THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas.....Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb are Respondents and

J. Mars Sapp is the .....Appellant.

BRIEF OF APPELLANT

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1. Even if there was no actual intent to defraud the creditor, was the conveyance fraudulent when it was without consideration?

2. If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, did the grantor overcome the rebuttable presumption of fraud arising from the transfer when he failed to offer any testimony as to the *bona fides* of the transfer?

3. Even if there was consideration for the transfer, was the conveyance fraudulent where it was made by the grantor with actual intent to defraud the creditor and the intent is imputable to the grantee in which the grantor held a 99% membership interest?

B. Where a mortgage is given on property by a fraudulent grantee to a subsequent creditor who has notice of the fraud, should the mortgage be void as to an existing creditor of the fraudulent grantor?

C. Where a fraudulent grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of the property, and the lender is on notice of the fraudulent conveyance, should the mortgage be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent grantor?

II. STATEMENT OF THE CASE

This case was commenced by Respondent Kennedy Funding, Inc. ("Kennedy") on February 9, 2011 by the filing of a Summons and Complaint in Georgetown County. Kennedy sought to foreclose a mortgage given by Respondent Pawleys Island North, LLC ("Pawleys") on two parcels of property (Lots 3 and 4) (collectively "the Property"); sought to collect on loan guarantees given by Respondents Will Darwin Wheeler ("Wheeler") and Peggy Wheeler-Cribb ("Wheeler-Cribb") (collectively "Guarantors"); and sought a determination whether Appellant J. Mars Sapp's ("Sapp") judgment lien against Wheeler was prior to the mortgage lien of Kennedy[1] (Complaint, R. pp. 24–30). Sapp answered the Complaint and alleged that he claimed an interest in the property subject to the foreclosure action and that his judgment lien and interest in the Property was superior to Kennedy's mortgage lien (Answer, R. pp. 60–62).

By Order filed March 22, 2012, the case was referred to the Honorable Joe M. Cosby, Master-in-Equity for Georgetown County ("the Master"), with finality and any appeal to be taken to the South Carolina Supreme Court or Court of Appeals, as appropriate (Order of Reference, R. pp. 18-21).

By motion filed October 3, 2011, Kennedy moved for summary judgment seeking to dismiss Sapp's claim of an interest in the Property or to declare Sapp's lien junior and subordinate to Kennedy's lien (Plaintiff's Motion for Summary Judgment, R. pp. 788-790). By agreement of the parties, the Master heard the motion on January 17, 2012. He granted, in part, Kennedy's motion by Order filed March 5, 2012 when he declared Sapp's lien, if any, junior and subordinate to Kennedy's lien (Order Granting Plaintiff's Motion for Summary Judgment as to

[1] In a separate civil action, Sapp had sued Wheeler in 2008 and secured a verdict on June 4, 2010 in the amount of $252,798.00 to which the trial judge added $48,929.00 in legal fees for a total judgment in the principal amount of $301,727.00. On appeal by Wheeler, the South Carolina Court of Appeals affirmed. *Sapp v. Wheeler*, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013).

Defendant J. Mars Sapp, R. pp. 22–23). On March 8, 2012, Sapp moved for the Master to reconsider the order granting Kennedy Funding summary judgment as to Sapp (Defendant Sapp's Rule 59 Motion to Alter or Amend Judgment, R. pp. 791-799). The Master heard oral argument on Sapp's motion on August 13, 2012, but issued no ruling until he denied the motion from the bench at the trial of the case on February 11, 2013, with the denial to be reduced to a detailed order to be issued by the court (Trial Tr., R. p. 695, line 13–p. 697, line 7).

On September 5, 2012, Kennedy filed an Amended Summons and Complaint adding BNP Paribus ("BNP") as a Plaintiff alleging that Kennedy assigned its rights to BNP (R. pp. 63-69). Sapp answered the Amended Complaint on September 20, 2013. Sapp continued to deny Plaintiffs' alleged priority as the court had not ruled on his Motion to Alter or Amend Judgment, and he alleged that Plaintiffs had unclean hands. Sapp further asserted by way of cross-claim that the conveyance of the Property by Wheeler to Pawleys was a fraudulent conveyance under the Statute of Elizabeth (S.C. Code Ann. § 27-23-10(A) (2007)), that Plaintiffs, Pawleys, and the Guarantors condoned and participated in the transfer of the Property, that the conveyance to Pawleys was void, and that if the conveyance of the Property was not completely void, it was void as to Lot 3 which was unencumbered at the time of the transfer from Wheeler to Pawleys (Answer to Amended Complaint and Crossclaim of J. Mars Sapp, R. pp. 101-107). Plaintiffs replied to the Cross-claim and the remaining Respondents answered the Cross-claim, all denying that the conveyance of the Property was fraudulent and setting up various affirmative defenses (Plaintiffs' Reply, R. pp. 118-122; Answer of Pawleys Island North, LLC, Will D. Wheeler, and Peggy Wheeler-Cribb, R. pp. 123–127).

On February 11, 2013 the Master conducted a non-jury trial. Once the Master denied Sapp's Rule 59 Motion to Alter or Amend Judgment, the only issues remaining for trial were for

Kennedy to establish its allegations for foreclosure of the mortgage, and for Sapp to prove his Cross-claim against Pawleys, Wheeler and Wheeler-Cribb. Kennedy presented one witness who testified as to Kennedy's damages. By agreement of the parties, Kennedy also presented two deposition transcripts with exhibits. These were SCRCP Rule 30(b)(6) depositions of Kennedy's CEO and President. Sapp also testified. Pawleys, Wheeler, and Wheeler-Cribb elected not to testify, not to call any witnesses and not to present any evidence. At the close of the testimony by Plaintiffs and Sapp, Sapp moved for a directed verdict. By Order filed June 7, 2013, the Master found the Plaintiffs' mortgage to be first lien on the Property, ordered that the Property be sold at a judicial sale, and ordered that the Plaintiffs were owed $1,825,935.33 as of April 10, 2012. The Master further found that the conveyance of the Property by Wheeler to Pawleys was not fraudulent (Order and Judgment, R. pp. 1-17).

Counsel for Sapp received the filed June 7 Order and Judgment sometime after June 10, 2013, and filed Sapp's Notice of Appeal on June 27, 2013 appealing the Order Granting Summary Judgment dated February 14, 2012 and the Order and Judgment entered June 7, 2013. He also filed an Amended Notice of Appeal on July 10, 2013 clarifying that Pawleys, Wheeler and Wheeler-Cribb were also respondents in the appeal (Notice of Appeal, R. pp. 128,129; Amended Notice of Appeal, R. pp. 130-134).

III. STATEMENT OF FACTS

a. Wheeler's Transfer of the Property during Litigation.

Appellant Sapp sued Respondent Wheeler in September 2008 alleging over $500,000 in damages for breach of a commercial lease guaranty (the "Sapp/Wheeler Litigation"). At that time, Wheeler was the sole owner in fee simple of two parcels of property on Pawley's Island, known as lots 3 and 4 (previously referred to collectively as the "Property"), which are the

subject of Kennedy's foreclosure action. Lot 3 was unencumbered. Lot 4 was subject to a $300,000.00 mortgage to First South Bank.[2] While the Sapp/Wheeler Litigation was pending, by quitclaim deed dated April 28, 2009, Wheeler transferred lots 3 and 4 to Pawleys for "FIVE AND 00/100 DOLLARS ($5.00) and no other consideration." Wheeler had a 99% interest in Pawleys and his mother (Wheeler-Cribb) had the remaining 1% interest. The Sapp/Wheeler Litigation was tried before a jury in June, 2010 in Georgetown County resulting in a verdict in favor of Sapp and against Wheeler in the amount of $252,798.00 to which the trial judge added $48,929.00 in legal fees for a total judgment of $301,727.00. The South Carolina Court of Appeals affirmed the verdict and judgment. *Sapp v. Wheeler*, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013).

b. Kennedy's Knowledge and Participation.

Two days after the conveyance of lots 3 and 4 "for FIVE AND 00/100 DOLLARS ($5.00) and no other consideration," Kennedy made a loan to Pawleys and took a mortgage on lots 3 and 4 (Quitclaim Deed dated April 28, 2009, Sapp Trial Ex. 1, (R. pp. 750–755); Promissory Note dated April 30, 2009, Kennedy's Ex. 1, (R. pp. 275–282); and Mortgage and Security Agreement dated April 30, 2009, (R. pp. 283–336)). Prior to this loan, Kennedy had no lending relationship with Pawleys, Wheeler or Wheeler-Cribb (Wolfer Deposition 1, R. p. 179, lines 5-10). At the time of Kennedy's loan to Pawleys, the unencumbered lot 3 had an "As Is Market Value" value of $1,040,000.00 and lot 4, encumbered only with a $300,000.00 mortgage, had an "As Is Market Value" of $880,000.00 (Kennedy Trial Ex. 2, R. pp. 511-518). Prior to the conveyance of the Property and prior to closing the loan, Kennedy knew of Sapp's pending suit against Wheeler (Wolfer Deposition 1; R. p. 196, line 21–p. 203, line 20; Kennedy's Trial Exs.

[2] Wheeler also owned lots 1 and 2 in the same "subdivision" and these lots were subject to another mortgage. (Trial Tr., R. p. 724, line 21–p. 725, line 7.)

1, 4, and 5, (R. pp. 505, 506, 525–537, and 539). Kennedy knew that Wheeler owned the Property solely in his name (Wolfer Deposition 1, R. p. 193, line 15–p. 196, line 17; and Kennedy Trial Ex. 2, R. p. 521). Kennedy knew that Wheeler was a 99% owner of Pawleys (Wolfer Deposition 1, R. p. 187, line. 6-p. 189, line 9); Kennedy Trial Ex. 1, R. pp. 396–399, 436, 243). Kennedy took its mortgage on the Property which appraised for $1,920,000.00, and was quitclaimed by Wheeler to Pawleys "for FIVE AND 00/100 DOLLARS (5.00) and no other consideration." Kennedy knew that Wheeler had no income with which to repay the loan, and it was solely looking to the value of the Property for payment of the loan (Wolfer Deposition 1, R. p. 192, lines 17-24). However, worried about the litigation and its impact on the loan, twice Kennedy's counsel asked Wheeler's counsel for an explanation of the litigation - which never came (Wolfer deposition 1, R. p. 203, lines. 9–20). Regardless of Kennedy's failure to secure a response, Kennedy was on notice of Wheeler's existing indebtedness to Sapp which resulted in Sapp's judgment lien. Ultimately, Kennedy decided a possible fraudulent conveyance did not matter as long as it obtained a title opinion on the lots and title insurance (Wolfer Deposition 1, R. p. 200, lines 5–13, p. 215, line 19–p. 216, line 5). Kennedy was a knowing participant in the fraudulent conveyance. It was complicit in the transaction.

c. The Kennedy Loan.

The amount of the purported loan from Kennedy to Pawleys was $960,000.00, which was 50% of the estimated value of lots 3 and 4; however, an examination of the closing statement shows that Kennedy Funding advanced substantially less than $960,000.00 to Pawleys. Kennedy retained $185,200.00 of the loan proceeds for a commitment fee ($70,000.00) and prepaid interest ($115,200.00; no payments were required for the first year of the loan) (R. pp. 228, 229). Thus, of the purported $960,000.00 loan, Kennedy loaned only $774,800.00, or 40% of the value

of the lots quitclaimed by Wheeler. Further, significant amounts were paid to Kennedy's counsel, borrower's counsel, appraisers, etc. After the accounting entry to pay itself, and after paying associated closing costs, the borrower (Pawleys) netted $397,438.50 and it repaid the $300,000.00 First South loan (*Id.*). Wheeler and Wheeler-Cribb unconditionally guaranteed the Kennedy loan as "a primary obligation" (R. p. 358, para. 2). As a result, Wheeler obtained no benefit for the transfer; he incurred additional liability over and above his existing $300,000.00 debt; and he mortgaged both lots including the unencumbered lot 3 which had a value of $1,040,000.00. Kennedy's loan is accruing interest at 25% per annum, and the Master awarded Kennedy attorney's fees of $100,000.00 against Pawleys and the guarantors even though they did not contest the foreclosure and even though Kennedy presented no evidence of its legal fees. Thus, from a $774,800.00 loan funded in May, 2009, Kennedy asserted, and the Master ordered that Kennedy was owed $1,825,935.33 as of April 10, 2012, plus interest at 25% per annum thereafter (R. p. 4).

d. The *Nulla Bona Return.*

In April 2011, The Georgetown County Sherriff returned a *nulla bona* execution on Sapp's judgment against Wheeler (R. pp. 786, 787). Sapp testified that as a result of Wheeler's transfer to Pawleys, he was unable to find any assets held by Wheeler from which his judgment could be satisfied (R. p. 719, line 1–p. 721, line 2).

IV. STANDARD OF REVIEW

An action to establish lien priorities regarding property that is subject to a mortgage is an action in equity, as is an action to foreclose a mortgage. The appellate court's standard of review in equitable matters is its own view of the preponderance of the evidence. *Independence National Bank v. Buncombe Professional Park, LLC*, 402 S.C. 514, 741 S.E.2d 572 (Ct. App.

2013). Likewise, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). "[T]he appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *Id.*, 400 S.C. at 397, 735 S.E.2d at 463. *Oskin* further states the oft-cited principle that an appellate court is not required to disregard the findings of the trial Court who is in a better position to assess the credibility of the witnesses. However, in the case before this court, the only witnesses who testified before the Master were Kennedy's damages' witness and Sapp, and the Master made no credibility judgments as to either.

V. ARGUMENT

A. The transfer of property valued at $1,920,000.00 for "the sum of FIVE AND NO/100 DOLLARS and no other consideration" to a limited liability company (Pawleys) in which the grantor Wheeler held a 99% membership interest, must be set aside as a fraudulent conveyance where the grantor Wheeler was indebted to the creditor Sapp at the time of the transfer, the conveyance was voluntary, and Wheeler failed to retain sufficient property to pay his indebtedness to Sapp.

The Statute of Elizabeth declares:

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

S.C. Code Ann. § 27-23-10(A) (2007).

Conveyances shall be set aside as fraudulent under the Statute of Elizabeth under two conditions:

> First, where the transfer is made with the actual intent of defrauding his creditors where the intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration.

Coleman v. Daniel, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973).

Wheeler's transfer of the Property to Pawleys fails under both conditions. This transfer is void and the Property is subject to Sapp's judgment against Wheeler.

In *Coleman*, the South Carolina Supreme Court reversed a referee and circuit court judge who had found that a transfer of property was not fraudulent and, therefore, refused to order the sale of property in satisfaction of a judgment creditor's liens. The facts of *Coleman* are almost exactly the same as the facts in this appeal with one striking difference which makes Wheeler's conveyance even more fraudulent. The facts of *Coleman* are compared with the case before this court in the table below:

Coleman Facts:	Sapp Facts:
1. Sometime prior to October 26, 1964 (the date of the conveyance under attack), Linzie Rogers executed notes in favor of Coleman and became indebted to Coleman.	Sometime prior to May 5, 2009 (the date of the conveyance under attack), Wheeler guaranteed the real property lease payments of a business to Sapp and became indebted to Sapp.
2. On October 26, 1964, Rogers made an intra-family transfer of property to his daughter Annie Daniel and her husband (the Daniels).	On May 5, 2009 Wheeler made an intra-family transfer of the Property to Pawleys, a limited liability company in which he and his mother held 100% of the membership interest.
3. The deed recited consideration of "$5, love and affection, and subject to the lien of a mortgage held by Lake City Building & Loan Association" which was $29,000.	The deed recited consideration as "the sum of FIVE AND NO/100 DOLLARS ($5.00) and no other consideration to the Grantor." At the time of the transfer, lot 4 of the Property was subject to a $300,000.00 mortgage in favor of First South Bank. Lot 3 was unencumbered.
4. The Daniels contended there was an additional $20,000 in consideration for the transfer. The Court concluded that the	Wheeler did not testify at trial and has never contended that he received any consideration, much less additional consideration for the

maximum consideration was $49,000 (the $29,000 mortgage plus the $20,000 alleged additional consideration).	transfer.
5. Daniels did not assume payment of the Lake City mortgage; however, they secured a loan from another financial institution for $32,000 and paid the Lake City Building & Loan mortgage.	Pawleys did not assume payment of the First South Bank mortgage; however, it secured a loan from Kennedy receiving $697,438.50 of which it paid $300,000.00 to First South Bank.
6. The Daniels were solely liable for the payment of the Lake City Building & Loan debt. Rogers had no liability.	Notably different from the *Coleman* case is that Wheeler executed a personal guaranty of the Kennedy loan to Pawleys. The guaranty describes Wheeler's obligation as "a primary obligation" and as "a continuing inexhaustible guaranty." Thus, Wheeler remained fully liable for the First South debt and mortgage on lot 4, and received no benefit (consideration) as his liability was simply transferred to Kennedy. (Kennedy Exhibit 1, R. pp. 358–368).
7. The transferred property appraised between $85,000 and $100,000.00.	The undisputed appraisal for the property was $1,920,000.00; $1,040,000.00 for lot 3, and $880,000.00 for lot 4.
8. The supreme court found a discrepancy in the consideration received by the grantor compared to the property's value. The discrepancy was between $36,000 and $51,000 ($49,000 (the maximum consideration received based on the grantor's testimony) as compared to the appraised value range of $85,000 to $100,000). The supreme court held that an exact determination of the actual consideration received by the grantor was irrelevant because even assuming the highest possible consideration and lowest value, the consideration was grossly inadequate.	There was a discrepancy in the consideration received by the grantor Wheeler compared to the Property's value. The discrepancy was $1,919,995.00 pursuant to the recited consideration in the deed ($5.00), and even if one were to include the First South payoff, there was a discrepancy of $1,619,995.[3]
9. Under the supreme court's analysis, the consideration for the transfer was somewhere between 49% ($49,000 ÷ $100,000) and 58%	The consideration the grantor Wheeler received for the transfer was 0% ($5.00 ÷ $1,920,000.00).

[3] The mortgage payoff by Pawleys was not consideration to Wheeler for the transfer. Since Wheeler offered no testimony at trial, to find that the mortgage payoff by Pawleys was consideration for the transfer of the Property by Wheeler would require both this court and the trial court to speculate beyond the evidence in the record ("FIVE AND NO/100 DOLLARS ($5.00) and no other consideration"). Further, as the guarantor of Pawleys debt to Kennedy, Wheeler received no benefit since he remained obligated for the full amount of the mortgage payoff.

($49,000 ÷ $85,000) of the property's value.	
10. The referee and circuit court judge erred in dismissing the judgment creditor's Complaint, failing to find the transfer fraudulent, and failing to order the sale of the property in satisfaction of Coleman's judgment liens.	Subject to this court reversing the Master's orders, the Master erred in dismissing Sapp's fraudulent conveyance claim and in failing to rule that his lien on the property superseded any interest that Kennedy might hold.

Under facts more favorable to the grantor in *Coleman* than the facts favorable to Wheeler, the Supreme Court held that the deed by Rogers to the Daniels was void and that the deeded property was subject to Coleman's judgments. On its *de novo* review of the evidence, the court found the circumstantial evidence sufficient to overcome Coleman's (the grantor's) testimony that the transfer was not fraudulent. In this case there was no testimony by Wheeler and the circumstantial evidence points only to a fraudulent transfer.

In analyzing the circumstantial evidence, the court stated, "Fraud is seldom proved by direct evidence. More often, it is proved by circumstantial evidence." *Coleman*, 261 S.C. at 207, 199 S.E.2d at 78. Quoting from *Dinkins v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942), the court further stated:

> Fraudulent intent in such instances can usually be shown only by a consideration of the attendant facts and circumstances, a resort to which must usually be had in order to distinguish between transactions which are bona fide, and those which are not. The Courts frequently must resort to evidence or circumstances which are not properly explained, when such circumstances lead to the belief that a fraudulent intent was present.

Coleman, 261 S.C. at 209, 199 S.E.2d at 79.

In the case before this court, the circumstances of Wheeler's transfer to Pawleys were never explained, much less "properly explained" by either of them.

The *Coleman* court further stated:

> Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as 'badges of fraud'. The badges tend to excite suspicions as to the Bona fides of a challenged conveyance. Unexplained,

> they may warrant an inference of fraud. Whether the inference is warranted depends in large measure on whether a satisfactory explanation is presented.
>
> The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.
>
> Although it has been said that a single badge of fraud may stamp a transaction as fraudulent, it is more generally held that while one circumstance recognized as a badge of fraud may not alone prove fraud, where there is a concurrence of several such badges of fraud an inference of fraud may be warranted.
>
> Practically all of the indicia of fraud enumerated above are present in this case, and we think the lower court erred in concluding factually that the conveyance was Bona fide on the part of Linzie Rogers.

Coleman, 261 S.C. at 209 – 210, 199 S.E.2d at 79 – 80.

In the case before this court, the enumerated badges of fraud are present and unexplained given Wheeler's and Pawley's silence.

- ✓ Wheeler was indebted to Sapp at the time of the transfer.[4]
- ✓ There was no consideration for the transfer, or at best, the consideration received by Wheeler was grossly inadequate.
- ✓ The transferor (Wheeler) conveyed the Property to a family owned limited liability company solely owned by him and his mother. As to Sapp, the effect of this transfer was to remove the Property, and in particular the unencumbered lot 3 worth over one million

[4] It makes no difference that Sapp's suit had not been reduced to judgment at the time of the conveyance. The Statute of Elizabeth applies even where a debt has not been reduced to a judgment. *Albertson v. Robinson,* 371 S.C. 311, 638 S.E.2d (Ct. App. 2006), holding that a creditor's claim only needs to be in existence, not reduced to judgment, at the time of the transfer. Wheeler's debt to Sapp was in existence at the time of transfer as Sapp had brought suit on it and he later reduced the debt to a judgment. *See also, Lebovitz v. Mudd,* 293 S.C. 49, 358 S.E.2d 698 (1987).

dollars, from Sapp's ability to execute on it since Sapp had no claim or judgment against Pawleys Island North, LLC.

- ✓ Litigation was pending.
- ✓ The transfer was carried out in secret without Sapp's knowledge (Trial Tr., R. p. 719, line 1-p. 720, line 21).
- ✓ Wheeler had owned the property in fee simple for years and departed from his normal course of business by conveying it to the LLC.
- ✓ The transfer rendered Wheeler insolvent as he never paid anything on the debt, the Sapp execution was returned *nulla bona*, and he had no other unencumbered property on which to execute. (Trial Tr., R. p. 719, line 1-p. 721, line 2).
- ✓ Wheeler, through the LLC he owned, reserved the use, possession and development of the lots.

There is not just a single badge of fraud; Wheeler's transfer of the Property is rife with fraud. The trial judge erred in finding that the transfer by Wheeler to Pawleys was not a fraudulent conveyance in violation of the Statute of Elizabeth. Turning the conditions under which conveyances have been deemed fraudulent, Sapp makes the following specific arguments:

1. Even if there was no actual intent to defraud Sapp, the conveyance by Wheeler to Pawleys was fraudulent when it was without consideration.

A transfer of property shall be set aside as fraudulent under the Statute of Elizabeth where it is made without actual intent to defraud the grantor's creditors, but without consideration. *Coleman v. Daniel*, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973) *citing Jeffords v. Berry*, 247 S.C. 347, 147 S.E.2d 415 (1966). In the case before this court, the transfer was

without consideration to the grantor. Therefore, it is void even if the Master could have correctly determined that Wheeler had no fraudulent intent in transferring the property to Pawleys.[5]

> [A] transfer made without valuable consideration will be set aside as a fraudulent conveyance if the grantor was indebted to the plaintiff at the time of the transfer and the grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect.

Future Grp., II v. Nationsbank, 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996).

Here, the transfer was without consideration, Wheeler was indebted to Sapp at the time of the transfer, and Wheeler failed to retain sufficient property to pay Sapp as evidenced by the *nulla bona* return and Sapp's testimony (R. p. 719, line 1–p. 721, line 2; R. pp. 786, 787).

The only consideration the Master could find for Wheeler to support the transfer to Pawleys was simply incorrect. The Master erred when he concluded that the transfer by Wheeler to Pawleys was supported by valuable consideration. At paragraph 32 of the Master's order (R. pp. 11, 12), the Master found that Wheeler increased the value of his membership interest in Pawleys by over $1,900,000.00 by the conveyance and that this was valuable consideration to support the transfer. Actually, Wheeler lost $1,920,000.00 by the transfer, the full value of the Property. Had the Master completed his analysis, he would have realized that, the transfer, in fact, was a net loss for Wheeler. At best, had Wheeler been a 100% owner of the limited liability company, the transfer would have been a "wash" in benefit for Wheeler. Wheeler, however, had only a 99% membership interest in Pawleys. Wheeler actually diluted his holdings by the transfer and received no benefit; therefore, the transfer was not supported by any consideration. Further, even if the value of the membership increased, it was more than offset by the liability which Wheeler incurred by guaranteeing Pawleys' debt to Kennedy, another fact which the Master simply overlooked.

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[5] The issue of Wheeler's fraudulent intent is developed in Argument A.3., *infra.*

2. **If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, Wheeler failed to overcome the rebuttable presumption of fraud arising from a transfer made for grossly inadequate consideration when he failed to offer any testimony as to the *bona fides* of the transfer.**

Assuming arguendo that on *de novo* review this court finds that the conveyance by Wheeler to Pawley's was supported by consideration, at best it could only be inadequate consideration. For example, despite Wheeler's continuing liability to Kennedy for paying off the First South debt, perhaps the court could find a $300,000.00 consideration.[6] This court could consider the possible payment of $5.00 to be actual consideration. Under either scenario, the consideration would be deemed grossly inadequate.

In *Coleman*, the Supreme Court found that the maximum consideration for the transfer of property was 58% of the value of the property conveyed ($49,000 received ÷ $85,000 property value). It found this consideration to be grossly inadequate. Assuming Wheeler received $300,000.00 on property valued at $1,920,000.00, or 15% consideration, it would follow under *Coleman* that such consideration is grossly inadequate. After determining that the transfer was for grossly inadequate consideration, the *Coleman* court placed the burden on the transferee (here Pawleys) to prove the *bona fides* of the transaction by clear and convincing testimony. *Coleman,* 261 S.C. 208, 211, 199 S.E.2d 79, 80. Coleman and other courts have followed this analytical framework in situations involving family members following the case of *Gardner v. Kirven,* 184 S.C. 37, 191 S.E. 814 (1937):

> Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony.

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[6] Appellant Sapp does not concede this to be valuable consideration and it is simply set forth here to foreclose any argument which Kennedy may make.

Coleman v. Daniel, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973).

The case before this court involves an intra-family transfer where Wheeler conveyed the property to the limited liability company owned by him and his mother. The fact that one of the parties is a limited liability company makes no difference. In *Windsor Properties v. Dolphin Head Const. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998), Dolphin Head Construction, Inc. was a corporation wholly owned by Ralph Liscio. Dolphin Head transferred property to Ralph's wife, Linda. A creditor successfully attacked the conveyance under the Statute of Elizabeth despite the Liscios' argument that Linda had advanced thousands of dollars to purchase and renovate the property. The Supreme Court determined the conveyance from the corporation to the wife to be a transfer to a family member ("this was in reality an intra-family transfer"). It followed *Kirven* and stated that Linda (the transferee) had the burden of proving by clear and convincing testimony that there was consideration and that the transaction was *bona fide. Windsor Properties,* 331 S.C. at 471, 498 S.E.2d 861.

As Pawleys failed to offer any evidence, Pawleys failed to prove by any standard of proof, much less a clear and convincing standard, that it gave consideration for the transfer and that the transfer was *bona fide.* In fact, in the witnessed and notarized deed, Pawleys' 99% member Wheeler said the only consideration was $5.00 "and no other consideration." Thus, even if there was grossly inadequate consideration for the transfer, the Master erred by finding there was no fraudulent transfer since the grantee failed to offer any evidence of the *bona fides* of the transfer.

3. Even if there was consideration for the transfer by Wheeler, the conveyance was fraudulent where it was made by Wheeler with actual intent to defraud Sapp and the intent is imputable to the grantee in which he held a 99% membership interest.

In *Royal Z Lanes, Inc. v. Collins Holding Corp.,* the Supreme Court stated:

> In answering the certified question now before us, we are asked to consider whether a grossly inadequate consideration (here less than 20% of the property's value) is sufficient to set aside the conveyance as fraudulent. As noted above, grossly inadequate consideration is treated as a "badge of fraud" under this Court's precedent. *See also McGhee v. Wells,* 57 S.C. 280, 35 S.E. 529, 531 (1900) (defining grossly inadequate consideration as "a consideration so far short of the value of the property as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust."). A badge of fraud creates a rebuttable presumption of intent to defraud. *Dinkins v. Robbins,* 200 S.C. 475, 21 S.E.2d 10 (1942); *James v. Martin,* 150 S.C. 75, 147 S.E. 752 (1929).

337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999).

The transfer by Wheeler to Pawleys was either without consideration or for grossly inadequate consideration. Further, there were other badges of fraud associated with the transfer. For example, Wheeler was indebted to Sapp at the time of transfer; Wheeler retained possession and control of the Property; and the transfer was intra-family. Given these and other badges of fraud, the Master erred by finding that the conveyance was not fraudulent because there was an un-rebutted presumption of fraud which arose from the transaction.

The Master erred at paragraph 32 of the Order (R. pp. 11, 12) where he declared that there was no fraudulent intent in the transfer from Wheeler to Pawleys because there was no proof presented on the issue. The badges of fraud furnish the fraudulent intention, and it became Wheeler's obligation to rebut the proof. In *Dinkins v. Robbins*, the court stated:

> Quoting further from the language of Justice John Belton O'Neall in the case of Smith v. Henry, supra, we find on page 122 of 2 Bailey, on page 122 of 18 S.C.L.: "Applicable to this case, we have some general and well defined rules, by which it can be tested. Two of the most usual badges or evidences of a fraudulent sale are, first, the vendor's retaining possession, after an absolute sale; second, the pendency of suits against him, at the time of a sale or transfer of the most valuable part of his property. *** Where, after an absolute sale, the vendor still retains possession, I have always thought that it was a fraud per se, in other words that it was a legal fraud; and, if I have been in error in this respect, I have the consolation of knowing, that I am in company with the late venerable and distinguished Judge Nott, and with Chancellor Kent."

> In the syllabus to that case we find the following on page 119 of 2 Bailey, on page 119 of 18 S.C.L.: "*The idea of a badge of fraud is, that it furnishes a legal presumption of a fraudulent intention, which supersedes inquiry into the actual intention; and every badge of fraud is therefore evidence of a legal fraud, or fraud per se. It does not change the essential character of the presumption, that sometimes it may be rebutted, and sometimes not; for, until it is rebutted, the presumption remains,* and whether rebutted or not, presents a question for the determination of the court, and not of the jury."

200 S.C. 475, 21 S.E.2d 10, 16 (1942) (emphasis added).

As Pawleys and Wheeler failed to offer any evidence, Pawleys and Wheeler failed to rebut the presumption of fraud for the transfer between them ("for until it is rebutted, the presumption remains"), and the Master erred in finding that the transfer was not fraudulent.

Under the conditions outlined in many South Carolina cases, including the *Coleman* case, the conveyance by Wheeler to Pawleys is fraudulent as to Appellant Sapp. The conveyance should not survive under any analytical framework as shown in the preceding three arguments, A.1, A.2, and A.3.

B. Where a mortgage is given on property by a fraudulent grantee (Pawleys) to a subsequent creditor (Kennedy) who has notice of the fraud, the mortgage is void as to an existing creditor (Sapp) of the fraudulent grantor (Wheeler).

Before Kennedy loaned money to Pawleys (the fraudulent grantee) at the April 30, 2009 closing, Kennedy had actual knowledge by email dated March 11, 2009 that the Property was personally owned by Wheeler, and that Wheeler planned to transfer it to Pawleys (Wolfer Deposition 1, R. p. 193, line 15–p. 196, line 17; Kennedy's Ex. 3, R. p. 521). Kennedy also had actual knowledge that litigation was pending against Wheeler, that Wheeler owed a debt to Sapp, and that Sapp was seeking damages for Wheeler's failure to perform under a lease guaranty. In a memorandum to Kennedy dated April 9, 2009, three weeks before the loan closing, its legal counsel advised Kennedy that the Sapp/Wheeler Litigation was pending with an amount demanded of $556,099 (Kennedy's Ex. 1, R. pp. 505, 506).

Two days prior to closing, Kennedy's counsel provided Kennedy's CEO and President, Kevin Wolfer, with a closing checklist which stated that the borrower was to provide a status update on the Sapp/Wheeler Litigation (Wolfer Deposition 1, R. p. 204, line 9–p. 205, line 24; and Kennedy's Ex. 4, R. pp. 525, 531). On April 29, the day before the closing, Kennedy's counsel sent an email to Wheeler's, Wheeler-Cribb's and Pawleys' counsel (Robert Gwin) requesting the status of an email that Gwin was supposed to send Kennedy's counsel regarding the Sapp/Wheeler Litigation. Despite not getting a response from Mr. Gwin, Kennedy elected to proceed with the loan as long as it had title insurance and there were no encumbrances on the property. Wolfer, Kennedy's SCRCP Rule 30(b)(6) witness, testified that he could not recall if any evaluation of a possible fraudulent conveyance was made for Kennedy (Wolfer Deposition 1, R. p. 202, line 9–p. 204, line 7; Kennedy's Ex. 5, R. p. 539). In short, Kennedy made the loan and assumed the known risk, or at least was willing to transfer the risk to borrower's counsel and a title insurance company.

In addition to the actual knowledge which Kennedy had of the Sapp/Wheeler Litigation, Wheeler transferred the Property to Pawleys by quitclaim deed. In testimony completely lacking in credulity, Wolfer, someone who is familiar with property and lending transactions as the CEO and President of Kennedy, testified that a quitclaim transfer did not raise any concern or red flag[7] (Wolfer Deposition 1, R. p. 214, line 17–p. 216, line 12; Sapp Ex. 1, R. pp. 750–755).

[7] Wolfer also incredulously testified that he would not know if the transfer by Wheeler to Pawley's of unencumbered lot 3 would make it more difficult for Wheeler's creditors to satisfy claims against Wheeler from that lot. Likewise, the witness testified that he did not know if the placing of a mortgage on lot 3 would make it more difficult for a creditor to satisfy a claim out of lot 3. The witness was simply being dishonest as the conveyance and the attempt to secure a first lien on the property were solely designed to ensure that Kennedy would take priority over other creditors.

Because Kennedy had notice that the conveyance to Pawleys was fraudulent, Pawleys could not give Kennedy a valid mortgage as to an existing creditor.

In *Rilling v. Schultze*, 95 Tex. 352, 67 S.W. 401 (1902), the Texas Supreme Court held a mortgage executed by a fraudulent grantee was invalid as to creditors of the fraudulent grantor existing at the time of the fraudulent conveyance when the mortgagee had notice of the fraud.

In *Rilling*, Caroline Schultze divorced from Schultze, Jr. She was a creditor of Schultze, Jr. arising from a judgment entered in the divorce proceeding in 1896 in which she was given custody of their child and $12.50 per month child support with payments beginning July 1, 1896. This divorce judgment, however, did not give Caroline a lien on any of Schultze, Jr.'s property. At the time of the divorce Schultze, Jr. owed Rilling $500.00 which was determined to be Schultze, Jr.'s debt. In the divorce decree, Schultz, Jr. was awarded various parcels of property, one of which (Presa Street) was already subject to a mortgage to Rilling for Schultze, Jr.'s $500.00 debt.

After the divorce decree and later in 1896, Schultze, Jr. conveyed all of the property (including Presa Street and 16 lots in San Antonio) he was awarded in the divorce decree to his father, Schultz, Sr., "for a pretended consideration" according to the *Rilling* opinion. On March 1, 1900 Schultze, Sr. supposedly conveyed Presa Street and 16 lots in San Antonio to Rilling for the recited consideration of $1,500.00. In connection with this transaction, Schultze, Jr. agreed to pay all property taxes and upkeep on the conveyed property, and Rilling agreed to deed the property to Schultze, Jr. after full payment of $1,500.00 and interest on debt which Schultze, Jr. owed Rilling, part of which was the $500.00 debt existing at the time of the divorce, the other $1,000.00 having arisen after the divorce. The court found the conveyance to Rilling from Schultze, Sr. was actually a mortgage in Rilling's favor, and was not a deed transferring

ownership. Like the case before this court and the transfer from Wheeler to Pawleys, Rilling took the mortgage with full knowledge of the facts that existed regarding the conveyance by Schultze, Jr. to his father. *Rilling*, 95 Tex at 354, 67 S.W. 402.

Schultze, Jr. did not pay the child support after January 1897, and in September 1900, Caroline Schultze sued and prayed for (1) cancellation of the deeds to Rilling and the appointment of a receiver to collect rents and pay the child support, or (2) annulment of the deeds and sale of the property to satisfy her claims. The trial court held the judgment awarded Caroline had priority in payment as to the property mortgaged by Schultze, Sr., except as to $400.00 and interest, that being the balance due upon the $500.00 debt originally secured by a lien in favor of Rilling which was on record at the time of the divorce.

The Texas Supreme Court affirmed. It held that because Rilling had notice of the fraud in the conveyance from Schultze, Jr. to his father, that Rilling was not a bona fide purchaser from the fraudulent grantee (Sr.). The Texas Supreme Court determined that the debt owed to Rilling consisted largely of debt which arose subsequent to the indebtedness owed by Schultze, Jr. to Caroline arose. Likewise, the debt owed to Kennedy in this case arose after Wheeler was indebted to Sapp. The Texas Supreme Court found Rilling's mortgage to be invalid as to all indebtedness created at the time the mortgage was executed:

> The grantee can no more give a lien to a subsequent creditor who has notice of the fraud than he can sell to a purchaser with such notice. Very clearly the mortgage is not valid as to the debts created at the time the mortgage was executed; and since Rilling has failed to show that his judgment was for a debt which existed at the time of the execution of the fraudulent conveyance, the mortgage as to that debt must also be held void as to Caroline Schultze.

Rilling, 95 Tex. at 358, 67 S.W.2d 404.

Rilling is very close factually to the case before this court; however, the *Rilling* court found the lien of Rilling which existed at the inception of the debt coming due to Caroline

Schultze to have priority. Mortgagees with no preexisting debt, such as Kennedy in this case, who advance money after the debt is incurred by the fraudulent grantee, are not accorded such favorable treatment in South Carolina.

In *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), after acquiring the property at issue, the fraudulent grantees (the Daniels) borrowed $32,000 from a financial institution. This financial institution is not identified in the opinion, but will be referred to as "New Lender." New Lender paid off an existing $29,000 mortgage on the fraudulently conveyed property, and recorded a new mortgage executed by the fraudulent grantees.[8] The Supreme Court held that the conveyance was void as to the creditor (Coleman), that the property was subject to Coleman's judgments and that Coleman could seek an order of the lower court for sale of the property in satisfaction of his judgments. Justice Bussey authored a lone dissent. He stated that Coleman should only be paid to the extent that the sales price exceeds the consideration actually paid or assumed by the fraudulent grantees. The four justice majority refused to adopt this analysis.

In *Coleman*, there was no finding that New Lender was on notice of the fraudulent conveyance. Nevertheless, the Supreme Court did not provide for payment of New Lender's debt from the sale of the property. By finding the transfer void as to Coleman, the Supreme Court effectively negated New Lender's mortgage as to Coleman.

In the case before this court, the Master found that Kennedy was a good faith purchaser for value; therefore, Kennedy did not participate in a plan to defraud Sapp. These findings are erroneous at best, and most likely irrelevant under *Coleman*. For hundreds of years in South Carolina, the term good faith purchaser for value includes the concept of lack of notice. *See,*

[8] The opinion does not state why there was a $3,000.00 difference in the new loan and the existing mortgage. Presumably closing costs, legal fees, or a cash-out to the borrower account for the difference.

e.g., Messervy v. Barelli, 11 S.C. Eq. (2 Hill Eq.) 576 (1837) and *Brunson v. Sports*, 239 S.C. 58, 121 S.E.2d 294 (1961). In *Messervy*, a mortgage was deemed subordinate to the rights of the grantee's wards where the mortgagee took the mortgage with notice of the wards' claims against the mortgagor. Similarly, in *Brunson*, Dukes took a deed to property from West. The property was subject to an unrecorded trust. Dukes had notice of the unrecorded trust. The Supreme Court stated, "The law is well settled that actual notice of an outstanding equity will cut off the defense of bona fide purchaser." 239 S.C. at 68, 121 S.E.2d at 299. The court further stated that even if Dukes secured from reputable counsel an opinion that his paper title was good, that the property was impressed with a trust in favor of the respondents.

Kennedy knew that Sapp was subject to a pending legal action asserting a claim of over $500,000.00. It stopped investigating the fraudulent nature of the transaction because it secured an attorney's opinion and title insurance. Based on Kennedy's notice of Sapp's claim, and even with an opinion of counsel, Kennedy cannot be a bona fide purchaser.

Even if Kennedy could be determined to be a good faith purchaser for value without notice, it is irrelevant under *Coleman*. In *Coleman*, there was no examination of the New Lender's good faith. The court did not delve into the lender's bona fides. The Supreme Court held that the transfer was void and that the property could be sold to satisfy Coleman's liens, not New Lender's mortgage. The dissent would have given priority to New Lender, but that was not the court's holding.

The mortgage given by the fraudulent grantee (Pawleys) to Kennedy, a creditor subsequent in time to Wheeler's debt owed to Sapp, is void as to Sapp regardless of Kennedy's knowledge of the fraudulent conveyance, but even more particularly in this case since Kennedy was on notice of the fraud.

C. Where a fraudulent grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of property, and the lender is on notice of the fraudulent conveyance, the mortgage shall be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent grantor.

Before Kennedy loaned money to Pawleys (the fraudulent grantee) at the April 30, 2009 closing, Kennedy had actual knowledge by email dated March 11, 2009 that the Property was personally owned by Wheeler, and that Wheeler planned to transfer it to Pawleys (Wolfer Deposition 1, R. p. 193, line 15–p. 196, line 17; and Kennedy's Ex. 3, R. p. 521). Kennedy also had actual knowledge that litigation was pending against Wheeler, and that Sapp was seeking damages for Wheeler's failure to perform under a lease guaranty. In a memorandum to Kennedy dated April 9, 2009, three weeks before closing, its legal counsel advised Kennedy that the Sapp/Wheeler Litigation was pending with an amount demanded of $556,099 (Kennedy's Ex. 1, R. pp. 505, 506).

Two days prior to closing, Kennedy's counsel provided Kennedy's CEO and President, Kevin Wolfer, with a closing checklist which stated that the borrower was to provide a status update on the Sapp/Wheeler Litigation (Wolfer Deposition 1, R. p. 204, line 9–p. 205, line 24; and Kennedy's Ex. 4, R. pp. 525, 531). On April 29, 2009, the day before the closing, Kennedy's counsel sent an email to counsel for Wheeler, Wheeler-Cribb and Pawleys requesting the status of an email that borrowers' counsel was supposed to send Kennedy's counsel regarding the status of the Sapp/Wheeler Litigation. Despite not getting a response from borrowers' counsel, Kennedy elected to proceed with the loan as long as it had title insurance and there were no encumbrances on the property. Wolfer, Kennedy's SCRCP Rule 30(b)(6) witness, testified that he could not recall if any evaluation of a possible fraudulent conveyance was made for Kennedy (Wolfer Deposition 1, R. p. 202, line 9–p. 204, line 7; and Kennedy's Ex. 5, R. p. 539).

In addition to the actual knowledge which Kennedy had of the Sapp/Wheeler Litigation, Wheeler transferred the Property to Pawleys by quitclaim deed. In testimony completely lacking in credulity, Wolfer, someone who is familiar with property and lending transactions as the CEO and President of Kennedy, testified that a quitclaim transfer did not raise any concern or red flag[9] (Wolfer Deposition 1, R. p. 214, line 17–p. 216, line 12; Sapp Ex. 1, R. pp. 750–755).

Despite Kennedy's knowledge that (1) the Property was being transferred by quitclaim deed; (2) Wheeler was the sole owner of the Property; (3) Wheeler was transferring the property for no consideration to Pawleys; (4) Pawleys was a family owned limited liability company in which Wheeler held a 99% membership interest; and (5) that Wheeler was indebted to an existing creditor, Kennedy loaned less than 50% of the Property's value to Pawleys and took a mortgage on the Property. Kennedy participated in Wheeler's and Pawleys' fraudulent scheme. The finding by the Master that Kennedy did not participate (Order, para. 31, R. pp. 10, 11) cannot be supported by this court's *de novo* review of the evidence as a whole. The Master's finding goes against the preponderance of the evidence. Because Kennedy was complicit in the fraud, Pawleys could not give Kennedy a valid mortgage as to an existing creditor.

In *South Carolina National Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987), the court held that a mortgage could be set aside as a fraudulent conveyance where it was not supported by valuable consideration or the lender participated in the fraud. This court examined a transaction in which the lender secured a mortgage based on valuable consideration of an

[9] Wolfer also incredulously testified that he would not know if the transfer by Wheeler to Pawley's of unencumbered lot 3 would make it more difficult for Wheeler's creditors to satisfy claims against Wheeler from that lot. Likewise, the witness testified that he did not know if the placing of a mortgage on lot 3 would make it more difficult for a creditor to satisfy a claim out of lot 3. The witness was simply being dishonest as the conveyance and the attempt to secure a first lien on the property were solely designed to ensure that Kennedy would take priority over other creditors.

existing debt owed to Halter; therefore, this court held that the judgment creditor needed to prove that the judgment debtor intended to hinder, delay or defraud his creditors, and that the mortgagor participated in the fraud. In its analysis, the court relied upon *Lenhardt v. Ponder*, 64 S.C. 354, 42 S.E. 169 (1902).

Lenhardt refused to set aside a deed as a fraudulent conveyance under the Statute of Elizabeth, but its holdings are instructive as to how the Master erred in this case. *Lenhardt* quoted with approval from the case of *Magovern v. Richard*, 27 S.C. 272, 3 S.E. 340 (1887). It set forth a two step analysis when examining a mortgage that was attacked as a fraudulent conveyance: first, was the mortgage supported by an existing debt such that there is consideration for the mortgage; and, second, did the mortgagor participate in the fraud?

In each of the three cases mentioned (*South Carolina Nat'l. Bank; Lenhardt;* and *Magovern*) each mortgagor was already indebted to and owed money to each mortgagee at the time the mortgage was given. The mortgages were given to secure preexisting debt. Based on the existing debts owed by the mortgagors, each court found the mortgage conveyance to be supported by valuable consideration. In the case before this court there was no debt owed to Kennedy until the loan closed. Thus, the Kennedy loan fails the first test of these three cases. It is of no moment that Kennedy may have loaned new money under the analysis of *South Carolina Nat'l. Bank, Lenhardt,* and *Magovern*. In essence, it appears that the South Carolina courts would follow the *Rilling* case, *supra*, which declared void a mortgage on new debt incurred by the fraudulent grantor.

Even if this court were to determine that Kennedy's loan was supported by consideration, the consideration would be grossly inadequate, and a court of equity should not uphold such a fraudulent mortgage. *Lenhardt* specifically stated that "a bona fide creditor has the right to

obtain a transfer of property from an insolvent debtor, *at a fair price*, for the sole purpose of securing or paying the debt." (emphasis added) Here, the mortgage of an unencumbered lot and the entire Property which was valued at $1,920,000 for a $774,000 loan was not a fair price. The consideration was grossly inadequate as lot 4 alone, with a value of $880,000, supported the value of the loan, especially considering that Kennedy also secured the personal guarantees of Wheeler and Wheeler-Cribb.

Not only does Kennedy fail the first test of lack of consideration articulated in *South Carolina Nat'l. Bank, Lenhardt,* and *Magovern*, but it also follows that Kennedy's participation in the fraud would make the mortgage invalid, *i.e.,* Kennedy was not a bona fide creditor. If Kennedy did not know that there was a fraudulent conveyance by which Wheeler had conveyed the Property to Pawleys, it certainly had notice thereof. Further its loan of $774,800 secured by the mortgage on lot 4 with a value of $880,000.00 and lot 3 with a value of $1,040,000.00 clearly put the property out of reach of Wheeler's legitimate creditors including Sapp. It cannot be contended that with all the documentation produced and legal fees paid by Kennedy that one intended consequence of Kennedy was not to put Wheeler's Property beyond the reach of Sapp and any other of Wheeler's existing creditors.

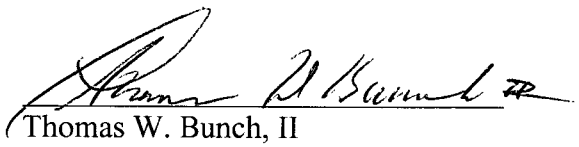
Since Pawley's debt did not exist prior to the execution of the mortgage to Kennedy, since the debt was for 40% of the Property's total value, and since Kennedy was on notice (or knew) of the fraudulent conveyance and participated in the fraud, the mortgage should be set aside as a fraudulent conveyance, or declared subordinate to Sapp's lien on the Property.

V. CONCLUSION

This court should reverse the Master's Order on Summary Judgment and the final Order and Judgment. Based on a *de novo* review of the record, it is clear and convincing that Wheeler

fraudulently conveyed the Property to Pawleys, that the mortgage given by Pawleys to Kennedy is not valid as to Sapp, and that the Property should be sold in satisfaction of Wheeler's debt owed to Sapp. Alternatively, the mortgage of the previously unencumbered lot 3 should be set aside and that lot should be sold in satisfaction Sapp's claim.

Respectfully submitted,



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December 13th, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas.....Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb are Respondents and

J. Mars Sapp is the .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief on opposing counsel by depositing a copy of it in the United States Mail, postage prepaid, on **December 13, 2013** addressed as follows:

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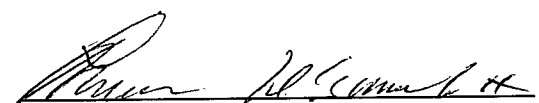

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