup> The Court concluded, and Appellant agrees, that three badges of fraud do not apply: lack of consideration for the conveyance, departure from the usual method of business, and the transfer of the debtor's entire estate.

protection that did not, at least on the surface, involve badges of fraud more appropriate in other types of transactions. More specifically, an owner like Clifton would always retain possession of the property, have a relationship to the transferee, and retain a benefit in the property where he has an equivalent ownership in the company formed to hold the property. The circumstances here are notably contrast from previous fraudulent conveyance jurisprudence in this state where property owners, by virtue of their conduct, made transparent title-only transfers to close relative.<sup>4</sup>

The Court of Appeal's analysis also emphasizes other potential badges of fraud where the evidence adduced at trial focused more specifically on the most relevant factor in this case: timing. It is undisputed that litigation had not commenced at the time Clifton transferred his interest in the Property. Rather, Respondent urged and the Court of Appeals agreed that the threat of litigation was imminent. While failure to satisfy obligations, or in this case successfully complete loan renewals, would result in litigation, in order to impose prescient foresight on Clifton the Court would have to necessarily disregard Respondent's conduct thereafter. In this case, the transfer took place some two (2) months before Respondent informed Clifton that renewal of the loans was nearing completion.<sup>5</sup> In that light, the Court would impose on Clifton knowledge that declination of his renewal requests would follow when he was assured- some two months later by Respondent's own agents- that the opposite was occurring. While litigation ultimately commenced when renewal negotiations failed, the timeline matters here not for what hindsight reflects but what foresight might have revealed. Accordingly, it was and

---

<sup>4</sup> See, e.g., *Judy v Judy* 742 S E 2d 672, 403 S C 203 (Ct App , 2013) (finding fraudulent conveyance where owner transferred property to his children while continuing to farm and receive farm income ).

<sup>5</sup> In email correspondence from November 25, 2008, John Wood of First Citizens relayed to Renee Gilreath that "I think we have everything worked out for the extension thru [sic] July, just waiting on the appraisals and the budget." Defendant's Exhibit 1, (R p 214)

remains inappropriate to charge Clifton with knowledge of what would happen when he was greeted by assurances from Respondent to the contrary.

As to the remaining two badges the Court of Appeals found applicable, Clifton would respectfully argue that the Court's analysis lacks support in the record. Appellant admittedly remained indebted at the time of the challenged transfer, but the actual issue as to this factor is the ability of the transferor to satisfy his obligations.<sup>6</sup> Furthermore, while there was some conflict in the trial testimony regarding the timing of Clifton's payments, there was no evidence that Appellant was insolvent at the time of the transfer or immediately following. Finally here, while Respondent urged and the Court agreed that Clifton's failure to amend his financial statement shrouded the transfer in secrecy, Respondent failed to present any evidence that such information was ever requested.

To the extent record evidence establishes badges of fraud, Clifton presented sufficient evidence to rebut that presumption. In this case, all three witnesses with direct knowledge of the transfer testified that Clifton transferred the property at the insistence of Whiteman.<sup>7</sup> Whiteman testified that she wanted the property in a limited liability company based on her fear of liability that might arise from hunting activities on the property.<sup>8</sup> Furthermore, while Whiteman testified regarding longstanding concerns about liability, she also emphasized that recent events related to the subject property lead her to again pressure Clifton to place the property in a limited liability company. *Id.*<sup>9</sup> Even if

---

As Clifton testified, at the time of the transfer he retained access to additional sources of credit to satisfy his obligations- sources that would only disappear after Respondent elected to litigate Tr p. 122 22 – 123 6, (R pp. 161-162); Tr p 134 9 – p 135 16, (R pp 173-174)

<sup>7</sup> Tr p 48 21 – 51 2, (R pp 87-90), Tr p. 81 6 – 82 1, (R. pp. 120-121); Tr. p 133 4-24, (R p 172).

<sup>8</sup> Ironically, several of the individual hunting the property were employed by Plaintiff First Citizens Tr. p. 21.8-12, (R p 60). Indeed, John Wood, a Senior Vice President that had worked closely with Ken Clifton, acknowledged hunting on the property and conversations about liability from hunters on the property *Id.*, Tr. p 28:5-8, (R p. 67).

<sup>9</sup> Tr p 48 21 – 51.2, (R pp. 87-90)

the trial Court found, as this Court agreed, that Clifton's testimony was not credible, there was no basis for disregarding the testimony of other witnesses whose interest were unrelated to business dealings with Respondent.

As this Court recently concluded in *Oskin v. Johnson*, a transaction that is legitimate on its face made to protect a bona fide interest in property does not become fraudulent merely because the ultimate upshot is an uncompensated creditor. 400 S.C. 390, 735 S.E.2d 459. It is undisputed that Clifton transferred his property at the behest of a co-owner at a time when all parties believed he would continue a successful business relationship with Respondent. Respectfully, both the Court of Appeals and the trial court overlooked the nature of the transaction at issue and what the circumstances at that time would have presented to Clifton regarding the aftermath of the transfer. The Court of Appeals erred to the extent it failed to analyze the actual nature of this transaction, and compounded that error by failing to apply the holding of *Oskin* to these facts.<sup>10</sup>

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

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>11</sup> The question presented, as it was at trial and to the Court of Appeals, is not whether Whiteman's

---

<sup>10</sup> Explaining that parties may use legal mechanisms to achieve fraudulent ends, but refusing to set aside the conveyance where record reflected legitimate purpose for transaction. *Oskin*, 400 S.C. at 401 (citing *Matthews v. Montgomery*, 193 S.C. 118, 131, 7 S.E.2d 841, 847 (1940))

<sup>11</sup> The Court of Appeals, like Respondent, relied exclusively on citations to secondary authority concerning the general nature of cotenancies. (App p. 8-9)


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 heir 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 the 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 the absence of precedent for this issue, the Court should grant Certiorari as to this issue and clarify whether deeds in this State are subject to division in subsequent review pursuant to the Statute of Elizabeth.

### **CONCLUSION**

Respectfully, the Court of Appeals overlooked the nature of the transaction to conclude that certain badges of fraud attached to this transfer. The Court of Appeals also charged Appellant with knowledge about events he reasonably believed would unfold quite differently. Furthermore, in the absence of evidence related to fraudulent intent on the part of Whiteman, setting aside half the deed was an error of law that this Court should grant Certiorari correct and provide guidance on the novel question presented. This Court should grant the Petition as to both questions, review the actual nature of the transaction and transfer at issue, and ultimately REVERSE the Court below.

Respectfully Submitted,



---

J. Calhoun Pruitt, Jr.  
SC Bar No. 4588  
Joshua B. Raffini  
SC Bar No. 101338  
PRUITT & PRUITT  
101 N. Murray Ave.  
Anderson, South Carolina 29625  
(864) 224-3121  
(864) 224-8711 (fax)  
Attorneys for Petitioners

Anderson, South Carolina

April 27, 2017.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM LAURENS COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2017-000979

RECEIVED

MAY 01 2017

S.C. SUPREME COURT

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

v.

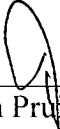
Park at Durbin Creek, LLC; Kenneth E. Clifton; and  
Linda G. Whiteman ..... Petitioners,

PROOF OF SERVICE

I certify that I have served the **PETITION FOR WRIT OF CERTIORARI AND APPENDIX** on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, April 27<sup>th</sup>, 2017, addressed as follows:

Ella S. Barbery  
James H. Cassidy  
Joseph O. Smith  
Roe Cassidy Coates & Price, P.A.  
P.O. Box 10529  
Greenville, SC 29603  
Attorneys for Respondent

April 27, 2017.

  
\_\_\_\_\_  
J. Calhoun Pruitt, Jr. SC Bar No. 4588  
Joshua B. Raffini, SC Bar No. 101338  
PRUITT & PRUITT  
101 N. Murray Ave.  
Anderson, SC 29625  
(864) 224-3121  
Attorney for Petitioners