

**STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT**

Appeal from the Court of Common Pleas For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096 and 2011-CP-10-8840
___ S.C. ___, 795 S.E.2d 857 (Ct.App. 2016)

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

Respondent,

v

Donald W. Lancaster,

Petitioner.

**Appendix to the
Petition for Writ of Certiorari**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Donald W. Lancaster, Appellant.

Appellate Case No. 2014-001247

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Published Opinion No. 5452
Submitted June 1, 2016 – Filed November 2, 2016

AFFIRMED

John Joseph Dodds, III, of The Law Firm of Cisa &
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Appellant.

Stephanie D. Drawdy and Justin O'Toole Lucey, both of
Justin O'Toole Lucey, PA, of Mount Pleasant, for
Respondent.

SHORT, J.: Donald W. Lancaster appeals an order awarding damages to Respondent Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, in a lawsuit Gordon filed to collect on a prior judgment he obtained against Lancaster's uncle. On appeal, Lancaster argues the underlying

judgment was no longer enforceable and challenges the findings that he and his uncle engaged in various fraudulent conveyances. We affirm.¹

FACTS AND PROCEDURAL HISTORY

From 1946 until approximately 1992, Lancaster's maternal uncle, Rudolph Robert Dews, owned and operated "The Dews Company," a construction business in Charleston, South Carolina. During his high school and college years, Lancaster worked at The Dews Company and became close to both Dews and Dews's wife, Effie. According to Lancaster, The Dews Company suffered financially after Hurricane Hugo in 1989 as a result of the acts of an unscrupulous business associate who absconded with customer deposits for lucrative jobs. As a result of this misfortune, the Dewses began borrowing heavily on their home in an effort to raise revenue for their business. The situation worsened when the Internal Revenue Service (IRS) filed liens against Dews and his business. Dews sold what was left of his business to Dorsey Biller, who had been the General Manager of The Dews Company. The Dewses decided to sell their home to raise funds to pay the various IRS liens and outstanding loans associated with The Dews Company. Lancaster asserted the Dewses had \$100,000 "[a]fter appropriately paying off the IRS and satisfying other standing debts."²

In May 1992, at Dews's request, Lancaster used the \$100,000 allegedly remaining from the sale of Dews's residence, along with \$60,000 of his own funds to purchase 17 Bainbridge Drive, in Charleston, South Carolina. On May 22, 1992, Lancaster executed an agreement purporting to grant the Dewses a life estate in this property. The agreement was not a deed and was not recorded in the public records. It does not reference the \$100,000 Dews gave to Lancaster to purchase the property, and it indicated the consideration for the conveyance of the life estate was "the sum of TEN (\$10.00) AND NO/100S DOLLARS and love and affection for my uncle and aunt."

On June 12, 1992, Lancaster obtained a \$40,000 open-ended mortgage on the Bainbridge Property. From 1993 to 1995, Lancaster paid Dews \$40,000 in checks drawn from the bank from which the \$40,000 line of credit was obtained,

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² Contrarily, the court noted that for the remainder of his life, Dews had "pending creditor claims, including IRS assessments and liens"

supposedly for the purpose of helping the Drewses pay their living expenses. Drews, however, paid the interest incurred on the line of credit, but did not sign any IOUs or notes of indebtedness for the disbursements. Lancaster maintained he used a spreadsheet to document payments by Drews on the loan and updated the entries contemporaneously with the corresponding events; however, Lancaster was unable to explain a discrepancy between the spreadsheet produced during his deposition and the one at trial.

In March 1995, Drews granted Lancaster a \$40,000 mortgage on real property Drews owned at 1705 Meeting Street, Charleston, South Carolina. The mortgage was not recorded until November 1995. Drews did not execute a note on the mortgage, and Lancaster did not provide any contemporaneous consideration for it.

On April 27, 1995, Drews, as attorney-in-fact for Lancaster, signed an agreement to purchase a residence at 2 Nuffield Road, in Charleston, South Carolina. Lancaster claimed he and Drews agreed they would substitute a one-story house chosen by the Drewses for the Bainbridge property because of medical problems with Drews's knees. Lancaster claimed he gave Drews a power of attorney to sign a sales contract on Lancaster's behalf; however, at trial, Lancaster could not find the document granting this authority, and no such document could be found in the public records. Mrs. Drews paid the \$1,000 deposit on the home. On May 15, 1995, Lancaster increased the \$40,000 line of credit to \$79,250 and purchased the Nuffield property for \$125,000 the following day. On May 17, 1995, Lancaster executed a "Memorandum of Lease and Subordination Agreement" for the Nuffield property that actually granted the Drewses a life tenancy in the property for consideration of \$10.00 "and other good and valuable consideration." The document was recorded; however, it was titled as a "lease" rather than as a deed.

In 1996, Drews and his business partner, Raymond Beasley, opened a hardware store in Charleston. The store, known as Builders Station, was incorporated, and its board of directors approved a business plan and capital structure that provided for the sale of stock to outside investors. Gordon, one of the outside investors, purchased fifty shares of stock on September 9, 1996, for \$50,000, on his mother's behalf and with her funds. The business failed and ultimately closed in 1997.

On April 15, 1998, Drews granted Lancaster a \$100,000 mortgage on the Meeting Street property, again without executing a note and without contemporaneous consideration from Lancaster. The mortgage was filed on May 4, 1998. However, contrary to Lancaster's position at trial that this mortgage was intended to replace

the \$40,000 mortgage Drews granted Lancaster in March 1995, no satisfaction of the \$40,000 mortgage was filed contemporaneously with the creation of the \$100,000 mortgage.

In April 1999, Gordon, as attorney-in-fact for Dorothy Gordon, filed a lawsuit against Drews, claiming the sale of the stock in Builders Station was illegal and fraudulent under the Uniform Securities Act and also asserting claims for common-law misrepresentation and breach of fiduciary duty.

In July 1999, three months after Gordon filed his action against Drews, Drews granted Lancaster a \$20,000 mortgage on the Meeting Street property. As with the two prior mortgages Drews gave to Lancaster on the same property, there was no contemporaneous consideration from Lancaster and no note.

On November 5 and 6, 2001, Lancaster executed satisfactions of the three mortgages on the Meeting Street property. By deed dated November 6, 2001, Drews conveyed this property to Charleston Antiques District, LLC, for \$205,000. On November 7, 2001, Drews received a \$190,000 note and mortgage from Charleston Antiques as consideration for the purchase. Drews simultaneously assigned this note and mortgage to Effie Drews.

On November 7, 2001, Mrs. Drews gave Lancaster a note for \$50,912 that was secured by the assignment of the mortgage on the Meeting Street property. Lancaster explained he received \$11,089.63 from the sale, which reduced the balance on the amount the Drewses owed him to \$50,912. According to Lancaster, as Charleston Antiques made monthly payments of about \$2,400 on its \$190,000 note and mortgage, Drews made corresponding monthly payments of about \$540, eventually reducing the balance on the \$50,912 note to \$35,621.12.

Following a three-day jury trial in December 2001, Gordon received a judgment of \$50,000 against Drews, plus \$15,789.12 in interest. On March 14, 2002, Gordon was awarded \$42,693.50 in attorney's fees, for a total judgment of \$108,482.62.

Drews appealed the judgment awarded to Gordon. On April 12, 2004, this court affirmed the judgment. *Gordon v. Drews*, 358 S.C. 598, 595 S.E.2d 864 (Ct. App. 2004). On September 22, 2005, the Supreme Court of South Carolina denied certiorari in the matter, and Gordon received an additional award on September 28, 2005, of \$1,467.21 in appellate court costs and expenses.



In September 2005, Charleston Antiques sold the Meeting Street property to unrelated third parties. As a result of the sale, Drews, by way of his wife, received the final payment of \$130,293.37 on the \$190,000 note and mortgage. On September 26, 2005, Lancaster received a final payment of \$35,621.12, for which he issued a satisfaction, and assigned back to Effie Drews the \$190,000 mortgage.

In August 2006, the circuit court issued an order for supplemental proceedings to aid Gordon in obtaining satisfaction of the judgment. The Master-in-Equity for Charleston County held a hearing in the matter on September 26, 2006; the Master continued the hearing and left the supplemental proceedings open because Drews did not provide certain court-ordered documents. During the hearing, Gordon's attorney expressed suspicion that Effie Drews and Lancaster were "intertwined in this" and indicated she wanted to subpoena Mrs. Drews, Lancaster, and any new property owners counsel deemed necessary to give a full picture of what happened with assets that had once been owned by Drews.

Drews died on September 25, 2007, and his estate was opened the following month. In February 2010, an inventory and appraisal was filed indicating there were no assets in Drews's estate. On February 26, 2010, Lancaster gave a deposition in the supplemental proceedings. During the deposition, Gordon became aware of the transfers between Drews and Lancaster that allegedly resulted in Drews's insolvency.

Effie Drews died on February 27, 2010, two days before she was scheduled to give a deposition in the supplemental proceedings. Her estate was filed on March 30, 2010, with her sister, Jessie B. Atkinson named as personal representative. Effie's estate was valued at \$55,460.44.

In November 2010, Gordon filed this action in the Court of Common Pleas for the Ninth Judicial Circuit against Drews's Estate, Effie Drews's Estate, and Lancaster. Gordon later filed a petition in the Charleston County Probate Court against Atkinson in her capacity as personal representative of Effie Drews's estate, Lancaster, and Shirrese Brockington, in her capacity as special administrator of Drews's estate. In November 2011, Gordon settled with Drews's estate and Effie Drews's estate, both of which assigned Gordon their rights against Lancaster. The probate court also issued a consent order for removal of the case to the circuit court.

The present action came before the circuit court on June 13-14, 2013, for a nonjury trial. Following the presentation of testimony by both sides, Lancaster moved for a directed verdict, arguing the judgment Gordon was attempting to collect was extinguished. The circuit court denied the motion.

By order filed August 19, 2013, the circuit court found Gordon proved the fraudulent nature of all the alleged transfers, including the following: (1) the 1992 transfer of \$100,000 for the purchase of the Bainbridge property; (2) the Nuffield property substitution; (3) the first mortgage of \$40,000 on the Meeting Street property; (4) the second mortgage of \$100,000 on the Meeting Street property; (5) the third mortgage of \$20,000 on the Meeting Street property; and (6) the assignment of the \$190,000 mortgage on the Meeting Street property. The court further noted that "[w]hile some of the transfers between Drews and Lancaster occurred prior to the September 1996 accrual of the underlying action resulting in [Gordon's] [j]udgment, [Gordon] has presented evidence that the transfers between Drews and Lancaster involved actual moral fraud as is required to set aside transfers that occurred before Gordon became a creditor." Based on these findings, the circuit court granted Gordon judgment against Lancaster for \$211,677.30. The circuit court later issued a supplemental order dismissing Gordon's claims for constructive trust, civil conspiracy, and negligence/aiding and abetting. Lancaster's post-trial motions were denied, and this appeal followed.

LAW/ANALYSIS

I. Enforceability of the Judgment

Lancaster argues the judgment Gordon obtained against Drews expired by operation of law before the present action was decided and could not be enforced against Lancaster. We disagree.³

³ Gordon correctly argues that Lancaster, in requesting dismissal of this action, made a directed verdict motion when he should have moved for an involuntary nonsuit. See *Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) (noting Rule 50, SCRCP "by its nature is applicable to jury trials" and "the proper motion for [the appellant] to have made, was a motion for involuntary non-suit under Rule 41, SCRCP"). However, Lancaster's incorrect terminology does not warrant a refusal on the part of this court to address the merits of his motion. See *Dorchester Cty. v. Branton*, 286 S.C.

Section 15-39-30 of the South Carolina Code (2005) currently reads as follows:

§ 15-39-30. Issuance of executions; effective period.

Executions may issue upon final judgments or decrees at any time within ten years from the date of 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.

In *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 185, 512 S.E.2d 123, 128 (Ct. App. 1999), this court held that even though the judgment creditor exercised due diligence in discovering the debtor's fraudulent conveyance of property to a third party and attempted to execute upon the wrongfully conveyed property more than one year before the expiration of the ten-year enforcement period, these circumstances did not extend the life of the creditor's judgment beyond the ten-year period provided for in section 15-39-30. In so holding, this court explained:

Here we have an enforcement action wherein Commercial Credit seeks to foreclose its lien against Riddle's property pursuant to a judgment of limited duration. The public policy of this state is to limit the life of a judgment to ten years. While this court does not condone efforts by judgment debtors to secrete assets to avoid payment of judgment, "[a] judgment creditor should recognize this [public] policy and proceed expeditiously to conclude his efforts to collect his judgment within the ten year period."

20, 22, 331 S.E.2d 377, 378 (Ct. App. 1985) (stating the court would overlook the appellants' "semantic lapse and treat their motion as having been properly made for involuntary nonsuit of the case pending against them" so that the appellants "w[ould] not be prevented from having their argument on appeal addressed on its merits").

Id. (quoting *Wells ex rel. A.C. Sutton & Sons, Inc. v. Sutton*, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct. App. 1989) (alterations by the court)).

In *The Linda Mc Company v. Shore*, 390 S.C. 543, 553-55, 703 S.E.2d 499, 504-05 (2010), the Supreme Court of South Carolina took a less rigid approach in interpreting section 15-39-30. The judgment at issue in *Linda Mc* was subject to execution and levy until June 2, 2005. *Id.* at 548 n.1, 703 S.E.2d at 501 n.1. By that date, the special referee had conducted a supplemental hearing to determine whether the debtors had assets to satisfy the balance of the judgment. *Id.* at 549-50, 703 S.E.2d at 502. The order authorizing the execution and levy upon debtors' assets was issued June 3, 2005, the day after the judgment expired. *Id.* at 550, 703 S.E.2d at 502. In allowing the execution to proceed, the court stated:

[W]hen a party has complied with the applicable statutes, as Respondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order. To hold otherwise would put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.

Id. at 554-55, 703 S.E.2d at 505. We hold the circuit court in this case correctly ruled that under *Linda Mc*, Gordon could still obtain satisfaction of his judgment because he filed his action against Lancaster within the ten-year statutory period of active energy. *See id.* at 554 n.7, 703 S.E.2d at 505 n.7 (acknowledging the equitable approach of *Hardee v. Lynch*, 212 S.C. 6, 14, 46 S.E.2d 179, 182 (1948), which recognized an exception to nullification of a judgment after ten years if an action was brought prior to the expiration of the ten years). Gordon's amended complaint alleged the judgment remained unsatisfied, and the hearing in the 2006 supplemental proceedings was left open due to the judgment debtor's failure to produce documents. The trial court considered the action as "commenced by [Gordon] to aid in executing on [the j]udgment." We find the action was filed to aid in enforcing the judgment. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("[P]leadings in a case should be construed liberally so that substantial justice is done between the parties."). Like the court in *Linda Mc*,

we find the action was active because it was filed before the ten-year period expired and Gordon continued to pursue satisfaction of his judgment.⁴

II. Fraudulent Conveyances⁵

Lancaster argues the circuit court erred in finding the following transactions constituted fraudulent conveyances: (1) the \$100,000 Drews paid to Lancaster in 1992; (2) the \$40,000 Lancaster loaned to Drews; and (3) the \$20,000 mortgage Drews gave Lancaster. We disagree.

The evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies." *Id.* "However, this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings[,] . . . [and] we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).

A. 1992 Payment of \$100,000

Lancaster argues the circuit court erred in finding the 1992 payment of \$100,000 was a fraudulent conveyance. We disagree.

Section 27-23-10(A) of the South Carolina Code (2007) provides as follows:

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

⁴ We decline to address Gordon's additional sustaining ground. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding when reversing a lower court's decision it is within an appellate court's discretion as to whether to address any additional sustaining grounds).

⁵ We combine Lancaster's issues challenging separate findings of fraudulent conveyance.

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.

In the recent decision of *Judy v. Judy*, 403 S.C. 203, 208-09, 742 S.E.2d 672, 675 (Ct. App. 2013) (internal citations omitted) (first alteration in original), this court stated the following regarding the application of section 27-23-10:

The Statute of Elizabeth "does not limit its application to judgment creditors. Its protection also extends to other types of parties defrauded in connection with the conveyance of property. . . ."

Subsequent creditors may have conveyances set aside when (1) the conveyance was "voluntary," that is, without consideration, and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors. Subsequent creditors must show "actual moral fraud," rather than legal fraud. Actual moral fraud involves "a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts." With a voluntary int[ra]-family transfer, the burden shifts to the transferee to establish the transfer was valid.

In determining whether a transferee has met his burden to show the bona fides of a conveyance, the court will look to whether there are indicia of "badges of fraud,"

including insolvency or indebtedness of the transferor, lack of consideration for the conveyance, a close relationship between the transferor and the transferee, pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, reservation of benefit to the transferor, and the retention by the transferor of possession of the property allegedly conveyed. *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). "[W]he[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted." *Id.* at 210, 199 S.E.2d at 79 (first alteration in original).

We find the record has evidence of multiple badges of fraud warranting setting aside Drews's 1992 payment to Lancaster. First, Lancaster was Drews's nephew and there was ample evidence indicating their multiple transactions departed from the usual method of business. Although Lancaster argued the Drewses were debt free in 1992 after they sold their home, there was no documentary evidence the liens had been discharged or the sales proceeds were sufficient to pay off outstanding obligations. To the contrary, Gordon submitted evidence of a federal tax lien of \$56,988.85 had been filed against the Drewses in September 2000 for the years 1995, 1996, and 1997. Furthermore, contrary to Lancaster's assertion that the Drewses were able to pay off pending tax liens with the proceeds from the sale of their home in 1992, counsel's questions during the supplemental proceedings suggest the public records show the home sold for only \$5 and Drews, though testifying he did not think the house sold for that price, would not reveal what he actually received for the property and could not explain why the stated consideration according to the public records was only \$5. Considering the badges of fraud, including Drews's insolvency, the failure to follow the usual formalities in granting a life estate, and Drews's retention of benefits in the funds conveyed, we affirm the circuit court's finding that the 1992 transfer of funds involved actual moral fraud and could be set aside even though it occurred before Gordon became a creditor.

B. \$40,000 Loan from Lancaster to Drews

Lancaster next argues the circuit court erred in finding the \$40,000 he paid to the Drewses between 1993 and 1995 constituted fraudulent conveyances. We disagree.

We find ample evidence in the record indicating the payments were not loans to the Drewses, but rather the payments constituted a surreptitious scheme to return to Drews a portion of the \$100,000 Drews provided Lancaster in 1992. Shortly after

the Bainbridge purchase, Lancaster obtained a \$40,000 open-end, equity line mortgage on the property. From 1993 until 1995, Lancaster paid Drews a total of \$40,000. Drews paid the interest on the line of credit. Also, Drews did not acknowledge the debt in writing or make payments to Lancaster on it. Finally, Lancaster presented no evidence of an arrangement with Drews regarding repayment of the alleged loans. We agree with the circuit court's finding that Lancaster's payments to Drews totaling \$40,000 from 1993 until 1995 were for the purpose of returning to Drews part of the \$100,000 transfer and involved actual moral fraud.

C. \$20,000 Mortgage

Lancaster also argues the circuit court erred in finding the July 1999 mortgage of \$20,000 on the Meeting Street property was the result of actual moral fraud. We disagree.

The circuit court noted Lancaster did not give Drews any contemporaneous consideration for the mortgage and no note was executed. Furthermore, the circuit court found "Lancaster gave contradictory testimony that he was not contemporaneously aware of the \$20,000 Meeting Street Mortgage while later testifying that he did participate in its genesis and that the purpose of the Third Mortgage was to fund a settlement on a bank guarantee." The circuit court appears to have rejected Lancaster's assertion that Drews granted him the mortgage in return for past consideration. We agree with the circuit court's findings that the \$20,000 mortgage was not supported by either contemporaneous or past valuable consideration and constituted actual moral fraud, which were based on credibility determinations. *See Clardy v. Bodolosky*, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) (explaining the broad scope of review in an equity proceeding "does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses").

III. Directed Verdict and Post-Trial Motions

Lancaster finally argues the circuit court erred in denying his motion for directed verdict and his post-trial motions seeking reconsideration. We disagree.⁶

⁶ As previously noted, we address the directed verdict issue as if it was properly raised as a motion for involuntary nonsuit under Rule 41(b), SCRCF.

"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRPC. Rule 41(b), SCRPC, "allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). In reviewing the rulings of a trial judge on motions for involuntary nonsuit, this court must review the evidence and all inferences in the light most favorable to the nonmoving party. *Rewis v. Grand Strand Gen. Hosp.*, 290 S.C. 40, 41-2, 348 S.E.2d 173, 174 (1986). If more than one reasonable inference can be drawn from the evidence, the motion for nonsuit must be denied. *Id.*

In support of his argument, Lancaster reiterates the arguments previously discussed. We find no error by the circuit court on the merits of those arguments; thus, we affirm the circuit court's denial of Lancaster's motion for involuntary nonsuit and post-trial motions for reconsideration.

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

WILLIAMS, J., concurs.

THOMAS, J., dissenting: I respectfully dissent and would reverse the circuit court's order because the judgment Respondent obtained against Rudolph Robert Drews expired by operation of law before the present action was decided and, thus, could not be enforced against Appellant. I disagree with the majority's reliance on *Linda Mc*⁷ and find the circumstances in this case are distinguishable from those in *Linda Mc*.

⁷ *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010).

As of March 18, 2012, the final day of the ten-year period following enrollment of the judgment, Respondent had only filed the present action in the circuit court and settled his allegations against the Drews' estates. Although Respondent filed this action prior to the expiration of the ten-year period, he was not "merely waiting on the court's order regarding execution and levy" as was the situation in *Linda Mc*. See *Linda Mc*, 390 S.C. at 554, 703 S.E.2d at 505 ("[W]hen a party has complied with the applicable statutes, as [r]espondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order."). Indeed, the circuit court did not hold the final hearing in this case until June 2013, more than one year after the expiration of the ten-year period. Based on the facts distinguishing this case and *Linda Mc*, I would decline Respondent's invitation to extend *Linda Mc*'s narrow holding to encompass these circumstances. See *id.* ("We want to stress that this is a narrow holding limited to facts similar to those at issue in this case."). I believe extending *Linda Mc* in this case thwarts the public policy of this state that limits the life of a judgment to ten years. See *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 185, 512 S.E.2d 123, 128 (Ct. App. 1999) ("The public policy of this state is to limit the life of a judgment to ten years."). Additionally, because the majority concludes Respondent's action was active simply because he filed it prior to the expiration of the ten-year period, the majority's interpretation could effectively allow any judgment holder to extend automatically the ten-year period by merely filing a new action to execute prior to the expiration of the ten-year period.

Accordingly, I would reverse the circuit court's order because Respondent's judgment against Drews expired prior to the circuit court deciding the present action and the narrow exception in *Linda Mc* is inapplicable.

795 S.E.2d 857
Court of Appeals of South Carolina.

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

v.

Donald W. LANCASTER, Appellant.

Appellate Case No. 2014-001247

|
Published Opinion No. 5452

|
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|
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|
Rehearing Denied February 16, 2017

West Headnotes (11)

[1] **Judgment**
 ↳ Proceedings to Enforce Judgment

Judgment creditor's fraudulent conveyance action against transferee was filed to aid in enforcing judgment within judgment's ten-year statutory period of active energy, and therefore, creditor could still obtain satisfaction of his judgment after expiration of the ten-year period. S.C. Code Ann. § 15-39-30.

Cases that cite this headnote

[2] **Fraudulent Conveyances**
 ↳ Weight and Sufficiency

Evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard. S.C. Code Ann. § 27-23-10(A).

Cases that cite this headnote

[3] **Appeal and Error**
 ↳ Equitable proceedings
 Fraudulent Conveyances
 ↳ Nature and Form of Remedy

An action to set aside a supposedly fraudulent conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. S.C. Code Ann. § 27-23-10(A).

Cases that cite this headnote

[4] **Appeal and Error**
 ↳ Equitable proceedings
 Appeal and Error

Synopsis

Background: Judgment creditor brought action against the estates of judgment debtor and his wife, and debtor's nephew, seeking, inter alia, to set aside allegedly fraudulent conveyances. The estates settled and assigned their rights against nephew to creditor. After a bench trial, the Circuit Court, Charleston County, J.C. Nicholson, Jr., J., entered judgment in favor of creditor. Nephew appealed.

Holdings: The Court of Appeals, Short, J., held that:

[1] because action was filed within judgment's period of active energy, creditor could still obtain satisfaction of his judgment after expiration of the ten-year period;

[2] multiple badges of fraud justified setting aside debtor's transfer of funds to his nephew;

[3] nephew's purported loans to debtor constituted fraudulent conveyances; and

[4] mortgage granted by debtor to nephew constituted a fraudulent conveyance.

Affirmed.

Thomas, J., filed a dissenting opinion.

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Effect of findings below

Broad de novo scope of review applied in actions to set aside supposed fraudulent conveyances does not relieve appellant of his burden to show that the trial court erred in its findings, and an appellate court is not required to disregard the findings of the trial judge, who was in a better position to determine the on in the Charleston County PrS.C. Code Ann. § 27-23-10(A).

Cases that cite this headnote

[5] **Fraudulent Conveyances**
Conclusiveness and effect

Multiple badges of fraud justified setting aside, as a fraudulent conveyance, judgment debtor's transfer of funds to his nephew, made nine years prior to the entry of judgment and purportedly in consideration for life estate in property purchased by nephew; public records showed that consideration for transaction was only \$5, and despite nephew's assertion that debtor was debt-free at time of transfer, federal tax liens were filed against debtor in subsequent years. S.C. Code Ann. § 27-23-10.

Cases that cite this headnote

[6] **Fraudulent Conveyances**
Particular facts and circumstances

In determining whether a family-member transferee has met his burden to show the bona fides of a supposed fraudulent conveyance, court will look to whether there are indicia of badges of fraud, including insolvency or indebtedness of the transferor, lack of consideration for the conveyance, a close relationship between the transferor and the transferee, pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, reservation of benefit to the transferor, and the retention by the transferor of possession of the property

allegedly conveyed. S.C. Code Ann. § 27-23-10.

Cases that cite this headnote

[7] **Fraudulent Conveyances**
Conclusiveness and effect

When there is a concurrence of several badges of fraud in a voluntary intra-family transfer, an inference of fraud may be warranted. S.C. Code Ann. § 27-23-10.

Cases that cite this headnote

[8] **Fraudulent Conveyances**
Transactions Subject to Attack by Creditors

Nephew's purported loans to judgment debtor in years prior to entry of judgment against debtor were for the purpose of returning to debtor part of an earlier fraudulent conveyance, and involved actual moral fraud, constituting fraudulent conveyances; shortly after purchase of property as part of earlier fraudulent conveyance, nephew obtained open-end, equity line mortgage for which debtor paid interest, and nephew transferred funds to debtor allegedly as a loan but debtor did not acknowledge the debt in writing or make payments to nephew on it. S.C. Code Ann § 27-23-10.

Cases that cite this headnote

[9] **Fraudulent Conveyances**
Transfers as security

Mortgage granted by judgment debtor to nephew three months after judgment creditor filed original action against debtor was the result of moral fraud, and therefore, constituted a fraudulent conveyance; there was no note, and the mortgage was not supported by either contemporaneous or past valuable consideration.

S.C. Code Ann. § 27-23-10.

Cases that cite this headnote

[10]

Trial

⚡Rulings on Weight and Sufficiency of Evidence

Motion for directed verdict under rule of civil procedure allows judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against plaintiff at the close of his case if justified. S.C. R. Civ. P. 41(b).

Cases that cite this headnote

[11]

Trial

⚡Inferences from evidence

Trial

⚡Hearing and determination of motion

In reviewing rulings of a trial judge on motions for involuntary nonsuit, an appellate court must review the evidence and all inferences in the light most favorable to the nonmoving party, and if more than one reasonable inference can be drawn from the evidence, the motion for nonsuit must be denied.

Cases that cite this headnote

*858 Appeal From Charleston County, J.C. Nicholson, Jr., Circuit Court Judge

Attorneys and Law Firms

John Joseph Dodds, III, of The Law Firm of Cisa & Dodds, LLP, of Mt. Pleasant; and **Stephen Peterson Groves, Sr.**, of Nexsen Pruet, LLC, of Charleston, for Appellant.

Stephanie D. Drawdy and Justin O'Toole Lucey, both of Justin O'Toole Lucey, PA, of Mount Pleasant, for

Respondent.

Opinion

SHORT, J.:

**1 Donald W. Lancaster appeals an order awarding damages to Respondent Frank Gordon, Jr., Individually and as Trustee of the Dorothy S Gordon (Deceased) Trust, in a lawsuit Gordon filed to collect on a prior judgment he obtained against Lancaster's uncle. On appeal, Lancaster argues the underlying judgment was no longer enforceable and challenges the findings that he and his *859 uncle engaged in various fraudulent conveyances. We affirm.¹

FACTS AND PROCEDURAL HISTORY

From 1946 until approximately 1992, Lancaster's maternal uncle, Rudolph Robert Drews, owned and operated "The Drews Company," a construction business in Charleston, South Carolina. During his high school and college years, Lancaster worked at The Drews Company and became close to both Drews and Drews's wife, Effie. According to Lancaster, The Drews Company suffered financially after Hurricane Hugo in 1989 as a result of the acts of an unscrupulous business associate who absconded with customer deposits for lucrative jobs. As a result of this misfortune, the Drewses began borrowing heavily on their home in an effort to raise revenue for their business. The situation worsened when the Internal Revenue Service (IRS) filed liens against Drews and his business. Drews sold what was left of his business to Dorsey Biller, who had been the General Manager of The Drews Company. The Drewses decided to sell their home to raise funds to pay the various IRS liens and outstanding loans associated with The Drews Company. Lancaster asserted the Drewses had \$100,000 "[a]fter appropriately paying off the IRS and satisfying other standing debts."²

In May 1992, at Drews's request, Lancaster used the \$100,000 allegedly remaining from the sale of Drews's residence, along with \$60,000 of his own funds to purchase 17 Bainbridge Drive, in Charleston, South Carolina. On May 22, 1992, Lancaster executed an agreement purporting to grant the Drewses a life estate in this property. The agreement was not a deed and was not recorded in the public records. It does not reference the \$100,000 Drews gave to Lancaster to purchase the property, and it indicated the consideration for the conveyance of the life estate was "the sum of TEN (\$10.00) AND NO/100S DOLLARS and love and affection for my uncle and aunt."

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On June 12, 1992, Lancaster obtained a \$40,000 open-ended mortgage on the Bainbridge Property. From 1993 to 1995, Lancaster paid Drews \$40,000 in checks drawn from the bank from which the \$40,000 line of credit was obtained, supposedly for the purpose of helping the Drewses pay their living expenses. Drews, however, paid the interest incurred on the line of credit, but did not sign any IOUs or notes of indebtedness for the disbursements. Lancaster maintained he used a spreadsheet to document payments by Drews on the loan and updated the entries contemporaneously with the corresponding events; however, Lancaster was unable to explain a discrepancy between the spreadsheet produced during his deposition and the one at trial.

****2** In March 1995, Drews granted Lancaster a \$40,000 mortgage on real property Drews owned at 1705 Meeting Street, Charleston, South Carolina. The mortgage was not recorded until November 1995. Drews did not execute a note on the mortgage, and Lancaster did not provide any contemporaneous consideration for it.

On April 27, 1995, Drews, as attorney-in-fact for Lancaster, signed an agreement to purchase a residence at 2 Nuffield Road, in Charleston, South Carolina. Lancaster claimed he and Drews agreed they would substitute a one-story house chosen by the Drewses for the Bainbridge property because of medical problems with Drews's knees. Lancaster claimed he gave Drews a power of attorney to sign a sales contract on Lancaster's behalf; however, at trial, Lancaster could not find the document granting this authority, and no such document could be found in the public records. Mrs. Drews paid the \$1,000 deposit on the home. On May 15, 1995, Lancaster increased the \$40,000 line of credit to \$79,250 and purchased the Nuffield property for \$125,000 the following day. On May 17, 1995, Lancaster executed a "Memorandum of Lease and Subordination Agreement" for the Nuffield property that actually granted the Drewses a life tenancy in the property for consideration of \$10 00 *860 "and other good and valuable consideration." The document was recorded; however, it was titled as a "lease" rather than as a deed.

In 1996, Drews and his business partner, Raymond Beasley, opened a hardware store in Charleston. The store, known as Builders Station, was incorporated, and its board of directors approved a business plan and capital structure that provided for the sale of stock to outside investors. Gordon, one of the outside investors, purchased fifty shares of stock on September 9, 1996, for \$50,000, on his mother's behalf and with her funds. The business failed and ultimately closed in 1997.

On April 15, 1998, Drews granted Lancaster a \$100,000 mortgage on the Meeting Street property, again without executing a note and without contemporaneous consideration from Lancaster. The mortgage was filed on May 4, 1998. However, contrary to Lancaster's position at trial that this mortgage was intended to replace the \$40,000 mortgage Drews granted Lancaster in March 1995, no satisfaction of the \$40,000 mortgage was filed contemporaneously with the creation of the \$100,000 mortgage.

In April 1999, Gordon, as attorney-in-fact for Dorothy Gordon, filed a lawsuit against Drews, claiming the sale of the stock in Builders Station was illegal and fraudulent under the Uniform Securities Act and also asserting claims for common-law misrepresentation and breach of fiduciary duty.

In July 1999, three months after Gordon filed his action against Drews, Drews granted Lancaster a \$20,000 mortgage on the Meeting Street property. As with the two prior mortgages Drews gave to Lancaster on the same property, there was no contemporaneous consideration from Lancaster and no note.

On November 5 and 6, 2001, Lancaster executed satisfactions of the three mortgages on the Meeting Street property. By deed dated November 6, 2001, Drews conveyed this property to Charleston Antiques District, LLC, for \$205,000. On November 7, 2001, Drews received a \$190,000 note and mortgage from Charleston Antiques as consideration for the purchase. Drews simultaneously assigned this note and mortgage to Effie Drews.

****3** On November 7, 2001, Mrs. Drews gave Lancaster a note for \$50,912 that was secured by the assignment of the mortgage on the Meeting Street property. Lancaster explained he received \$11,089.63 from the sale, which reduced the balance on the amount the Drewses owed him to \$50,912. According to Lancaster, as Charleston Antiques made monthly payments of about \$2,400 on its \$190,000 note and mortgage, Drews made corresponding monthly payments of about \$540, eventually reducing the balance on the \$50,912 note to \$35,621.12.

Following a three-day jury trial in December 2001, Gordon received a judgment of \$50,000 against Drews, plus \$15,789.12 in interest. On March 14, 2002, Gordon was awarded \$42,693.50 in attorney's fees, for a total judgment of \$108,482.62.

Drews appealed the judgment awarded to Gordon. On

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April 12, 2004, this court affirmed the judgment. *Gordon v. Drews*, 358 S.C. 598, 595 S.E.2d 864 (Ct. App. 2004). On September 22, 2005, the Supreme Court of South Carolina denied certiorari in the matter, and Gordon received an additional award on September 28, 2005, of \$1,467.21 in appellate court costs and expenses.

In September 2005, Charleston Antiques sold the Meeting Street property to unrelated third parties. As a result of the sale, Drews, by way of his wife, received the final payment of \$130,293.37 on the \$190,000 note and mortgage. On September 26, 2005, Lancaster received a final payment of \$35,621.12, for which he issued a satisfaction, and assigned back to Effie Drews the \$190,000 mortgage.

In August 2006, the circuit court issued an order for supplemental proceedings to aid Gordon in obtaining satisfaction of the judgment. The Master-in-Equity for Charleston County held a hearing in the matter on September 26, 2006, the Master continued the hearing and left the supplemental proceedings open because Drews did not provide certain court-ordered documents. During the hearing, Gordon's attorney expressed suspicion that Effie Drews and Lancaster were *861. "intertwined in this" and indicated she wanted to subpoena Mrs. Drews, Lancaster, and any new property owners counsel deemed necessary to give a full picture of what happened with assets that had once been owned by Drews.

Drews died on September 25, 2007, and his estate was opened the following month. In February 2010, an inventory and appraisal was filed indicating there were no assets in Drews's estate. On February 26, 2010, Lancaster gave a deposition in the supplemental proceedings. During the deposition, Gordon became aware of the transfers between Drews and Lancaster that allegedly resulted in Drews's insolvency.

Effie Drews died on February 27, 2010, two days before she was scheduled to give a deposition in the supplemental proceedings. Her estate was filed on March 30, 2010, with her sister, Jessie B. Atkinson named as personal representative. Effie's estate was valued at \$55,460.44.

In November 2010, Gordon filed this action in the Court of Common Pleas for the Ninth Judicial Circuit against Drews's Estate, Effie Drews's Estate, and Lancaster. Gordon later filed a petition in the Charleston County Probate Court against Atkinson in her capacity as personal representative of Effie Drews's estate, Lancaster, and Shirrese Brockington, in her capacity as special

administrator of Drews's estate. In November 2011, Gordon settled with Drews's estate and Effie Drews's estate, both of which assigned Gordon their rights against Lancaster. The probate court also issued a consent order for removal of the case to the circuit court.

****4** The present action came before the circuit court on June 13–14, 2013, for a nonjury trial. Following the presentation of testimony by both sides, Lancaster moved for a directed verdict, arguing the judgment Gordon was attempting to collect was extinguished. The circuit court denied the motion.

By order filed August 19, 2013, the circuit court found Gordon proved the fraudulent nature of all the alleged transfers, including the following: (1) the 1992 transfer of \$100,000 for the purchase of the Bainbridge property, (2) the Nuffield property substitution; (3) the first mortgage of \$40,000 on the Meeting Street property; (4) the second mortgage of \$100,000 on the Meeting Street property, (5) the third mortgage of \$20,000 on the Meeting Street property; and (6) the assignment of the \$190,000 mortgage on the Meeting Street property. The court further noted that "[w]hile some of the transfers between Drews and Lancaster occurred prior to the September 1996 accrual of the underlying action resulting in [Gordon's] [j]udgment, [Gordon] has presented evidence that the transfers between Drews and Lancaster involved actual moral fraud as is required to set aside transfers that occurred before Gordon became a creditor." Based on these findings, the circuit court granted Gordon judgment against Lancaster for \$211,677.30. The circuit court later issued a supplemental order dismissing Gordon's claims for constructive trust, civil conspiracy, and negligence/aiding and abetting. Lancaster's post-trial motions were denied, and this appeal followed.

LAW/ANALYSIS

I. Enforceability of the Judgment

^[1]Lancaster argues the judgment Gordon obtained against Drews expired by operation of law before the present action was decided and could not be enforced against Lancaster. We disagree.³

Section 15–39–30 of the South Carolina Code (2005) currently reads as follows:

***862 § 15–39–30. Issuance of executions; effective period.**

Executions may issue upon final judgments or decrees at any time within ten years from the date of 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

In *Commercial Credit Loans, Inc v Riddle*, 334 S.C. 176, 185, 512 S.E.2d 123, 128 (Ct. App. 1999), this court held that even though the judgment creditor exercised due diligence in discovering the debtor's fraudulent conveyance of property to a third party and attempted to execute upon the wrongfully conveyed property more than one year before the expiration of the ten-year enforcement period, these circumstances did not extend the life of the creditor's judgment beyond the ten-year period provided for in section 15-39-30. In so holding, this court explained:

****5** Here we have an enforcement action wherein Commercial Credit seeks to foreclose its lien against Riddle's property pursuant to a judgment of limited duration. The public policy of this state is to limit the life of a judgment to ten years. While this court does not condone efforts by judgment debtors to secrete assets to avoid payment of judgment, "[a] judgment creditor should recognize this [public] policy and proceed expeditiously to conclude his efforts to collect his judgment within the ten year period."

Id (quoting *Wells ex rel A.C. Sutton & Sons, Inc. v. Sutton*, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct. App 1989) (alterations by the court)).

In *The Linda Mc Company v. Shore*, 390 S.C. 543, 553-55, 703 S.E.2d 499, 504-05 (2010), the Supreme Court of South Carolina took a less rigid approach in interpreting section 15-39-30. The judgment at issue in *Linda Mc* was subject to execution and levy until June 2, 2005. *Id.* at 548 n.1, 703 S.E.2d at 501 n.1. By that date, the special referee had conducted a supplemental hearing to determine whether the debtors had assets to satisfy the balance of the judgment. *Id.* at 549-50, 703 S.E.2d at 502. The order authorizing the execution and levy upon debtors' assets was issued June 3, 2005, the day after the judgment expired. *Id.* at 550, 703 S.E.2d at 502. In allowing the execution to proceed, the court stated:

[W]hen a party has complied with the applicable statutes, as Respondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order. To hold otherwise would put those

trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.

Id. at 554-55, 703 S.E.2d at 505. We hold the circuit court in this case correctly ruled that under *Linda Mc*, Gordon could still obtain satisfaction of his judgment because he filed his action against Lancaster within the ten-year statutory period of active energy. *See id.* at 554 n.7, 703 S.E.2d at 505 n.7 (acknowledging the equitable approach of *Hardee v. Lynch*, 212 S.C. 6, 14, 46 S.E.2d 179, 182 (1948), which recognized an exception to nullification of a judgment after ten years if an action was brought prior to the expiration of the ten years). Gordon's amended complaint alleged the judgment remained unsatisfied, and the hearing in the 2006 supplemental proceedings was left open due to the judgment debtor's failure to produce documents. The trial court considered the action as "commenced by [Gordon] to aid in executing on [the judgment]." We find the action was filed to aid in enforcing the judgment. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("[P]leadings in a case should be construed liberally so that substantial justice is done between the parties."). Like the court in *Linda Mc*, we find the action was active because it was filed before the ten-year period expired and Gordon continued to pursue satisfaction of his judgment.⁴

***863 II. Fraudulent Conveyances⁵**

Lancaster argues the circuit court erred in finding the following transactions constituted fraudulent conveyances: (1) the \$100,000 Drews paid to Lancaster in 1992; (2) the \$40,000 Lancaster loaned to Drews; and (3) the \$20,000 mortgage Drews gave Lancaster. We disagree.

****6** [2] [3] [4] The evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies." *Id.* "However, this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings[,] .. [and] we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).

A. 1992 Payment of \$100,000

^[5]Lancaster argues the circuit court erred in finding the 1992 payment of \$100,000 was a fraudulent conveyance. We disagree.

^[6] ^[7]Section 27-23-10(A) of the South Carolina Code (2007) provides as follows:

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.

In the recent decision of *Judy v. Judy*, 403 S.C. 203, 208-09, 742 S.E.2d 672, 675 (Ct. App. 2013) (internal citations omitted) (first alteration in original), this court stated the following regarding the application of section 27-23-10:

The Statute of Elizabeth “does not limit its application to judgment creditors. Its protection also extends to other types of parties defrauded in connection with the conveyance of property. ...”

Subsequent creditors may have conveyances set aside when (1) the conveyance was “voluntary,” that is, without consideration, and (2) it was made with a view

to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors. Subsequent creditors must show “actual moral fraud,” rather than legal fraud. Actual moral fraud involves “a conscious intent to defeat, delay, or hinder [one’s] creditors in the collection of their debts.” With a voluntary int[ra]-family transfer, the burden shifts to the transferee to establish the transfer was valid.

In determining whether a transferee has met his burden to show the bona fides of a conveyance, the court will look to whether there are indicia of “badges of fraud,” including insolvency or indebtedness of the transferor, lack of consideration for the conveyance, a close relationship between the transferor and the transferee, pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, reservation of benefit to the transferor, and the retention *864 by the transferor of possession of the property allegedly conveyed. *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) “[W]he[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted.” *Id.* at 210, 199 S.E.2d at 79 (first alteration in original).

**7 We find the record has evidence of multiple badges of fraud warranting setting aside Drews’s 1992 payment to Lancaster. First, Lancaster was Drews’s nephew and there was ample evidence indicating their multiple transactions departed from the usual method of business. Although Lancaster argued the Drewses were debt free in 1992 after they sold their home, there was no documentary evidence the liens had been discharged or the sales proceeds were sufficient to pay off outstanding obligations. To the contrary, Gordon submitted evidence of a federal tax lien of \$56,988.85 had been filed against the Drewses in September 2000 for the years 1995, 1996, and 1997. Furthermore, contrary to Lancaster’s assertion that the Drewses were able to pay off pending tax liens with the proceeds from the sale of their home in 1992, counsel’s questions during the supplemental proceedings suggest the public records show the home sold for only \$5 and Drews, though testifying he did not think the house sold for that price, would not reveal what he actually received for the property and could not explain why the stated consideration according to the public records was only \$5. Considering the badges of fraud, including Drews’s insolvency, the failure to follow the usual formalities in granting a life estate, and Drews’s retention of benefits in the funds conveyed, we affirm the circuit court’s finding that the 1992 transfer of funds involved actual moral fraud and could be set aside even though it occurred before Gordon became a creditor.

B. \$40,000 Loan from Lancaster to Drews

^[8]Lancaster next argues the circuit court erred in finding the \$40,000 he paid to the Drewses between 1993 and 1995 constituted fraudulent conveyances. We disagree.

We find ample evidence in the record indicating the payments were not loans to the Drewses, but rather the payments constituted a surreptitious scheme to return to Drews a portion of the \$100,000 Drews provided Lancaster in 1992. Shortly after the Bainbridge purchase, Lancaster obtained a \$40,000 open-end, equity line mortgage on the property. From 1993 until 1995, Lancaster paid Drews a total of \$40,000. Drews paid the interest on the line of credit. Also, Drews did not acknowledge the debt in writing or make payments to Lancaster on it. Finally, Lancaster presented no evidence of an arrangement with Drews regarding repayment of the alleged loans. We agree with the circuit court's finding that Lancaster's payments to Drews totaling \$40,000 from 1993 until 1995 were for the purpose of returning to Drews part of the \$100,000 transfer and involved actual moral fraud.

C. \$20,000 Mortgage

^[9]Lancaster also argues the circuit court erred in finding the July 1999 mortgage of \$20,000 on the Meeting Street property was the result of actual moral fraud. We disagree.

The circuit court noted Lancaster did not give Drews any contemporaneous consideration for the mortgage and no note was executed. Furthermore, the circuit court found "Lancaster gave contradictory testimony that he was not contemporaneously aware of the \$20,000 Meeting Street Mortgage while later testifying that he did participate in its genesis and that the purpose of the Third Mortgage was to fund a settlement on a bank guarantee." The circuit court appears to have rejected Lancaster's assertion that Drews granted him the mortgage in return for past consideration. We agree with the circuit court's findings that the \$20,000 mortgage was not supported by either contemporaneous or past valuable consideration and constituted actual moral fraud, which were based on credibility determinations. See *Clardy v. Bodolosky*, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) (explaining the broad scope of review in an equity proceeding "does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses")

Lancaster finally argues the circuit court erred in denying his motion for directed verdict and his post-trial motions seeking reconsideration. We disagree.⁶

^[10] ^[11]"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, ... may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRPC. Rule 41(b), SCRPC, "allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). In reviewing the rulings of a trial judge on motions for involuntary nonsuit, this court must review the evidence and all inferences in the light most favorable to the nonmoving party. *Rewis v. Grand Strand Gen Hosp.*, 290 S.C. 40, 41-2, 348 S.E.2d 173, 174 (1986) If more than one reasonable inference can be drawn from the evidence, the motion for nonsuit must be denied. *Id*

****8** In support of his argument, Lancaster reiterates the arguments previously discussed. We find no error by the circuit court on the merits of those arguments; thus, we affirm the circuit court's denial of Lancaster's motion for involuntary nonsuit and post-trial motions for reconsideration.

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

WILLIAMS, J., concurs.

THOMAS, J., dissenting:

I respectfully dissent and would reverse the circuit court's order because the judgment Respondent obtained against Rudolph Robert Drews expired by operation of law before the present action was decided and, thus, could not be enforced against Appellant. I disagree with the majority's reliance on *Linda Mc*⁷ and find the circumstances in this case are distinguishable from those in *Linda Mc*.

As of March 18, 2012, the final day of the ten-year period

***865 III. Directed Verdict and Post-Trial Motions**

following enrollment of the judgment, Respondent had only filed the present action in the circuit court and settled his allegations against the Drews' estates. Although Respondent filed this action prior to the expiration of the ten-year period, he was not "merely waiting on the court's order regarding execution and levy" as was the situation in *Linda Mc*. See *Linda Mc*, 390 S.C. at 554, 703 S.E.2d at 505 ("[W]hen a party has complied with the applicable statutes, as [r]espondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order."). Indeed, the circuit court did not hold the final hearing in this case until June 2013, more than one year after the expiration of the ten-year period. Based on the facts distinguishing this case and *Linda Mc*, I would decline Respondent's invitation to extend *Linda Mc*'s narrow holding to encompass these circumstances. See *id* ("We want to stress that this is a narrow holding limited to facts similar to those at issue in this case"). I believe extending *Linda Mc* in this case thwarts the public policy of this state that limits the life of a judgment to ten years. See *Commercial Credit Loans, Inc. v Riddle*, 334 S.C. 176,

185, 512 S.E.2d 123, 128 (Ct. App 1999) ("The public policy of this state is to limit the life of a judgment to ten years."). Additionally, because the majority concludes Respondent's action was active simply because he filed it prior to the expiration of the ten-year period, the majority's interpretation could effectively allow any judgment holder to extend automatically the ten-year period by merely filing a new action to execute prior to the expiration of the ten-year period.

*866 Accordingly, I would reverse the circuit court's order because Respondent's judgment against Drews expired prior to the circuit court deciding the present action and the narrow exception in *Linda Mc* is inapplicable.

All Citations

--- S.E.2d ----, 795 S.E.2d 857, 2016 WL 6471967

Footnotes

- 1 We decide this case without oral argument pursuant to Rule 215, SCACR.
- 2 Contrarily, the court noted that for the remainder of his life, Drews had "pending creditor claims, including IRS assessments and liens ."
- 3 Gordon correctly argues that Lancaster, in requesting dismissal of this action, made a directed verdict motion when he should have moved for an involuntary nonsuit. See *Waterpointe I Prop. Owner's Ass'n v Paragon, Inc*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App 2000) (noting Rule 50, SCRCP "by its nature is applicable to jury trials" and "the proper motion for [the appellant] to have made was a motion for involuntary non-suit under Rule 41, SCRCP"). However, Lancaster's incorrect terminology does not warrant a refusal on the part of this court to address the merits of his motion. See *Dorchester Cty v. Branton*, 286 S.C. 20, 22, 331 S.E.2d 377, 378 (Ct. App 1985) (stating the court would overlook the appellants' "semantic lapse and treat their motion as having been properly made for involuntary nonsuit of the case pending against them" so that the appellants "w[ould] not be prevented from having their argument on appeal addressed on its merits").
- 4 We decline to address Gordon's additional sustaining ground. See *I'On, L.L.C v Town of Mt Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding when reversing a lower court's decision it is within an appellate court's discretion as to whether to address any additional sustaining grounds).
- 5 We combine Lancaster's issues challenging separate findings of fraudulent conveyance.
- 6 As previously noted, we address the directed verdict issue as if it was properly raised as a motion for involuntary nonsuit under Rule 41(b), SCRCP.
- 7 *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010).

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096 and 2011-CP-10-8840

___ S.C. ___, ___ S.E.2d ___ (Ct.App. 2016)
(2016 WL 6471967)

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

Respondent,

v.

Donald W. Lancaster,

Petitioner.

Petition for Rehearing by the Petitioner,
Donald W. Lancaster

Stephen P. Groves, Sr., Esquire
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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES NOW the Petitioner, Donald W. Lancaster ("Mr. Lancaster"), pursuant to Rule 221(a), SCACR, and respectfully submits his ***Petition for Rehearing***. Mr. Lancaster respectfully requests this Court of Appeals to grant rehearing and to reverse its recent decision which affirmed the Circuit Court.¹

Rehearing is appropriate, because this Court of Appeals overlooked the import of material facts of record and, furthermore, misinterpreted the relevant facts. The record clearly demonstrated Mr. Lancaster acted appropriately in assisting his aunt and uncle during their dire financial dilemmas. Moreover, the judgment upon which the Trial Court based its judgment against Mr. Lancaster was undisputedly more than ten years old when entered and, therefore, neither effective nor enforceable.

I. STATEMENT OF THE ISSUES ON REHEARING

- A. Whether This Court of Appeals Improperly Expanded The Supreme Court's Decision in Linda Mc Co. v. Shore To Permit The Enforcement Of A Judgment Which Was Over Ten Years Old?
- B. Whether The Judgments Obtained Against Mr. Drews Were Unenforceable Against The Petitioner Due To The Passage Of The Ten-Year Validity Period?
- C. Whether This Court of Appeals Improperly Held The \$100,000.00 The Drewses Paid The Petitioner In 1992 Constituted A Fraudulent Conveyance?
- D. Whether This Court of Appeals Improperly Held The \$40,000.00 The Petitioner Loaned The Drewses During 1993-1995 Constituted Fraudulent Conveyances?
- E. Whether This Court of Appeals Improperly Held The Drewses Gave The Petitioner A \$20,000.00 Mortgage Without Any Valuable Consideration?

¹ See Gordon v. Lancaster, ___ S.C. ___, ___ S.E.2d ___ (Ct.App. 2016) (2016 WL 6471967, filed 2 November 2016).

II. STATEMENT OF THE FACTS²

A. Mr. Lancaster Assists The Drewses

Mr. Lancaster is a certified internal auditor/business analyst who performs contract work for the U. S. Department of State. (R.p.319, line 25 – R.p.320, line 15; R.p.763, para. 1). He is the nephew the late Mr. Rudolph Robert Drews and his wife, the late Effie D. Drews (the “Drewses”) and was very close to them both. (R.p.387, lines 5-10; R.p.763, para. 2).³

Mr. Drews previously owned and operated “The Drews Company” - a fairly successful Charleston area construction business from 1946 or so to about late 1991 or early 1992. (R.pp.763-764, para. 3). The Drews Company fell upon hard times after Hurricane Hugo in 1989 (R.p.13, para. 1; R.p.439, line 23 – R.p.440, line 4; R.p.764, para. 4), due, in part, to an unscrupulous business associate who had absconded with company funds. (R.p.355, lines 13-18; R.p.764, para. 4).

Even though Mr. Drews attempted to “keep the company afloat” by borrowing heavily on the Drewses’ personal residence in Charleston’s Edgewater Park subdivision, the IRS filed liens against the business for unpaid payroll taxes. (R.p.13, para. 1; R.p.355, lines 6-12; R.p.373, lines 6-13; R.p.764, para. 4). In response, Mr.

2 Mr. Lancaster’s predicament herein is unfortunately a classic example of the classic idiom “no good deed goes unpunished.” He tried to do the right thing by his aunt and uncle and has, heretofore, paid dearly for his kindnesses. Furthermore, this Court of Appeals’ rendition of the “facts” continues to tarnish his good reputation by affirming the Circuit Court’s findings that he was guilty of moral fraud. As demonstrated by the record, nothing could be further from the truth. Even if it is assumed that Mr. Drews was promoting some nefarious scheme to hide money from his creditors, a meritless assumption at best, **Mr. Lancaster should not be “painted with the same broad brush” as his motives and intentions were above reproach.**

3 Mr. Drews passed away in September 2007, and Mrs. Drews followed in February 2010. (R.p.383, lines 2-7; R.p.763, para. 2).

Drews decided to sell his company. (R.p.440, lines 5-10; R.p.764, para. 4). The Drewses also decided to sell their Edgewater Park home to satisfy the outstanding IRS liens, as well as the various loans taken out to keep The Drews Company in business. (R.p.355, lines 6-12; R.p.440, lines 11-15; R.pp.764-765, para. 5).⁴

1. The Bainbridge Drive Property

In April 1992, Mr. Drews told Mr. Lancaster about \$100,000.00 would remain from the sale of the Edgewater Park residence and asked Mr. Lancaster if he would consider undertaking the same housing arrangement he had made with his (Mr. Lancaster's) parents. (R.p.373, line 6 – R.p.374, line 5; R.pp.764-765, para. 5).⁵ Mr. Drews proposed to (a) give Mr. Lancaster the \$100,000.00, (b) have Mr. Lancaster use that money, in part, to purchase a suitable home, and (c) allow the Drewses to live there for the rest of their lives, via a life estate, rent and mortgage free. (R.pp.764-765, para. 5).⁶ Due to his close relationship with the Drewses (R.p.387, lines 5-10) and since no one else in their family possessed the financial ability to help, Mr. Lancaster understood and agreed to Mr. Drews' proposal (R.p.13, para. 2; R.p.387, lines 11-19; R.p.418, lines 6-21), having previously undertaken such an agreement with his parents.

In May 1992, the Drewses sold their Edgewater Park home and found a suitable home located at 17 Bainbridge Drive. **After paying off the IRS and satisfying other**

⁴ When Mr. Drews broached the "life estate" issue with Mr. Lancaster, the Drewses had about 30 days to vacate their home. (R.p.373, lines 9-15). They had not been able to find a comfortable home in the \$100,000.00 price range. (R.p.373, lines 14-25).

⁵ Mr. Lancaster previously purchased a home for his parents when his father was forced to stop working and, while retaining ownership thereof, allowed them to live there for the remainder of their lives. (R.p.373, line 6 – R.p.374, line 5).

⁶ The Drewses were effectively making a single lease payment "up front" (R.p.397, lines 11-15) and leaving the risk of interest rate flux, property devaluation, *etc.* solely to Mr. Lancaster. The Drewses did not have sufficient funds to purchase a home on their own and, with no income, could not obtain a residential mortgage. (R.p.387, lines 11-14).

outstanding debts⁷ (R.p.387, line 20 – R.p.388, line 2; R.p.488, line 16 – R.p.491, line 14),⁸ the Drewses gave Mr. Lancaster the remaining \$100,000.00. (R.p.137, paras. 43-45; R.pp.144-145, paras. 3, 9-10; R.p.322, lines 13-25; R.p.376, lines 14-20). Using that money (R.p.137, para. 44; R.p.144, para. 3; R.p.376, lines 21-23; R.p.484, lines 17-23), together with some of his own, Mr. Lancaster purchased Bainbridge Drive on 22 May 1992, for \$160,000.00 (R.p.14, para. 7; R.p.340, line 22 – R.p.341, line 7; R.p.376, line 24 – R.p.377, line 1; R.pp.662-664)⁹ and added another \$5,000.00 or so in repairs. (R.p.341, lines 2-7; R.p.379, lines 9-15).¹⁰ Mr. and Mrs. Drews, via the life estate (R.p.14, para. 8; R.p.484, line 24 – R.p.485, line 2; R.p.487, lines 7-18; R.p.665), moved into Bainbridge Drive and lived there for the next 37 months. (R.p.137, para. 47; R.p.146, para. 11; R.p.378, lines 16-18).

⁷ This Court of Appeals stated that while Mr. “Lancaster argued the Drewses were debt free in 1992 after they sold their home, there was no documentary evidence the liens had been discharged or the sales proceeds were sufficient to pay off outstanding obligations.” Gordon v. Lancaster, 2016 WL 6471967, *7. The mere fact the property sold is all the evidence needed. Mr. and Mrs. Drews could not have sold their Edgewater Park home in 1992 if there still had been liens attached to the property. The fact they did so with about \$100,000.00 left over demonstrates they were debt free in 1992.

⁸ Mr. Gordon’s accounting expert witness, Richard T. Livingston, CPA of Dixon Hughes Goodman (R.p.443, line 9 – R.p.447, line 8), testified that he was not aware of any specific creditors which the Drewses were attempting to avoid when they gave Mr. Lancaster the \$100,000.00 to use in purchasing Bainbridge Drive. (R.p.491, lines 9-14). This testimony is obviously correct in that the Drewses had paid off the IRS and the other creditors with the proceeds from the sale of their home and still had \$100,000.00 left over.

⁹ Mr. Lancaster contributed \$60,000.00. (R.p.341, line 2 – R.p.343, line 11; R.p.359, lines 14-17; R.p.360, lines 2-10; R.p.377, lines 2-17). Mr. Drews’ attorney - Kerry Koon, Esquire - prepared most, if not all, of the real estate documents involving the Drewses, including the life estate documentation. (R.p.354, lines 15-18). There was no evidence showing that either Attorney Koon represented Mr. Lancaster or requested Mr. Lancaster’s input into any of the documents Attorney Koon prepared for the Drewses.

¹⁰ Mr. Lancaster owned Bainbridge Drive (R.p.133, para. 47; R.p.146, para. 11; R.pp.662-664) and paid the property taxes on that home. (R.p.378, lines 2-4). The Drewses paid for the property insurance and the utilities. (R.p.378, lines 5-8). The Drewses did not own a home once they sold Edgewater Park. (R.p.998, line 11 – R.p.999, line 13, R.p.1013, lines 2-17).

2. The Nuffield Road Property

In April 1995, Mr. Drews asked Mr. Lancaster to sell Bainbridge Drive (two story) and to purchase a one story home. (R.p.378, line 19 – R.p.379, line 3).¹¹ The Drewses then found a suitable property at 2 Nuffield Road. (R.p.360, lines 18-20; R.p.363, lines 11-15; R.p.380, lines 4-19). Mr. Lancaster bought the Nuffield Road property on 16 May 1995 (R.p.137, para. 48; R.p.144, para. 12; R.pp.667-671; R.pp.1055-1059),¹² for \$125,000.00 (R.p.487, line 19 – R.p.488, line 5; R.pp.667-671; R.pp.1055-1059) and expended an additional \$14,500.00 or so for a new air conditioning system, updated appliances, and various needed repairs. (R.p.364, line 22 – R.p.365, line 2; R.p.R.pp.687-688).¹³ The Drewses lived there (R.p.378, line 23 – R.p.379, line 1) under the same life estate arrangement with Mr. Lancaster as before. (R.p.378, lines 1-22; R.p.382, line 15 – R.p.383, line 1; R.p.488, lines 6-8; R.pp.677-681; R.p.726, para. 6; R.pp.1060-1064).¹⁴ Mr. Drews lived at Nuffield Road for over 12 years from 1995,

¹¹ One of Mr. Drews' knees had deteriorated and he could not negotiate the stairs at Bainbridge Drive. (R.p.379, line 19 – R.p.380, line 3; R.p.487, lines 19-23).

¹² Mr. Drews, acting as Attorney-in-Fact for Mr. Lancaster via a Power-of Attorney, signed the real estate sales documents for Nuffield Road. (R.p.360, line 16 – R.p.362, line 11; R.pp.672-676). This Court of Appeals characterized this 15 year old real estate transaction as nefarious since Mr. Lancaster could not locate a copy of the POA. Gordon v. Lancaster, 2016 WL 6471967, *2. Mr. Lancaster had no reason to retain a copy of the POA after the Nuffield Road sale closed or the original POA which he did not retrieve from Mr. Drews. (R.p.360, line 16 – R.p.361, line 11). Mr. Lancaster used the POA since he was in San Francisco on 27 April 1995, when Mr. Drews executed the real estate sales agreement for Nuffield Road. (R.p.360, lines 16-22; R.p.362, lines 3-8; R.p.380, lines 7-25; R.pp.672-676). Mr. Lancaster later attended the closing. (R.p.380, line 23 – R.p.381, line 4; R.pp.667-671).

¹³ Mr. Lancaster owned Nuffield Road. (R.p.137, para. 49; R.p.146, para. 13; R.pp.R.pp.667-671). As before, he paid the property taxes (R.p.383, lines 8-10) and the Drewses paid the utilities and casualty insurance. (R.p.383, lines 11-15).

¹⁴ As with the Bainbridge Drive life estate documents (R.p.378, lines 1-3; R.pp.665-666; R.pp.1053-1054), Attorney Koon again prepared and handled the Nuffield Road life estate documentation. (R.p.378, lines 1-13; R.p.382, line 18 – R.p.383, line 1; R.pp.R.pp.677-681;

until his death in September 2007. (R.p.137, para. 49; R.p.383, lines 2-7). Mrs. Drews lived there for almost 15 years from 1995 until she passed away in February 2010. (R.pp.137-138, paras. 49, 52; R.p.383, lines 2-7).¹⁵

3. Other Loans And Advances

Since the Drewses had no “income” after The Drews Company failed, other than their social security benefits, they paid their living expenses using credit cards. (R.p.328, lines 7-10; R.p.385, lines 4-20). Consequently, during the 1993-1995 time frame, Mr. Lancaster made additional direct loans/advances to Mr. and Mrs. Drews totaling \$40,000.00 (R.p.324, lines 20-23; R.p.328, lines 7-10; R.p.385, line 21 – R.p.386, line 14; R.p.1065) so they could, in part, retire their \$35,000.00 in credit card debt. (R.p.355, lines 19-25; R.pp.692-695).¹⁶

R.pp.1060-1064). Mr. Lancaster’s legal counsel was not involved. (R.p.378, lines 1-13; R.p.382, line 18 – R.p.383, line 1; R.pp.R.pp.665-666; R.pp.677-681; R.pp.1053-1054; R.pp.1060-1064).

¹⁵ Considering both Bainbridge Drive and Nuffield Road, the Drewses lived in property owned by Mr. Lancaster for over 15 years (Mr. Drews) and almost 18 years (Mrs. Drews), respectively.

¹⁶ This Court of Appeals held that these “payments were not loans. . . , but . . . constituted a surreptitious scheme to return to the Drewses a portion of the [original] \$100,000[.00]” Gordon v. Lancaster, 2016 WL 6471967, *7. The record fails to support this determination. The evidence showed that on 1 March 1995, Mr. Drews gave Mr. Lancaster a mortgage on Mr. Drews’ warehouse property at 1705 Meeting Street (“1705 Meeting”) to secure the \$40,000.00 in various loans. (R.p.346, line 8 – R.p.347, line 6; R.pp.629-630). On April 15, 1998, Mr. Drews gave Mr. Lancaster a \$100,000.00 mortgage on the same property as security for any additional loans Mr. Lancaster would make to them on an open-ended basis. (R.p.348, line 20 – R.p.350, line 14; R.p.351, lines 18-22; R.p.402, lines 12-18; R.pp.633-637). Mr. Lancaster did not request the \$100,000.00 mortgage and “wasn’t involved in securing [it].” (R.p.348, line 20 – R.p.349, line 3). While Mr. Lancaster eventually satisfied the \$40,000.00 mortgage in 2001, he was never asked to provide a satisfaction prior to that time. (R.p.350, line 9 – R.p.351, line 16). Both of these mortgages were satisfied in November 2001, when Mr. and Mrs. Drews sold 1705 Meeting to Charleston Antique District. (R.p.357, lines 9-18; R.p.359, lines 1-8). Mr. Lancaster never initiated any collection efforts on either of these mortgages. (R.p.358, lines 19-25; R.p.368, lines 8-16). Mr. Lancaster was aware of the \$40,000.00 mortgage when it originated, but was not advised until about 1999, by Mr. Drews, that he had increased the mortgage from \$40,000.00 to \$100,000.00. (R.p.401, line 19 – R.p.368, line 23). Mr. Lancaster did not learn until

In addition, in 1999, Mr. Lancaster loaned Mr. and Mrs. Drews \$20,000.00 to pay off loans from First Citizens Bank and South Trust Bank obtained to finance the failed Builders Station hardware store business endeavor. (R.p.367, lines 11-22; R.p.388, line 23 – R.p.389, line 24; R.p.402, lines 19-23; R.pp.1060-1064). To satisfy those loans, Mr. Lancaster sent a check on 2 June 1999, directly to First Citizens from his own First Citizens account for \$5,000.00 (R.p.389, lines 2-24; R.p.766, para. 8; R.p.1073) and, on 7 June 1999, had Wachovia issue a \$15,000.00 check out of his Wachovia line of credit made payable directly to South Trust. (R.p.389, lines 2-24; R.p.766, para. 8; p.1073). After this final \$20,000.00 loan,¹⁷ Mr. and Mrs. Drews' debt to Mr. Lancaster totaled \$63,738.11 for the additional loans and accrued interest.¹⁸

4. Payments And Loan Security

In 1996, Mr. Drews sold another piece of property he owned – 623 Meeting Street. (R.p.370, lines 15-21; R.p.384, lines 13-24). The Drewses still owed Mr.

much later that there were two separate mortgages – both a \$40,000.00 mortgage and a \$100,000.00 mortgage – or that they were still unsatisfied. (R.p.371, line 6 – R.p.372, line 9; R.p.401, line 19 – R.p.403, line 10). Mr. Lancaster was unaware of Mr. Drews' actions and it should not be “assumed” that Mr. Lancaster's actions were inappropriate and/or fraudulent.

¹⁷ On 1 July 1999, Mr. Drews gave Mr. Lancaster another mortgage for this final \$20,000.00 loan – again on 1705 Meeting. (R.p.351, line 17 – R.p.353, line 23; R.pp.638-642). Mr. Lancaster was unaware of this last mortgage as Mr. Drews did it without his knowledge. (R.p.352, lines 3-6). Mr. Drews ultimately told Mr. Lancaster about the \$20,000.00 mortgage sometime way after the fact. In any case, this mortgage was satisfied in November 2001, when Mr. and Mrs. Drews sold 1705 Meeting to Charleston Antique District. (R.p.357, lines 9-18; R.p.359, lines 1-8).

¹⁸ Mr. Lancaster kept good records of the monies he loaned to Mr. and Mrs. Drews and their payments back to him. (R.p.388, lines 3-22; R.p.390, line 15 – R.p.391, line 15; R.pp.692-695; R.pp.1066-1072). All of the monies Mr. Lancaster loaned to Mr. and Mrs. Drews undisputedly occurred in 1999 or before. (R.p.399, lines 2-6). No loans of any type were made after 1999. (R.p.399, lines 2-6).

Lancaster \$40,000.00. (R.p.370, line 22 – R.p.371, line 1; R.p.1065).¹⁹ Understandably, Mr. Lancaster asked Mr. Drews for some security for the unpaid balance of the \$40,000.00 loan. (R.p.371, lines 6-15). Mr. Drews provided him with the \$40,000.00 mortgage²⁰ on 1705 Meeting. (R.p.371, lines 16-17). Importantly, however, there was no evidence Mr. Lancaster, other than seeking security for the loans he made, had any other participation or involvement in the preparation of either the \$100,000.00 mortgage, or the \$40,000.00 mortgage, or the \$20,000.00 mortgage. (R.p.371, lines 18-23). Attorney Koon prepared all of the required documentation. Mr. Lancaster was not given copies of the mortgages. (R.p.371, line 24 – R.p.372, line 9).

In November 2001, the Drewses sold 1705 Meeting to Charleston Antique District for around \$190,000.00. (R.p.356, lines 16-23; R.p.391, lines 7-15; R.p.391, line 22 – R.p.392, line 6; R.pp.643-648). While most of the purchase price was financed,²¹ Mr. Lancaster received around \$11,089.63 from the sale. (R.pp.136-137, para. 41; R.p.145, para. 8; R.p.327, lines 3-19; R.p.392, lines 22-24). This reduced the Drewses' loan balance to \$50,912.00 which was memorialized in a promissory note. (R.p.136,

¹⁹ Mr. Lancaster only received around \$3,000.00 from the 623 Meeting sales proceeds (R.p.371, lines 2-5), even though he and Mr. Drews that the \$40,000.00 in loans would be fully satisfied from that sale. (R.p.371, lines 10-15; R.p.386, lines 6-19).

²⁰ This Court of Appeals intoned that Mr. Lancaster assisted Mr. Drews to dodge creditors since the \$40,000.00 mortgage was executed on 1 March 1995, but not recorded until 7 November 1995. Gordon v. Lancaster, 2016 WL 6471967, *2. This assertion ignores the fact that an unrecorded mortgage is not "of record" and, therefore, not within the chain of title and not required to be satisfied or addressed upon an ownership change. An unrecorded mortgage protects a debtors' creditors because it will likely never come into play. As far as the public was concerned the \$40,000.00 mortgage did not exist during the time it was not recorded.

²¹ Charleston Antique District gave Mr. Drews a \$190,000.00 Promissory Note and a Mortgage. (R.p.134, para. 20; R.p.144, para. 3; R.p.329, lines 3-6; R.pp.643-648).

para. 37; R.pp.144-145, para. 3; R.p.327, line 23 – R.p.328, line 10; R.p.392, line 25 – R.p.393, line 16; R.p.658; R.p.1074).²² The promissory note was secured by an assignment of the 1705 Meeting mortgage. (R.p.136, para. 38; R.p.144, para. 3; R.p.328, lines 25 – R.p.329, line 2; R.p.393, line 22 – R.p.394, line 25; R.pp.651-652; R.pp.1075-1077).²³ The Drewses sent Mr. Lancaster the \$540.00 monthly payment from monthly payments they received from Charleston Antique District. (R.p.136, para. 40; R.p.144, para. 3; R.p.334, lines 21-25; R.p.391, lines 11-15; R.p.395, lines 1-23; R.pp.692-695; R.pp.1066-1071).

In September 2005, Charleston Antique District, in turn, sold 1705 Meeting to unrelated third-parties. (R.p.334, lines 13-16; R.p.395, lines 5-10; R.pp.655-657; R.pp.721-725).²⁴

B. The Underlying Judgment

In 1996, Mr. Drews and Raymond Beasley incorporated the ill-fated Builders Station hardware store business. (R.p.365, lines 3-16). Mr. Drews sold stock, allegedly

²² Attorney Koon prepared the promissory note (R.p.393, lines 17-21) which had a 5% rate of interest with monthly payments of \$540.00. (R.p.392, lines 1-21; R.p.658; R.p.1074).

²³ Mr. Drews assigned to Mrs. Drews the Charleston Antique District's 1705 Meeting Note and Mortgage. (R.pp.643-650). Mrs. Drews then assigned the same mortgage to Mr. Lancaster to secure the \$50,912.00 Promissory Note. (R.p.134, para. 21; R.p.144, para. 3; R.p.372, lines 10-23; R.pp.651-652; R.pp.1075-1076). Mr. Lancaster understandably wanted to secure the Drewses' \$50,912.00 debt. (R.p.359, lines 16-19; R.p.393, line 22 – R.p.394, line 25). Attorney Koon suggested an assignment of the Charleston Antique District mortgage and prepared the necessary documentation. (R.p.393, line 22 – R.p.394, line 25; R.pp.651-652; R.pp.1075-1076). When Charleston Antiques District sold 1705 Meeting Mr. Lancaster satisfied and released the 1705 Meeting mortgage assignment. (R.p.395, line 24 – R.p.396, line 2; R.pp.689-691).

²⁴ The Drewses obtained approximately \$130,000.00 from the sale. (R.p.335, line 19 – R.p.336, line 1; R.p.372, line 24 – R.p.373, lines 5; R.p.396, lines 3-8; R.pp.719-720). They paid Mr. Lancaster \$35,621.12, representing the remaining unpaid amount outstanding on the Drewses' original loan balance of \$50,912.00. (R.p.136, para. 40; R.p.144, para. 3; R.p.334, lines 13-20; R.p.395, lines 5-23; R.p.658; R.pp.689-690).

required to be registered, to various investors, including Mr. Gordon and Mr. Lancaster. (R.p.133, para. 8; R.p.365, lines 17-25).²⁵ Builders Station completely failed and Mr. Gordon sued seeking compensation for Mr. Drews' alleged violation of South Carolina's securities laws. (R.p.133, para. 8; R.p.726, para. 2). The Circuit Court held a non-jury trial on 3-4 December 2001, and granted Mr. Gordon judgment against Mr. Drews for \$65,789.12. (R.p.11, para. 2; R.pp.46-53; R.p.133, para. 9; R.p.726, para. 3; R.pp.1079-1085). In March 2002, Mr. Gordon was awarded \$42,693.50 in attorneys' fees and costs (R.p.11, para. 2; R.pp.41-43; R.pp.1079-1090) producing a total judgment of \$108,482.62. (R.p.11; R.p.133, para. 9; R.pp.1079-1090).²⁶

III. ARGUMENT AND CITATION OF AUTHORITY

A. THIS COURT OF APPEALS INCORRECTLY EXPANDED THE VERY LIMITED HOLDING IN *LINDA Mc CO. V. SHORE* BY HOLDING THAT MR. GORDON HAD TIMELY INITIATED HIS ENFORCEMENT ACTION AGAINST MR. LANCASTER EVEN THOUGH THE 2002 DREWS JUDGMENT WAS UNDISPUTEDLY MORE THAN TEN YEARS OLD

South Carolina law currently provides, in pertinent part, that "[e]xecutions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal thereof, and this whether any return may or may not have been made during

²⁵ There was no evidence showing Mr. Lancaster was involved, in any way, with the formation of Builders Station or the sale of the unregistered corporate stock. Mr. Lancaster, himself, was a victim as he had purchased \$30,000.00 worth of Builders Station's stock. (R.p.365, lines 17-19; R.p.366, lines 3-5; R.p.389, line 25 - R.p.390, line 6).

²⁶ Mr. Gordon's judgment was affirmed on appeal. See Gordon v. Drews, 358 S.C. 598, 595 S.E.2d 864 (Ct.App. 2004), *rehearing denied* (20 May 2004), *cert. denied* (22 September 2005). Mr. Gordon also was awarded \$1,467.21 in appellate costs. (R.pp.38-34). Mr. Lancaster first found out about Mr. Gordon's judgment in December 2001. (R.p.399, line 20 - R.p.400, line 1). In this matter the Circuit Court inexplicably issued a judgment for \$211,677.30 (R.p.9; R.pp.10-30), even though Mr. Gordon's accounting expert witness, Mr. Livingston (R.p.443, line 9 - R.p.447, line 8), stated that his damage calculations for Mr. Gordon, including pre-judgment interest, was only \$151,029.49 (R.p.469, line 5 - R.p.470, line 11), more than \$60,000.00 lower.

such period on such executions.²⁷ This required Mr. Gordon, with a very small exception, to act on the judgment he obtained against Mr. Drews **within ten years** of receiving that judgment. The record demonstrates Mr. Gordon failed to timely do so and his claim against Mr. Lancaster was barred as a matter of law. This Court of Appeals must reverse its earlier decision and grant judgment for Mr. Lancaster.

Mr. Gordon obtained his damages judgment against Mr. Drews on **5 December 2001** (R.p.11, para. 2; R.pp.46-53; R.p.133, para. 9; R.p.726, para. 3; R.pp.1079-1085), and the attorneys' fees award on **15 March 2002**. (R.p.11, para. 2; R.pp.41-43; R.pp.1079-1090). The judgment was enrolled on **18 March 2002**.²⁸ Mr. Gordon sued Mr. Lancaster on **2 November 2010** (R.pp. 120-130), and obtained his judgment on **19 August 2013**. (R.p.9; R.pp.10-30). By any reasonable calculation, Mr. Gordon's judgments had expired and were unenforceable as they were more than ten years old.

In Linda Mc Co. v. Shore, the Supreme Court, in a very limited holding, recognized that S.C. Code Ann. § 15-39-30 operated like a statute of limitations when a judgment creditor had initiated supplemental proceedings against the judgment debtor within the ten-year time period and the Circuit Court had not issued the levy and

²⁷ See S. C. Code Ann. 15-39-30 (Thomson Reuters West 2012) (Emphasis added). See also generally Linda Mc Co. v. Shore, 375 S.C. 432, 653 S.E.2d 279 (Ct.App. 2007), *certiorari granted and affirmed as modified*, 390 S.C. 543, 703 S.E.2d 499 (2010); Carr v. Guerard, 365 S.C. 151, 616 S.E.2d 429 (2005). Before 1946, even though the life of a judgment was ten years, it could be extended for an additional ten years. See generally U.S. Rubber Co. v. McManus, 211 S.C. 342, 345-346, 45 S.E.2d 335, 336 (1947). See also Linda Mc. Co. v. Shore, 390 S.C. 543, 560, 703 S.E.2d 499, 508 (Beatty, J., dissenting). In 1946, the Legislature decided that ten years was a **sufficient time period** and rewrote the law prohibiting any extension. The Supreme Court held "[t]he logical result of the 1946 enactment . . . was to utterly extinguish a judgment after the expiration of ten years from the date of entry." Hardee v. Lynch, 212 S.C. 6, 16-17, 46 S.E.2d 179, 183 (1948) (Emphasis added).

²⁸ Gordon v. Lancaster, 2016 WL 6471967, *8 (Thomas, J, dissenting).

execution order until after expiration of the ten-year period.²⁹ Entirely unlike the Supreme Court's **very limited factual situation** in Linda Mc Co.,³⁰ this case was not a circumstance where Mr. Gordon, as the judgment creditor, "ha[d] complied with the applicable statutes . . . and [wa]s merely waiting on a court's order regarding execution and levy [order]" ³¹ Mr. Gordon sued Mr. Lancaster on **2 November 2010** (R.pp. 120-130), and "the [C]ircuit [C]ourt **did not hold the final hearing** in this case until June 2013, more than one year after the expiration of the ten-year period."³² Furthermore, Mr. Gordon's judgment was not effective until **19 August 2013**. (R.p.9; R.pp.10-30).

This Court of Appeals has vastly expanded Linda Mc Co.'s limited reach to the extent that a judgment creditor could logically file and serve an action to enforce an outstanding judgment on the **last day of the ten-year "active energy" period** and still have effective enforcement rights because the judgment creditor "filed [the] action . . . within the ten-year statutory period of active energy."³³ This rational effectively extends the ten-year active energy period for whatever time period it takes the Circuit Court to **actually conduct a hearing and to issue a final order** – potentially years assuming the existence of legitimate delays and continuances. This goes far beyond the limited

²⁹ See Linda Mc Co. v. Shore, 390 S.C. 543, 544, 703 S.E.2d 499, 504-505.

³⁰ The Supreme Court specifically stated that "[w]e want to stress that this is a narrow holding limited to facts similar to those at issue in this case." Linda Mc Co. v. Shore, 390 S.C. 543, 544, 703 S.E.2d 499, 504-505; GrandSouth Bank v. Cleveland Land Co., 2015 WL 5834241, *1 (Ct.App. 2015) (*per curiam*)

³¹ Gordon v. Lancaster, 2016 WL 6471967, *5 (*quoting Linda Mc Co. v. Shore*, 390 S.C. 543, 554-555, 703 S.E.2d 499, 505).

³² Gordon v. Lancaster, 2016 WL 6471967, *8 (Thomas, J., dissenting) (Emphasis added).

³³ Gordon v. Lancaster, 2016 WL 6471967, *5 (*citing Linda Mc Co. v. Shore*, 390 S.C. 543, 554 n.7, 703 S.E.2d 499, 505, n.7).

circumstances in Linda Mc Co. and appears to clearly expand that decision well beyond what the Supreme Court both anticipated and intended.³⁴

This Court of Appeals' reliance on Hardee v. Lynch³⁵, to justify an expansion of the Linda Mc Co. holding is misplaced. Firstly, Hardee v. Lynch addressed South Carolina law prior to 1946 when the ten-year period could be extended. That is not the law now. Moreover, as Justice Beatty noted, in Linda Mc Co., the "Hardee court specifically declined to address the question of what happens when a timely-filed action to enforce a judgment is not concluded prior to the expiration of the ten-year repose period as it was unnecessary to resolve the issue before it."³⁶ Furthermore, Justice Beatty recognized the Supreme Court had already "squarely confronted the question and concluded that an action to enforce the lien will not preserve it beyond the time by statute if such time expires before the action is tried."³⁷

Furthermore, **Mr. Lancaster is not and never has been the original judgment debtor to Mr. Gordon.** Mr. Drews and others occupied that position. Mr. Gordon has sought only to "attach" the "downstream" proceeds of monies which Mr. Drews allegedly "parked" with Mr. Lancaster to hide from creditors. The fallacy with this Court of

³⁴ Mr. Gordon was required to initiate litigation against Mr. Lancaster in a timely manner sufficient to allow the Circuit Court to conduct the final hearing. Under Linda Mc Co., ten years means ten years and the only recognized extension of time beyond the ten-year "active energy" period involves a situation where the final hearing has been held and the judgment creditor is merely awaiting the Circuit Court's issuance of the final order, levy, and execution. That is not what occurred in this case.

³⁵ Hardee v. Lynch, 212 S.C. 6, 46 S.E.2d 179. The Supreme Court incorrectly referred to Hardee v. Lynch in Linda Mc Co. as supporting the theory that the mere filing of an enforcement action within the ten-year period was sufficient to preserve the "active energy".

³⁶ Linda Mc Co. v. Shore, 390 S.C. 543, 561, 703 S.E.2d 499, 508 (citing Hardee v. Lynch, 212 S.C. 6, 13, 46 S.E.2d 179, 182) (Beatty, J., dissenting).

³⁷ Linda Mc Co. v. Shore, 390 S.C. 543, 561, 703 S.E.2d 499, 508 (citing Garrison v. Owens, 258 S.C. 442, 189 S.E.2d 31 (1972)) (Beatty, J., dissenting) (Emphasis added).

Appeals' decision is that most of the monies were involved in transactions which took place (a) when Mr. and Mrs. Drews **did not have** any debts or creditors, (b) **long before** Builders Station existed, (c) **long before** Mr. Gordon had a potential claim against Mr. Drews, (d) **long before** Mr. Gordon made any claim as a result of his failed investment in Builders Station, and (e) **long before** Mr. Gordon obtained any judgment of any type or amount against Mr. Drews.

B. THIS COURT OF APPEALS INCORRECTLY HELD THE \$100,000.00 THE DREWSES PAID MR. LANCASTER IN 1992 TO PURCHASE BAINBRIDGE DRIVE CONSTITUTED A FRAUDULENT CONVEYANCE

This Court of Appeals concluded the \$100,000.00 Mr. Drews gave Mr. Lancaster in 1992 for the Drewses' life estate was somehow done to defraud creditors.³⁸ This Court of Appeals was incorrect on both the facts and the law. The \$100,000.00 payment for the Drews' life estate was made simply and solely for that purpose – to obtain a life estate for the Drewses – in order that they could live in a comfortable and suitable home for the remainder of their natural lives.³⁹

In Carr v. Guerard, the Supreme Court held the "Statute of Elizabeth renders void any transfer of property made with '**intent or purpose to delay, hinder, or defraud creditors** and others' [and] may be employed by any creditor, including a judgment creditor."⁴⁰ Furthermore, "[w]hen a judgment creditor is the plaintiff, the

³⁸ Gordon v. Lancaster, 2016 WL 6471967, **6-7.

³⁹ In fact, Mr. Gordon (via his legal counsel) stated that "the valuable consideration [for the Drewses \$100,000.00 payment to Mr. Lancaster] was providing Mr. and Mrs. Drews a house to live in for the rest of their years" (R.p.323, lines 5-7). Mr. Lancaster agreed with this assessment. (R.p.323, lines 5-11).

⁴⁰ Carr v. Guerard, 365 S.C. 151, 153-154, 616 S.E.2d 429, 430 (2005) (citing S.C.Code Ann. § 27-23-10; Future Group, II v. Nationsbank, 324 S.C. 89, 98, 478 S.E.2d 45, 50; Lebovitz v. Mudd, 293 S.C. 49, 52-53, 358 S.E.2d 698, 700-01 (1987)) (Emphasis added).

statute limiting the time for executing on judgments to ten years might also apply.”⁴¹ Furthermore, the “Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land.”⁴² Importantly, “[e]ven where it is shown that the grantor has fraudulent intent, to “annul for fraud a deed based upon value consideration [under the Statute of Elizabeth], it must not only be shown that the grantor intended to hinder, delay[,] or defraud creditors, but it must also appear that the **grantee participated in such fraudulent act**.”⁴³ Mr. Lancaster did not participate in any fraudulent scheme; he was **simply trying to assist his aunt and uncle through their very tough situation**.

1. IRS Liens And Outstanding Loans

The Drewses, during **1990/1991**, valiantly sought to keep The Drews Company afloat by borrowing heavily on their Edgewater Park home. Unfortunately, the IRS filed several liens against Mr. Drews and his company. (R.p.13, para. 1; R.p.355, lines 6-12; R.p.373, lines 6-13; R.p.764, para. 4). These liens finally convinced him to sell the business. (R.p.440, lines 5-10; R.p.764, para. 4). During the same time, the Drewses sold their Edgewater Park home to satisfy the IRS liens and the outstanding mortgage loans. (R.p.355, lines 6-12; R.p.440, lines 11-15; R.pp.764-765, para. 5). After **paying off** the mortgage loans and the IRS, Mr. and Mrs. Drews were left with \$100,000.00 from the sale of their home. (R.pp.764-765, para. 5).

⁴¹ Carr v. Guerard, 365 S.C. 151, 154, 616 S.E.2d 429, 430 (citing S.C.Code Ann. § 15-39-30). See also Oskin v. Johnson, 400 S.C. 390, 397-398, 735 S.E.2d 459, 463 (2012) (citing Future Group, II v. Nationsbank, 324 S.C. 89, 96, 478 S.E.2d 45, 48-49; McDaniel v. Allen, 265 S.C. 237, 242-243, 217 S.E.2d 773, 775-776 (1975)).

⁴² Oskin v. Johnson, 400 S.C. 390, 397-398, 735 S.E.2d 459, 463 (citing McDaniel v. Allen, 265 S.C. 237, 242-243, 217 S.E.2d 773, 775-776 (1975)).

⁴³ Oskin v. Johnson, 400 S.C. 390, 398 n.5, 735 S.E.2d 459, 463 n.5 (quoting McDaniel v. Allen, 265 S.C. 237, 242-243, 217 S.E.2d 773, 775-776 (1975)) (Second alteration in original and emphasis added).

2. The Life Estate – Bainbridge Drive And Nuffield Road⁴⁴

Desperate, the Drewses turned to Mr. Lancaster for help. In 1992, Mr. Drews proposed (R.p.321, lines 6-8), that (a) the Drewses give Mr. Lancaster the \$100,000.00 left from the sale, (b) Mr. Lancaster use that money, in part, to purchase them a suitable home and (c) the Drewses, via a life estate,⁴⁵ would then live in that “new” home for the remainder of their lives without the need to make either rent or mortgage payments. (R.pp.665-666; R.pp.677-681; R.pp.764-765, para. 5; R.pp.1053-1054; R.pp.1060-1064). Mr. Lancaster agreed to Mr. Drews’ proposal. (R.p.13, para. 2; R.p.387, lines 11-19; R.p.418, lines 6-21). Consequently, In 1992, Mr. Lancaster took the \$100,000.00 (R.p.137, paras. 43-45; R.pp.144-145, paras. 3, 9-10; R.p.322, lines 13-25; R.p.376, lines 14-20) added some of his own money and bought Bainbridge Drive on 22 May 1992. (R.p.14, para. 7; R.p.340, line 22 – R.p.341, line 7; R.p.376, line 24 – R.p.377, line 1; R.pp.662-664).⁴⁶ Mr. and Mrs. Drews moved in and lived there for the next 37 months. (R.p.137, para. 47; R.p.146, para. 11; R.p.379, lines 16-18).

⁴⁴ While Mr. Lancaster had financial dealings with Mr. and Mrs. Drews in the past, it is undisputed that the financial transactions involved in this case started in 1992. (R.p.321, line 6 – R.p.322, line 19; R.p.956).

⁴⁵ A life estate is “an estate of indeterminate duration . . .” Strother v. Folk, 123 S.C. 127, 138, 115 S.E. 605, 611 (1922). This Court of Appeals imputing Mr. Lancaster’s “a nefarious motive” to assist the Drewses in avoiding creditors, noted Mr. Lancaster’s failure to file the life estate agreement (R.pp.665-666; R.pp.1053-1054) in the public record. Gordon v. Lancaster, 2016 6471967, *1, *7. This “logic” is unsupportable as – (a) there were no creditors to avoid as they had been paid off from the Edgewater Park sale proceeds (R.p.355, lines 6-12; R.p.440, lines 11-15; R.pp.764-765, para. 5), (b) Mr. Drews’ lawyer – Attorney Koon – prepared and handled all of the life estate documentation and, as Mr. Gordon’s attorney conceded, would have been responsible for recording the life estates. (R.p.378, lines 1-22; R.p.382, line 15 – R.p.383, line 1; R.pp.665-666; R.pp.672-676; R.pp.1053-1054; R.pp.1060-1064). Mr. Lancaster had no nefarious intent or any other bad intent; he simply wanted to help his aunt and uncle.

⁴⁶ Mr. Lancaster added another \$5,000.00 or so in repairs. (R.p.341, lines 2-7; R.p.379, lines 9-15).

In April 1995, Mr. Drews again asked Mr. Lancaster for help in moving into a one-story home. (R.p.379, line 19 – R.p.380, line 3). The Drewses found Nuffield Road (R.p.359, lines 18-20; R.p.360, lines 11-15; R.p.380, lines 4-19) and Mr. Lancaster bought the property on 16 May 1995 (R.p.137, para. 48; R.p.146, para. 12; R.pp.667-671; R.pp.1055-1059), for \$125,000.00. (R pp.667-671; R.pp.1055-1059).⁴⁷ The Drewses lived there (R.p.378, line 23 – R.p.379, line 1) under the same life estate arrangement as had existed at Bainbridge Drive. (R.p.378, lines 1-22; R.p.382, line 15 – R.p.383, line 1; R.p.677-671; R.pp.1060-1064).

3. No Evidence Of Any Continuing Debts Or Creditors In 1992

This Court of Appeals found that while Mr. Lancaster argued the Drewses were debt free in 1992 after they sold their home, there was no documentary evidence the liens had been discharged or the sales proceeds were sufficient to pay off outstanding obligations.”⁴⁸ On the contrary, the mere fact the Drewses were able to sell their home and still have about \$100,000.00 left over from the sale shows emphatically there were no outstanding creditor debts. Had there been any recorded liens or judgments then existing, they would have had to be paid off before title could transfer. In fact, contrary to this Court of Appeals “conclusion” there was no any credible evidence which showed or even reasonably inferred that the Drewses had any unpaid debts or outstanding creditors in 1992 once they sold their Edgewater Park home, satisfied the IRS liens, and paid off the loans they had incurred to keep The Drews Company in business.⁴⁹

⁴⁷ Mr. Lancaster added an additional \$15,000.00 or so for a new air conditioning system, updated appliances, and other needed repairs. (R.p.364, line 22 – R.p.365, line 2).

⁴⁸ Gordon v. Lancaster, 2106 WL 6471967, *7.

⁴⁹ This Court of Appeals noted that Mr. Gordon submitted an IRS tax lien into evidence which was dated 1 September 2000, and filed on 8 September 2000. (R.p.700). The IRS

In order to “get to” the \$100,000.00 the Drewses paid Mr. Lancaster in 1992, Mr. Gordon was required to show, under the Statute of Elizabeth, that the Drewses made the monetary transfer for the “**intent or purpose to delay, hinder, or defraud creditors** . . .”⁵⁰ There was no credible evidence of any still outstanding debts or unpaid creditors. The actual “uncontested evidence” was to the contrary – no debts or creditors existed when the \$100,000.00 was paid. Moreover, the only credible evidence in the record was the Drewses specifically sold Edgewater Park to **pay off the IRS and satisfy the outstanding loans**. (R.p.355, lines 6-12; R.p.440, lines 11-15; R.pp.764-765, para. 5). There was no evidence of any other creditors then existing.

C. THIS COURT OF APPEALS IMPROPERLY FOUND THE \$40,000.00 MR. LANCASTER LOANED THE DREWSES DURING 1993-1995 TO PAY OFF THEIR CREDIT CARD DEBTS WAS A FRAUDULENT CONVEYANCE

This Court of Appeals found that the \$40,000.00 Mr. Lancaster loaned the Drewses during the **1993 to 1995** time period was done to defraud creditors.⁵¹ This Court of Appeals was incorrect on both the facts and the law. The \$40,000.00 in loans were made simply and solely for the purpose of helping the Drewses pay off their \$35,000.00 mountain of credit card debt.

Mr. and Mrs. Drews had no “income” after The Drews Company failed, other than their social security benefits, and were living off of their credit cards. (R.p.328, lines 7-10; R.p.385, lines 4-20; R.p.979, lines 14-21; R.p.1012, lines 14-16). They racked up

lien, however, only addressed unpaid taxes for periods ending 31 December 1995, 31 December 1996, and 31 December 1997. (R.p.700). Gordon v. Lancaster, 2106 WL 6471967, *7. Clearly, that lien does not involve debts from 1992.

⁵⁰ See S.C. Code Ann. § 27-23-10(A) (Emphasis added). Mr. Livingston, Mr. Gordon’s expert accounting witness, specifically testified **he was not aware of the specific creditors which the Drewses were attempting to avoid** when they paid Mr. Lancaster the \$100,000.00 for the life estate in Bainbridge Drive. (R.p.491, lines 9-14).

⁵¹ Gordon v. Lancaster, 2016 WL 4671967, *1, *7.

about \$35,000.00 in credit card debt (R.pp.692-695) and, during 1993-1995, Mr. Lancaster periodically made six direct loans to the Drewses totaling \$40,000.00 (R.p.324, lines 20-23; R.p.328, lines 7-10; R.p.385, line 21 – R.p.386, line 14; R.p.1065) so they could, in part, retire their credit card debt. (R.p.355, lines 19-25; R.pp.692-695).

Mr. Gordon produced no credible evidence demonstrating the Drewses had any unpaid debts or outstanding creditors during the 1993-1995 time period as the Drewses had sold Edgewater Park in 1992, to eliminate their then existing debts. (R.p.355, lines 6-12; R.p.440, lines 11-15; R.pp.764-765 para. 5).⁵² Mr. Lancaster made loans to the Drewses in various amounts from 6 February 1993, through 30 January 1995,⁵³ and it appears the Drewses were paying off their credit cards in part or in whole on an intermediate basis – essentially, somewhat as the credit became due or, at least, not significantly overdue. (R.p.1065).

When Mr. Drews sold 623 Meeting (R.p.370, lines 15-21; R.p.384, lines 13-24), the Drewses still owed Mr. Lancaster \$40,000.00. (R.p.370, line 22 – R.p.371, line 1; R.p.1065). Even though the \$40,000.00 (plus interest) was supposed to have been fully satisfied from the sale (R.p.371, lines 10-15; R.p.386, lines 6-19), Mr. Lancaster only received around \$3,000.00. (R.p.371, lines 2-5). Chagrined, Mr. Lancaster asked Mr.

52 The only “creditors” the Drewses could have “had” during 1993-1995 were the very credit card companies which they were periodically paying off using Mr. Lancaster’s loaned \$40,000.00. As the Drewses were paying off their credit card debts it cannot credibly be argued that payments they subsequently made to Mr. Lancaster to reimburse him for the \$40,000.00 was done to “avoid creditors”. The creditors whose very extension of personal consumer credit to the Drewses which actually gave rise to the \$35,000.00 in credit card debt had undisputedly been paid.

53 Mr. Lancaster loaned the Drewses (a) \$5,000.00 on 6 February 1993, (b) \$3,000.00 on 19 April 1993, (c) \$7,000.00 on 9 July 1993, (d) \$6,000.00 on 28 August 1993, (e) \$3,000.00 on 21 December 1993, (f) \$6,000.00 on 18 January 1994, (g) \$5,000.00 on 20 June, 1994, and (h) \$5,000.00 on 30 January 1995 - totaling \$40,000.00. (R.pp.692-695; R.pp.804A-811; R.p.1065; R.pp.1066-1071).

Drews for some security for the \$40,000.00 loan (R.p.371, lines 6-15) and Mr. Drews, via Mrs. Drews, gave Mr. Lancaster a \$40,000.00 mortgage on 1705 Meeting. (R.p.371, lines 16-17). There was **no evidence Mr. Lancaster**, other than seeking security for the \$40,000.00 in total loans, **had any other participation or involvement in the preparation of the \$40,000.00 mortgage**. (R.p.371, lines 18-23). Mr. Drews' lawyer, Attorney Koon, prepared all of the required documentation. Mr. Lancaster was not provided a copy of the mortgages. (R.p.371, line 24 – R.p.372, line 9).

For Mr. Gordon to “get to” the money the Drewses paid Mr. Lancaster for the \$40,000.00 in loans, Mr. Gordon was required to show, under the *State of Elizabeth*, the Drewses made the monetary transfer for the **“intent or purpose to delay, hinder, or defraud creditors . . .”**⁵⁴ Mr. Lancaster made the \$40,000.00 in loans to help the Drewses retire their \$35,000.00 credit card debt. The Drewses had **no** income other than their social security and were only able to pay their normal living expense using their credit cards.

D. THIS COURT OF APPEALS INCORRECTLY FOUND THE \$20,000.00 MORTGAGE THE DREWSSES GAVE MR. LANCASTER TO SECURE THE \$20,000.00 LOAN MORTGAGE WAS NOT BASED UPON ADEQUATE CONSIDERATION

In **1999**, Mr. Lancaster loaned, albeit indirectly, the Drewses \$20,000.00 to pay off loans from First Citizens Bank and South Trust Bank obtained to finance the failed Builders Station business endeavor. (R.p.367, lines 11-22; R.p.388, line 23 – R.p.389, line 24; R.p.402, lines 19-23; R.p.1073). To satisfy those loans, Mr. Lancaster sent a \$5,000.00 check on **2 June 1999, directly** to First Citizens from his own First Citizens account (R.p.389, lines 2-24; R.p.766, para. 8; R.p.1073) and, on **7 June 1999**, had

⁵⁴ See S.C. Code Ann. § 27-23-10(A) (Emphasis added).

Wachovia issue a \$15,000.00 check out of his Wachovia line of credit made payable directly to South Trust. (R.p.389, lines 2-24; R.p.766, para. 8; R.p.1073).

On 1 July 1999, Mr. Drews gave Mr. Lancaster another mortgage for this final \$20,000.00 loan – again on 1705 Meeting. (R.p.19, para. 41; R.p.351, line 17 – R.p.353, line 23; R.pp.638-642).⁵⁵ This Court of Appeals dismissed this \$20,000.00 mortgage and Mr. Lancaster's \$20,000.00 payments to First Citizens and South Trust on the basis the "\$20,000 mortgage was not supported by either contemporaneous or past valuable consideration and constituted actual moral fraud" ⁵⁶ This Court of Appeals misinterpreted and misapplied the facts of this transaction.

In Roper, LLC v. Harris Teeter, Inc.,⁵⁷ this Court of Appeals noted that the term "valuable consideration" has been defined "as 'some right, interest, profit[,] or benefit accruing to one party or some forbearance, detriment, loss[,] or responsibility given, suffered[,] or undertaken by the other.' " ⁵⁸ Conversely, in Royal Z. Lanes, Inc. v. Collins Holding Corp.⁵⁹, the Supreme Court stated recognized that "grossly inadequate consideration [is defined] as 'a consideration so far short of the value of the property as

⁵⁵ Mr. Lancaster was initially unaware of this last mortgage as Mr. Drews did it without his knowledge. (R.p.352, lines 3-6). Mr. Drews later told Mr. Lancaster about the \$20,000.00 mortgage well after its inception.

⁵⁶ Gordon v. Lancaster, 2106 WL 6471967, *7.

⁵⁷ Roper, LLC v. Harris Teeter, Inc., 2013 WL 8539469 (Ct.App., filed 17 July 2013) (Not reported in S.E.2d).

⁵⁸ Roper, LLC v. Harris Teeter, Inc., 2013 WL 8539469, * 1 (quoting Hennes v. Shaw, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct.App. 2012)).

⁵⁹ Royal Z. Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 524 S.E.2d 621.

to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust.’ ”⁶⁰

The Drewses gave Mr. Lancaster the \$20,000.00 mortgage on 1 July 1999 (R.p.19, para. 41; R.p.351, line 17 – R.p.353, line 23; R.pp.638-642), about three weeks after Mr. Lancaster sent the \$5,000.00 check to First Citizens and the \$15,000.00 check to South Trust. (R.p.766, para. 8; R.p.1073). While this Court of Appeals voided this transaction because Mr. Lancaster did not give the Drewses “contemporaneous consideration” for the mortgage (R.p.19, para.42), this Court of Appeals completely ignored the exigent circumstances surrounding the transactions necessitating quick action to settle the debts.

Mr. Drews called Mr. Lancaster in early June 1999, and advised him that he (Mr. Drews) “had talked to both First Citizens and South Trust and [the banks] were both offering him **24 hours** to settle [his outstanding loans] for substantially less than the amount owed . . .” (R.p.389, lines 4-7) (Emphasis added). Mr. Drews asked Mr. Lancaster if he could help. (R.p.389, lines 7-8). Since Mr. Drews did not have any “other source [for the \$]20,000 dollars, so to be able to take advantage of those [lessened] payoffs, [Mr. Lancaster] [with]drew [\$]15,000[.00] out of [his] equity loan on [his personal] house] and [\$]5.000[.00] [he] had in [his] checking account to pay the other.” (R.p.389, lines 9-12).

⁶⁰ Royal Z. Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 596, 524 S.E.2d 621, 623 (quoting McGhee v. Wells, 57 S.C. 280, 35 S.E. 529, 531 (1900)). In any case, “[w]hen a transfer is supported by valuable consideration, it may be set aside as a fraudulent conveyance only if an actual intent to defraud creditors may be imputable to the grantee.” Pfeil v. Steven Walker Homes Corp., 2006 WL 7286989 (Ct.App. filed 23 October 2006) (citing Royal Z. Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 594, 524 S.E.2d 621, 622) (Not reported in S.E.2d) (Emphasis added).

Clearly, this urgent situation demanded immediate action. Mr. Lancaster paid out the \$20,000.00 to the banks as quickly as he could, due to the banks' demands for quick satisfaction (i.e.; 24 hours) of Mr. Drews' Builders Station-related debts at significantly reduced amounts. (R.p.354, lines 3-13; R.p.369, lines 10-15; R.p.389, lines 2-12). Even though the Drewses gave the \$20,000.00 mortgage around three weeks later, the \$20,000.00 consideration had unquestionably been paid directly to First Citizens and South Trust respectively.⁶¹ Under the circumstances, it seems particularly disingenuous for this Court of Appeals to hold Mr. Lancaster, who admittedly paid the banks \$20,000.00, failed to give the Drewses contemporaneous consideration for the mortgage. This is especially true when the funds were paid directly to the banks to settle some of Mr. Drews' debts.

The \$20,000.00 in loans were made to pay off First Citizens and South Trust for Builders Station-related loans, not to hide funds from those creditors or from other creditors. Mr. Lancaster was entitled to have the \$20,000.00 repaid. This Court of Appeals should and, indeed, must reverse its prior contrary decision.

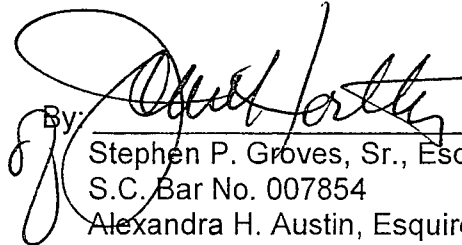
⁶¹ Moreover, the development and production of the documentation needed to evidence the \$20,000.00 mortgage required the involvement of legal counsel. (R.p.354, lines 3-9). Given the pressing nature of the banks' settlement demands, it was thought that to obtain counsel's involvement would have taken more time than either First Citizens or South Trust were willing to give.

IV. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Donald W. Lancaster, respectfully requests that this Court of Appeals to grant his a rehearing, reverse its prior decision, and grant him judgment.

Respectfully submitted:

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By:  *With express permission*

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15 November 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096
And 2011-CP-10-8840

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

Respondent,

v.

Donald W. Lancaster,

Appellant.

Proof of Service for Petition for Rehearing

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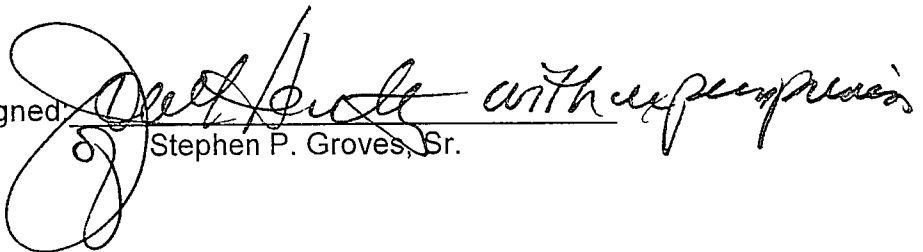
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I, Stephen P. Groves, Sr., Esquire, hereby certify that on 15 November 2016, I served one copy of the **Petition for Rehearing** submitted by the Petitioner, Donald W. Lancaster, on counsel for the Respondent via the United States Mail, postage pre-paid, and addressed as follows:

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Signed

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Charleston, South Carolina

15 November 2016

NPCHAR1 1830049 1-APL-(SPG) 053211-00001

STATE OF SOUTH CAROLINA
IN THE
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RECEIVED
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SC Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096
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Appellate Case Tracking No. 2014-001247

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

Respondent.

Donald W. Lancaster,

v.

Appellant.

Respondent's Return to Appellant's Petition for Rehearing

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Attorneys for the Respondent

Pursuant to South Carolina Appellate Court Rules 221(a) and 240(e), Respondent Gordon (hereinafter "Gordon") submits his Return to the Petition for Hearing filed by Petitioner/Appellant Lancaster (hereinafter "Lancaster") on November 15, 2016.

This Court issued a published opinion in which it affirmed the Circuit Court's Order and Judgment issued on August 19, 2013, awarding damages to Respondent Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, in a lawsuit Gordon filed to collect on prior judgments he obtained against Lancaster's uncle, Rudolph Robert Drews (hereinafter "Drews"). *Gordon v. Lancaster*, No. 2014-001247, 2016 WL 6471967 (S.C. Ct. App. Nov. 2, 2016). Lancaster appealed the Circuit Court's determination arguing that the prior judgments had expired and therefore, were unenforceable, and challenged the Circuit Court's determination that Lancaster and his uncle engaged in various fraudulent conveyances to hide Drews' assets from creditors. This Court affirmed the Circuit Court's determination that the two judgments that were the subject of this suit were active even though more than ten years had passed since their original award dates due to Gordon's timely actions to collect on them, and that Lancaster and his uncle engaged in fraudulent transactions. Lancaster now seeks a rehearing on all issues decided by this Court. Petitioner Lancaster has not identified any points overlooked or misapprehended by the Court as required by South Carolina Appellate Rule 221(a), but rather seeks to retry his appeal, and have this Court disregard the Circuit Court's credibility determination and other factual findings.

STATEMENT OF THE FACTS

Respondent hereby incorporates by reference the Statement of Facts in Respondent's Final Brief pages 2 through 13, and all findings of fact made by the Circuit Court in its Order & Judgment dated August 19, 2013, (R. pp. 010-027.)

ARGUMENT

A petition for rehearing must show points supposedly overlooked or misapprehended by the court. Its purpose is not to present points the lawyers of losing parties overlooked themselves or to have the case tried in the Court of Appeals a second time. *See Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

Checker Yellow Cab Co., Inc. v. Checker Cab & Parcel Service, Inc., 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986).

I. THIS COURT CORRECTLY APPLIED THE SUPREME COURT'S HOLDING IN *LINDA MC COMPANY* BY AFFIRMING THE CIRCUIT COURT'S DECISION THAT GORDON TOOK ACTION WITHIN TEN YEARS OF THE JUDGMENTS THEREBY EXTENDING THE JUDGMENTS' ACTIVE PERIODS.

Lancaster contends that this Court incorrectly expanded *Linda Mc Company, Inc. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010), by holding that Gordon had timely initiated his enforcement action. Lancaster argues that the *Linda Mc Company* holding should be extremely limited to its exact facts and that this Court should allow a judgment's active period to be extended only when the hearing has been completed, and the creditor is waiting for a court's order regarding execution and levy. Appellant's Petition for Rehearing, p. 12. Lancaster would have this Court rule that even if a judgment creditor has been diligent throughout the ten-year period, and has suffered many delays due to the debtor's and opposing party's actions, he should be severely penalized, and lose his right to collect his judgments. This result would not be consistent with the Supreme Court *Linda Mc Company* opinion.

A. The Supreme Court in *Linda Mc Company* Focuses on the Judgment Creditor's Action to Enforce the Judgment During the Judgment's Active Period, and Specifically Warns that the Judgment Creditor Should Not be at the Mercy of the Court to Conclude the Matter Within the Ten-Year Period.

The Supreme Court set forth its specific holding in the *Linda Mc Company* opinion's conclusory paragraph to be broader than Lancaster's restrictive and unfair interpretation:

... 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 (*emphasis added*). Had the Supreme Court intended its holding to be restricted to only those exact circumstances where the party was merely waiting for a court's action as Lancaster contends, then the Court could have written its conclusion in that manner, but instead the Court focused on the creditor's actions in attempting to enforce the judgment. The Supreme Court also emphasized that where a party trying to enforce his judgment has complied with the applicable statutes, that party should not be "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. Lancaster would have us ignore this part of the Supreme Court's opinion, and restrict the *Linda Mc Company* holding only to the exact fact pattern set forth in that case.

B. Gordon Acted Earlier to Enforce His Judgments than the *Linda Mc Company* Plaintiff, and Should Not Lose His Right to Recover Because this Litigation, which Involved Convoluting and Secretive Transactions, Took Longer.

A closer examination of the *Linda Mc Company* opinion shows that Gordon's actions were very similar to the creditor's actions in that case. Gordon filed this action thirteen months prior to the original judgment's expiration while the plaintiff in the *Linda Mc Company* case filed an action approximately eleven months before the expiration of that judgment.¹ When both of these creditors

¹ In *Linda Mc Company*, the judgment in question was entered on June 2, 1995, and on July 29, 2004, approximately ten months prior to the end of the judgment's ten-year active period, the judgment-creditor filed a petition for supplemental proceedings to enforce the judgment. *Linda Mc Co.*, 390 S.C. at 548-549, 703 S.E.2d at 501-502. In this case, the original judgment was awarded to Gordon on December 5, 2001, and on November 2, 2010, approximately thirteen months prior to the end of this judgment's active period, he filed his fraudulent conveyance action to aid in

were diligent in attempting to enforce their judgments and took action within at least ten months prior to the expiration of the judgments' active periods, it would make no sense to allow the judgment's active period to extend for the *Linda Mc Company* plaintiff, yet be extinguished for Gordon. This is especially true when Gordon brought his action several months earlier than the *Linda Mc Company* plaintiff when compared to the judgment extinguishment dates, but this case took much longer to litigate due to the discovery that was required to uncover the complicated, convoluted, and dishonest transactions in which Lancaster and Drews engaged. Lancaster should not be able to benefit from those dishonest acts by arguing that Gordon should be treated differently from the *Linda Mc Company* plaintiff because Gordon was not merely waiting a decision. Gordon also would have been merely waiting a decision if he had a straightforward collection action where the debtor was upfront and produced documents evidencing his assets, instead of this one involving fraudulent conveyances.

Moreover, Gordon actually brought supplemental proceedings to enforce the judgments much earlier than the plaintiff in *Linda Mc Company*: Gordon petitioned the court to open supplemental proceedings to aid him in collecting the judgments in August 2006 – within five years of the original judgments dated December 2001 and March 2002, and within only one year of the September 2005 final modification and award on these judgments by the Court of Appeals when it denied Drews' appeal. However, the timely supplemental proceedings were not fruitful due to Drews' failure to produce requested documents and untimely demise.

Contrary not only to the *Linda Mc Company* holding, but to sound public policy, Lancaster would have this Court issue an unduly restrictive holding which would encourage debtors to

collecting on these judgments. (This calculation does not even take into account the supplemental proceeding he brought five years earlier to aid in enforcing these judgments.)

engage in unscrupulous behavior, and employ any delay tactics possible to run out a judgment's ten-year active period while the case is being litigated. Such a holding would also put the judgment creditor "at the mercy of the court system to conclude the matter within the ten-year period" which is precisely what the Supreme Court acknowledged would be an unjust outcome. *Linda Mc Co.*, 390 S.C. at 554-555, 703 S.E.2d at 505. Gordon's diligence throughout the ten-year period falls squarely within the *Linda Mc Company* holding, and therefore, this Court should continue to uphold the Circuit Court's finding that the judgments' active periods were extended.

Lancaster also argues that this Court's reliance on *Hardee v. Lynch*, 212 S.C. 6, 46 S.E.2d 179 (1948), is "misplaced." (Appellant's Petition for Rehearing, p. 13). Lancaster argues that as the ten-year period can no longer be extended to twenty years, then the approach in *Hardee* should not apply. Gordon adamantly disagrees: this Court's acknowledgement of *Hardee's* proposition that allows creditors to proceed if they have been diligent and taken action to enforce their judgments before the expiration of the ten years is not misplaced, but even more appropriate under current law where the creditors cannot request an extension, but have only half the time to attempt to collect the money rightfully due them.

The *Hardee* and *Mc Company* approach, rather than Lancaster's unforgiving and stringent one, is especially appropriate under the facts of this case where Gordon attempted to enforce his judgments, but his efforts were frustrated due to factors outside of his control. Gordon faced multiple delays and hurdles during the judgments' ten-year active periods, including:

- Gordon lost almost four years of the judgments' active period as he was defending Drews' appeals of the judgments until the end of September 1995, when Gordon won his appeal and he received the final award and modification of the judgments.
- Gordon had to engage in extensive discovery to uncover the true nature of Drews' and Lancaster's dealings as they were complex and convoluted in nature in order to hide Drews' assets.

- Gordon was unable to rely on the public record and financial documents as Drews and Lancaster did not follow customary business practices, and failed to record several pertinent documents in the public record.
- Gordon's efforts in bringing supplemental proceedings to aid in the collection of his judgments were obstructed as Drews failed to produce records in September 2006 despite a court order to do so.²
- Gordon faced further delays in his attempts to collect on his judgment as both the Drewses died during the active ten-year period, and subsequent estate disputes caused further delays in proceeding as it was several years before a final estate accounting was completed.³

All of these factors were completely outside of Gordon's control and thwarted his timely efforts to enforce his judgments. Pursuant to *Linda Mc Company* and *Hardee*, this Court should continue to affirm the Circuit Court's determination that Respondent Gordon's judgments are active and enforceable.

C. Other Jurisdictions also have Recognized that a Judgment's Enforceability Should be Extended where the Judgment Creditor has Brought Action to Enforce the Judgment.

Similar to South Carolina, in both Kentucky and Georgia, the filing of a proceeding to discover assets and/or enforce a judgment extends the period for which the judgment is active. *See Wade v. Poma Glass & Specialty Windows Inc.*, 394 S.W.3d 886, 893-95 (Ky. 2012); *A.B. Farquhar Co. v. Myers*, 194 Ga. 220, 225, 21 S.E.2d 432, 436 (1942). The Kentucky law is similar in that the issuance of a writ of execution or institution of proceedings to discover the judgment debtor's assets "keeps the judgment alive" and tolls the period during which action can be taken upon a judgment. *Wade*, 394 S.W.3d at 893-95. In Georgia, the law dictates that a judgment

² In September 2006, Drews was ordered by the court to appear and produce many documents which would have revealed the nature of these multi-step, convoluted transactions involving Drews' assets. For example, Drews was ordered to produce gift tax returns, and "documents reflecting all property transfers, real or personal, to any relative..." (R. pp. 034-037.)

³ Drews died on September 25, 2007 and the estate's inventory and appraisement was filed on February 2010, approximately two years and four months later. (R. p. 732.)

becomes dormant seven years after it is rendered, and once dormant, the judgment creditor has three years to revive the judgment or it is extinguished. OCGA § 9-12-60. However, a judgment will remain active if an action to enforce the judgment is filed prior to the expiration of the dormancy period even if the dormancy period would have expired during the pendency of the action. *A.B. Farquhar*, 194 Ga. at 225, 21 S.E.2d at 436; *Gen. Disc. Corp. v. Chunn*, 188 Ga. 128, 131, 3 S.E.2d 65, 67 (1939) (citing *Conley v. Buck*, 100 Ga. 187, 28 S.E. 97 (1897)). In North Carolina, when a judgment creditor brings an action to enforce a judgment within that judgment's ten-year active period, and receives a new judgment in that action, the entry of the new judgment begins a new ten-year period. N.C. Gen. Stat. Sec. 1-47(1) (2013); *Magazian v. Creagh*, 234 N.C. App. 511, 512 n.2, 759 S.E.2d 130, 131 n.2 (2014); *Raccoon Val. Inv. Co. v. Toler*, 32 N.C. App. 461, 463, 232 S.E.2d 717, 718-19 (1977). In these states, the judgment creditor's actions to enforce a judgment extends the time within which he can collect on his judgment. This Court should deny Lancaster's Petition for Rehearing as its affirmance of the Circuit Court's holding is in keeping with South Carolina and other states' legal precedent, as well as sound public policy.

II. RESPONDENT GORDON WAS ENTITLED TO BRING THE ACTION UNDERLYING THIS APPEAL AS ASSIGNEE OF THE DREWSSES' ESTATES.

Lancaster fails to recognize that Gordon also should prevail against Lancaster given the fact that Gordon was assigned the Drewses' estate claims. (Pl. Ex. 58 & 59; 2d. Am. Compl. p. 3, para. 12.) The Estates' rights accrued sometime after the Drewses' deaths in 2007 and 2010 respectively, as assets at issue in this matter should have been included in those Estates.⁴ As of November 2011, Gordon had a renewed right to bring suit against Lancaster as a de facto,

⁴ See Respondent's Final Brief, Section VIII, at p. 48.

“executor de son tort” of the monies that rightfully belonged in Mr. and Mrs. Drews’ Estates.⁵ There is no issue as to whether the Estates’ claims brought by Gordon were timely. Gordon’s assignee status serves as an additional, sustaining ground for this Court to affirm the Circuit Court’s Order irrespective of the Appellant’s argument that Respondent’s Judgment had expired and was unenforceable.

III. THIS COURT CORRECTLY AFFIRMED THE CIRCUIT COURT’S HOLDING THAT DREWS’ AND LANCASTER’S TRANSACTIONS CONSTITUTED FRAUDULENT CONVEYANCES.

Lancaster’s arguments that this Court erred in affirming the Circuit Court’s determinations that the three appealed transactions are fraudulent conveyances are largely based on credibility issues, and are not proper for a Petition for Rehearing. Rather than demonstrate points to this Court that may have been overlooked or misapprehended, as required by South Carolina Appellate Rule 221(a), Lancaster seeks to have his credibility retried, and to persuade this Court to adopt his self-serving version of events which had been rejected by the Circuit Court. Lancaster would have this Court utterly disregard the Circuit Court’s determination that Lancaster’s testimony was not “credible” at trial. (R. pp. 024-025, para. 74).⁶

⁵ S.C. Code Ann. § 62-3-619 provides that an “executor de son tort” is “[a]ny 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 chargeable as executor of his own wrong (executor de son tort) with respect to the goods and debts. The value of the property is charged to the executor de son tort...”

⁶ See Respondent’s Final Brief, pp. 12-13, pp. 33-34 and pp. 41-42 for a full discussion of Lancaster’s credibility issues.

A. This Court Correctly Affirmed the Circuit Court's Decision that Drews' \$100,000 Payment to Lancaster Constituted a Fraudulent Conveyance.

The Circuit Court correctly found that Drews' and Lancaster's transaction was fraudulent because there were grave credibility issues with Lancaster's testimony, and he was unable to show the bona fides of the transaction.

1. Lancaster's Inconsistent Testimony Regarding Whether there was Contemporaneous Consideration for the \$100,000 Given to Him by Drews, Supported the Circuit Court's Finding that the \$100,000 was a Fraudulent Conveyance to Hide Assets From Drews' Creditors.

Lancaster goes to great lengths to argue that this Court erred in upholding the Circuit Court's finding that there was no contemporaneous consideration given for the \$100,000 transaction, even though Lancaster originally testified that it was a gift. He further testified that he could buy stock with it if he wanted to, (R. p. 418, lines 6-21; R. p. 13, paras. 2-3), that it was important that the \$100,000 was a gift so his tax basis in the property would be higher (R. pp. 13-14; R. 336, line 10 - R. p. 337, line 5), and that he prepared a gift tax return for Drews to sign and mailed it to the I.R.S. (R. p. 337, lines 1-10 and lines 18-25.)⁷ Lancaster ignores all this testimony and claims this Court erred in upholding the Circuit Court's findings in light of his later, contradictory testimony that the \$100,000 was not a gift, but rather consideration for a life estate.⁸

⁷ Lancaster's credibility was further damaged at trial by his inconsistent testimony related to the gift tax return: when asked at trial why he did not produce this tax return, he testified that he could not copy it because the copier was broken the day they prepared it. This testimony was impeached by his 2010 deposition testimony where he stated that he had looked for the copy of the tax return before his deposition. (R. p. 412, line 10 – R. p. 416, line 11).

⁸ See Respondent's Final Brief pages 22-23 for a full discussion of Lancaster's discrepancies and credibility problems relating to this \$100,000 transaction.

Lancaster would have this Court retry the credibility issues contrary to sound legal precedent⁹, and take all the facts in the light most favorable to Lancaster's self-serving testimony. The Circuit Court who observed Lancaster testify, including his trial impeachment with prior deposition testimony, found that there was no contemporaneous consideration for the \$100,000 conveyance (R. p. 026, para. ii), and that Lancaster's testimony lacked credibility (R. pp. 024-025, para. 74). This Court did not "misapprehend" facts, but properly gave deference to the trial judge's findings of fact and credibility determinations, and made rulings based on well-supported evidence and case law.

Furthermore, this Court's affirmance of the Circuit Court's finding that the \$100,000 paid to Lancaster constituted a fraudulent conveyance is consistent with the Supreme Court's opinion in *Windsor Props., Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998). According to *Windsor Properties*, as Lancaster offered contradictory testimony about whether valuable consideration was given for an interfamilial transfer, and only nominal consideration was cited to in the life estate document (R. p. 665), he failed to demonstrate by clear and convincing evidence that the transfer was for consideration and bona fide. *Windsor Props.*, 331 S.C. at 472-

⁹ *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011) (When conducting a de novo review, the standard does not require this court to disregard the factual findings of the trial court nor ignore the fact that the court is in the better position to assess the credibility of the witnesses.); *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) ("[T]he trial judge is in the better position to assess the credibility of the witnesses."); *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (2003) (citations omitted) ("Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal."); *South Carolina Dep't. of Soc. Serv. v. Forrester*, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) ("The credibility of testimony is a matter for the finder of fact to judge....Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.") (citations omitted).

73, 498 S.E.2d at 861-62. Therefore, the Circuit Court properly deemed the transfer to violate the Statute of Elizabeth and its ruling was correctly affirmed by this Court.

2. Although Lancaster Attacks this Court's Decision to Uphold the Circuit Court's Findings Relating to Drews' Indebtedness at the Time of the \$100,000 Payment, He was Unable to Show this Court any Credible Evidence that Drews was Free of Debt.¹⁰

Gordon cited to several pieces of evidence that supported the Circuit Court's finding that Drews was insolvent and in debt when he conveyed the \$100,000 to Lancaster, and throughout his remaining years.¹¹ Lancaster claims that Drews paid off his debt with proceeds from the sale of the Edgewater house. However, only \$5.00 was listed as consideration in the deed and when Drews was asked during the supplemental proceedings about what he actually received from the sale, Drews testified:

...I don't think we got that much. That's why I gave Donald the \$100,000. Because we took a licking on Edgewater. It was put there. When Hugo came, it knocked me out of my business. I lost a lot of money there. It knocked me out of my house, my dock. Everything went awash in the hurricane. And I would say I lost a half a million dollars almost overnight.

(Supp ROA pp. 1114-1115.) Drews did not say anything about paying off all of his debt. There also was not any documentary evidence presented that Drews' debts had been paid. Rather, the evidence established that Drews' insolvency and indebtedness continued:

- In 1990 and 1991, the Drewses borrowed heavily on their home to operate the Drews Company. (R. p. 764, para. 4.)

¹⁰ With a voluntary interfamilial transfer, the burden shifts to the transferee to establish the transfer was valid. *Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013) (citing *Windsor Props., Inc.*, 331 S.C. at 471, 498 S.E.2d at 860). "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." *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973) (quoting *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814 (1937)).

¹¹ See Respondent's Final Brief at pp. 25-29 for additional discussion of the evidence presented relating to Drews' indebtedness.

- The Drewses had no income other than social security benefits after The Drews Company failed and were paying their living expenses using credit cards. (R. p. 765, para. 6; R. p. 385, line 21 – p. 387, line 5.)
- In 1992, The I.R.S. was after Drews for unpaid taxes, and Drews was having problems from some failed construction projects. (R. p. 355, lines 6-12.)
- Also in 1992, Drews paid \$100,000 to Lancaster from the sale of his Edgewater home which constituted almost all of his money. (R. pp. 764-765, paras. 5 & 6.)
- Lancaster paid Drews money from 1993 to 1995 allegedly because Drews could not pay his living expenses and was incurring debt. (R. p. 355, lines 19-25; R. pp. 692-695; R. pp. 1066-1072; R. p. 385, line 21 - p. 386, line 14.)
- In 1995, 1996, and 1997, the Drewses failed to pay their taxes to the South Carolina Department of Revenue. (R. pp. 927, 928, 933 & 934.)
- In 1999, the Drewses owed \$20,000 to two different banks for loans associated with a failed business known as Builder's Station, which had been started in 1996. (R. p. 766, para. 8.)
- Drews lived most of his 90s on his credit card. (R. p. 355, lines 19-21.)
- In 2000, the I.R.S. filed a tax lien of approximately \$56,988 for taxes that had not been paid for the years 1995 through 1997. (R. p. 700; R. p. 509, line 15 - p. 510, line 14.)
- At the end of 2001, Drews still owed the I.R.S. money. (R. p. 954.)
- In December 2001 and March 2002, Gordon was awarded judgments against Drews. (R. pp. 1079-1090.)
- Lancaster presented a list of Drews' credit card debt from 2005 totaling \$35,000. (R. p. 355, lines 22-25 & R. p. 1072.)
- In September 2006, when Drews appeared at the supplemental proceedings, he allegedly had about \$30.00 in cash, about \$350 in his checking account, and owned no money orders, cashier's checks, drafts or coins of any value. (Supp ROA 1140.) The only personal property owned that was worth \$200 or more was minimal household goods, and a 1995 Buick Sentry. (Supp ROA 1141.) He further represented that he did not own any stocks, bonds, or securities. (Supp. ROA 1142.)
- In 2007, Biller accepted \$50,000 from Drews as he was owed "a large sum of money." Drews told Biller that he may need the money back as he was "not doing really well financially." (R. p. 435, line 4 – p. 436, line 4.) Biller never

actually recovered what he was owed from Drews as a month after Biller received this \$50,000, Biller began paying back Drews, starting with a \$10,000 check. (R. p. 435, lines 18 – p. 436, line 24.)

- Drews died in September 2007, and in February 2010 an inventory and appraisal was filed in his estate indicating that there were no assets in his estate. (R. p. 732.)

Ample evidence establishes that since the early 1990s to his death, Drews never was able to pay his own expenses, and had to borrow from multiple sources just to get by.

Despite this evidence, Lancaster continues to represent to the Court that the evidence showed that the debts had been paid off with the sale of Drews' home even when the evidence did not:

.... The Drewses sold their Edgewater Park home to satisfy the IRS liens and the outstanding mortgage loans. (R. p. 355, lines 6-12; R. p. 440, lines 11-15; R. pp. 764-765, para. 5.) After paying off the mortgage loans and the IRS, Mr. and Mrs. Drews were left with \$100,000.00 from the sale of their home. (R. pp. 764-765, para. 5).

Appellant's Petition for Rehearing p. 15 (*emphasis in the original*). As specifically demonstrated in Respondent's Final Brief on pages 27 and 28, none of the evidence and testimony referenced shows that these loans were paid off. These portions of the record prove only that Lancaster was on notice of Drews' indebtedness at the time that Drews proposed the large, \$100,000 conveyance to him,¹² which triggered Lancaster's duty to further investigate pursuant to the Supreme Court holding in *Coleman v. Daniel*, 261 S.C. at 210-211, 199 S.E.2d at 80. Lancaster also has failed to show why Drews' fraudulent intent in the conveyance should not be imputed to him when he failed to investigate whether those loans and other indebtedness had been paid before accepting this large sum of money.¹³

¹² For a more comprehensive discussion of how the testimony Lancaster cites does not evidence that the loans were paid off, see Respondent's Final Reply Brief at pp. 27-29.

¹³ Where the grantee has failed to investigate, the grantor's fraudulent intent in making the conveyance may be imputed to him, and will support a finding of a fraudulent transfer. *Coleman*

Lancaster further argues in his Petition for Rehearing that:

the mere fact the Drewses were able to sell their home and still have about \$100,000.00 left over from the sale shows emphatically there were no outstanding creditor debts. Had there been any recorded liens or judgments then existing, they would have had to be paid off before title could transfer.

Appellant's Petition for Rehearing p. 17. This does not show, much less "emphatically" show, that the Drewses were not in debt as Lancaster represents. This only shows that \$100,000 was left over after the recorded liens or judgments on that property were paid off. The Drewses could have had outstanding car loans, lines of credit with businesses, contractual monetary obligations, business debts, credit card debts, personal loans, and non-recorded judgments, none of which would have shown up in the title search unless those debts had been reduced to judgment or recorded as a lien.

It is also somewhat ironic, if not disingenuous, that Lancaster argues that this Court should rely on what the title search showed when much of this case has been about Drews' and Lancaster's irregularities of following customary business practices when it comes to giving adequate notice to creditors and revealing the true nature of the financial status of the owner and property. Some examples include the Bainbridge life estate that was neither created by deed nor recorded (R. pp. 665-666; R. p. 508, line 22 - p. 509, line 3), the Nuffield life estate which was recorded as a "Memorandum of Lease" (R. pp. 677-681), and the \$40,000 Meeting Street Mortgage that was not recorded until eight months after it was executed (R. p. 346, line 25 - R. p. 347, line 6). It seems a bit absurd that Lancaster argues that the title search for Drews' property would provide an actual reflection of Drews' financial health, much less prove he was not in debt.

v. *Daniel*, 261 S.C. at 210-211, 199 S.E.2d at 80. For a complete discussion, see Respondent's Final Brief at pp. 28-29 & Section VI D, pp. 44-46.

Lancaster fails to point this Court to any convincing evidence that Drews was not indebted at the time of the \$100,000 transfer, nor has he been able to point to any evidence that indicates that either this Court or the Circuit Court's findings of indebtedness were erroneous. Moreover, Lancaster conceded that in his mind, Drews was in "financial straits" during all of the transfers that occurred with Drews. (R. p. 355, line 6 – p. 356, line 3; R. p. 387, line 20 – p. 388, line 2.) Therefore, this Court's affirmance of the Circuit Court's holdings relating to the \$100,000 transfer were correct, and Lancaster's Petition for Rehearing should be denied.

3. Multiple Badges of Fraud Surrounded this \$100,000 Transfer which Further Supports this Court's Affirmance of the Circuit Court's Holdings.

Aside from Drews' insolvency and indebtedness, there were multiple other badges of fraud surrounding this \$100,000 conveyance, which supports the Circuit Court's findings. Gordon showed that Drews was insolvent at the time of the transfer; there was lack of consideration for the conveyance; Drews and Lancaster were related and shared a close relationship, Drews and Lancaster concealed the transaction by failing to follow customary business practices; the \$100,000 transfer constituted nearly all of Drews' money; and Drews retained benefit and control of the \$100,000 by living in the home purchased with it, selecting the next home largely purchased with this money, and receiving payments from Lancaster whenever he requested them.¹⁴ This Court correctly affirmed the Circuit Court's findings related to the \$100,000 conveyance as Gordon established Drews' and Lancaster's fraudulent intent in this and the other transactions between them.

¹⁴ See *Coleman v. Daniel*, 261 S.C. at 209-10, 199 S.E.2d at 79-80, which sets forth the badges of fraud our courts have recognized to frequently accompany fraudulent conveyances, and Respondent's Final Brief, pages 24-32, for a full discussion of the badges of fraud that accompanied the \$100,000 Drews conveyed to Lancaster.

4. This Court Correctly Affirmed the Circuit Court's Holding that Lancaster's \$40,000 in Payments to Drews were Part of a Scheme to Hide Assets from Drews' Creditors and then Return to Drews Money as he Wanted it.

Lancaster again asserts in his brief that Gordon produced no credible evidence demonstrating the Drewses had any unpaid debts or outstanding creditors during the 1993-1995 time period. Appellant's Final Brief at p. 19. He further asserts that:

Mr. Lancaster made loans to the Drewses in various amounts from 6 February 1993, through 30 January 1995, and it appears the Drewses were paying off their credit cards in part or in whole on an intermediate basis – essentially somewhat as the credit became due or, at least, not significantly overdue. (R. p. 1065.) (*emphasis in the original*) (*footnote omitted*)

Although Lancaster cites page 1065 of the record to support his proposition that the Drewses were paying off their credit card debts, all this page contains are notes jotted down by Drews of what money he was receiving back from Lancaster. These notes have nothing to do with what Drews was supposedly doing with the money, or whether these sums were sufficient to pay for Drews' credit cards and other expenses. Lancaster continues to argue conflicting positions by arguing that the Drewses had no income after their company failed except for social security benefits, they were living off of credit cards, and that he had to help them pay off their "mountain of credit card debt", while at the same time claiming that they were debt-free without any evidentiary proof. (Appellant's Petition for Rehearing at p. 19.)

Lancaster also tries to attack this Court's decision upholding the Circuit Court's finding that Lancaster assisted Drews in defrauding his creditors by stating that Lancaster had nothing to do with how these transactions were formed. The Circuit Court, however, specifically rejected this position largely due to Lancaster's inconsistent trial testimony:

The court finds that his failure to testify that he was not aware of any of this and didn't know anything about notes and mortgages and how this functions, the court does not find believable. The issue about neither party showing any payment of

interest by the Drews on the tax return, the '05 tax return, the defendant didn't show any return of interest. The court finds it was a concerted effort by both parties to hide all these transactions from any view of the public either by recording in the Register Mesne Conveyance, tax return, or any other methods to avoid any finding those assets by any creditor.

(R. p. 582, line 19 - p. 583, line 5.) This Court was correct in affirming the Circuit Court's finding, as it was based on the Circuit Court's determination that Lancaster's testimony was not credible on these issues, and also based on evidence which demonstrated the parties' complete failure to follow customary business practices.

Mr. Dorsey Biller's trial testimony provided additional evidence which supports that the \$40,000 in payments were part of a surreptitious scheme to return to Drews money he hid from creditors. Biller's testimony demonstrated that this was not the only time that Drews had given someone close to him a large sum of his money to pay the money back to him a little at a time. Mr. Biller was given a check for \$50,000 from Drews. Although purportedly to pay back money he owed to Biller, Drew told Biller that he was not doing really well financially and that Drews may need some of the money back. Drews then asked Biller, beginning the very next month, to return money back to him. (R. 435, lines 4-17.) At Drews' request, Biller made several payments back to Drews, and then once Drews died, Biller made payments to Drews' wife, Effie Drews. (R. p. 435, lines 18 – p. 436, lines 5-13.) Once Effie Drews died, the remaining amount of the \$50,000 was paid to her estate. (R. p. 436, lines 14-24.) The evidence also showed that the \$50,000 check was originally endorsed by Drews' sister, Jesse Atkinson. Atkinson testified that the Drewses gave her money to open a bank account, and that the money was to be used for the Drewses. (R. p. 1007, line 3 – p. 1008, line 6.) Biller explained in his testimony that Drews tried to give the money to Atkinson first, "but she would not do the deal with him." (R. p. 441, lines 9 – p. 442, line 4.) Although this transaction did not involve Lancaster, it demonstrated Drews' pattern of finding

someone close to him with whom he could park a large number of assets and who would agree to pay the money back to him in partial payments as he requested it. This is the same thing Drews did with the \$100,000: he gave a large sum of money to Lancaster, and little by little, asked Lancaster to return the money to him.

Lancaster also failed to refute the several other badges of fraud that surrounded these \$40,000 in payments: the lack of valuable consideration, the failure to follow customary business practices, and Drews' control and use of the money.¹⁵ Therefore, this Court correctly affirmed the Circuit Court's decision that the \$40,000 in payments Lancaster gave Drews were not legitimate loans, but rather were part of a concerted effort to conceal Drews' assets.

5. This Court Did Not Err in Affirming the Circuit Court's Ruling that the \$20,000 Meeting Street Mortgage Drews gave Lancaster was a Fraudulent Conveyance.

This Court upheld the Circuit Court's determination that the \$20,000 mortgage between Lancaster and Gordon involved actual moral fraud. It is important to note that Gordon was an existing creditor at the time of this transaction, and did not have to show actual moral fraud where no consideration was given.¹⁶ *Windsor Props.*, 331 S.C. at 470-71, 498 S.E.2d at 860 (citations omitted). Therefore, even in the absence of actual moral fraud, this Court should affirm the Circuit Court's ruling that the \$20,000 Meeting Street mortgage was a fraudulent conveyance.

In arguing that this Court erred, Lancaster once again seeks to have this Court ignore and disregard the Circuit Court's credibility determinations relating to Lancaster's testimony. As this Court points out in its opinion, the Circuit Court found Lancaster's testimony contradictory in that

¹⁵ See Respondent's Final Brief, Section V, pp. 34-37, for a full discussion.

¹⁶ See Respondent's Final Brief, Section VI, A, pp. 38-40, for a full discussion of Lancaster's failure to establish there was valuable consideration for this inter-familial transaction, including his testimony that he wasn't initially aware of this mortgage. (R. p. 352, lines 1-6)

he testified that he was not aware of the \$20,000 mortgage and then changed his story and testified that he participated in its genesis. (R. p. 019, para. 44.)

Lancaster also seeks to have this Court consider this \$20,000 mortgage in isolation. Lancaster continues to ignore the facts presented that this transaction was part of a pattern and scheme to defraud Drews' creditors by representing to the public that there was excessive debt on the Meeting Street property. Lancaster fails to acknowledge, or address in any way, that this \$20,000 mortgage was the third mortgage granted to him, way in excess of any money due to him.¹⁷ The first two mortgages on this same property for \$100,000 and \$40,000 already granted Lancaster security that greatly exceeded the \$60,000 plus interest that Lancaster claimed Drews owed him. (R. p. 326, lines 17-23.) As none of these mortgages was satisfied, and the total was excessive of any real debt, creditors were left with the impression that this property was encumbered in excess of its actual debt by at least \$100,000. (R. p. 19, para. 45.) Lancaster also cannot refute that the earlier \$100,000 mortgage was given after Gordon's cause of action accrued and when there was a pending bank claim on Drews' personal guarantee (R. p. 367, line 23 – R. p. 368, line 3), and that the \$40,000 excessive mortgage was given three months after Gordon's fraudulent conveyance suit was filed. Lancaster's testimony that the second mortgage of \$100,000 was in case Drews needed more money (R. p. 351, lines 17-22) impeaches his argument that the \$20,000 mortgage was to provide security for Drews' bank loans Lancaster paid off for him, (Appellant's Petition for Rehearing, pp. 20-21), as he already had more than sufficient security given the excessive \$100,000 mortgage. Lancaster argues that he should be granted a rehearing

¹⁷ See Respondent's Final Brief pp. 7-9 and 41-42 for the facts and arguments relating to these three mortgages. Lancaster failed to appeal the findings related to the first two mortgages so the findings related to them, including that they are fraudulent conveyances and part of a scheme to defraud creditors, are now the law of this case.

as “this Court of Appeals misinterpreted and misapplied the facts of this transaction” in affirming the Circuit Court’s holding that this transaction was not supported by consideration and constituted actual moral fraud. Appellant Lancaster’s Petition for Rehearing, p. 21. This position is untenable given that Lancaster refuses to acknowledge or address the other two Meeting Street Mortgages that had already provided excessive mortgages on the property, and that the Circuit Court had found Lancaster’s testimony inconsistent and not credible relating to this transaction. Lancaster improperly seeks to have this Court retry this issue, and therefore, his Petition for Rehearing should be denied.

IV. THIS COURT ALSO CORRECTLY AFFIRMED THE CIRCUIT COURT HOLDING THAT GORDON IS ENTITLED TO RECOVERY BECAUSE LANCASTER FAILED TO APPEAL THE FINDINGS OF A FRAUDULENT SCHEME AS WELL AS SEVERAL INDIVIDUAL TRANSACTIONS, WHICH ESTABLISHED HIS FRAUDULENT INTENT.

Lancaster failed to appeal the Circuit Court’s finding that these transactions were part of a fifteen-year scheme to defraud his creditors:

Drews and Lancaster structured the life estates, mortgages, assignments, and transfers as convoluted, multi-step transactions in contravention of typical business practices in order to defraud Drews’ creditors.

(R. p. 26, para. (i)). As fully set forth in Respondent’s Final Brief, Issue II at pages 17 and 18, Lancaster appealed only three of the transactions in this scheme, and did not appeal all the transactions, or the finding related to the scheme itself. Therefore, the findings regarding the other transactions¹⁸ being fraudulent, as well as the finding of the fraudulent, multi-step transactions between Drews and Lancaster are the law of this case. *Ex Parte Morris*, 367 S.C. 56, 65, 624

¹⁸ Other transactions that Lancaster did not appeal, and that the Circuit Court found to be fraudulent conveyances include: the substitution of the Nuffield property for the Bainbridge property, the first mortgage of \$40,000 on Meeting Street property, the second mortgage of \$100,000 on the Meeting Street property, and the assignment of \$190,000 mortgage on the Meeting Street property.

S.E.2d 649, 654 (2006) (as a general rule, an unchallenged ruling, right or wrong, is the law of the case).

One of the transactions Lancaster failed to appeal was the \$190,000 note and mortgage which Drews received for his Meeting Street Property. This note and mortgage was immediately assigned to Drews' wife who then in turn assigned the mortgage (but not the note) to Lancaster, purportedly in substitution for the excessive \$40,000, \$100,000 and \$20,000 mortgages. Now Lancaster was secured in the amount of \$190,000, *three times greater* than the amount Lancaster was allegedly due. The Trial Court found:

Importantly, at the time the Second and Third Mortgages were granted, Gordon's cause of action had already accrued. It was in large part the satisfaction of these fraudulent mortgages that was used to justify the later Assignment that occurred a month before the Gordon trial.

(R. p. 20, para. 48.) The excessive nature as well as the timing of this last assignment demonstrate the fraudulent nature of these transactions. The Circuit Court correctly found that Lancaster actively participated with Drews in this scheme to create the impression that Drews' property was encumbered in excess of the actual debt so as to avoid creditors. (R. pp. 019-020, para. 47.) Since there was no appeal of the findings related to this transaction, it has become the law of the case, and provides additional support for this Court to uphold the Circuit Court's rulings relating to the fraudulent nature of the three isolated transactions Lancaster appealed.

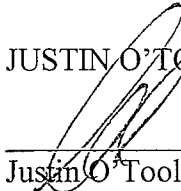
CONCLUSION

Appellant Lancaster's Petition for Rehearing should be denied as he failed to show this Court any points supposedly overlooked or misapprehended. He rather argues that the Court should adopt Lancaster's variations of testimony that support his defense, and ignore the remainder of Lancaster's testimony and other evidence, as well as all of the Circuit Court's credibility determinations. As for the judgments' active period, this Court correctly applied *Linda Mc*

Company and other controlling case law when affirming the Circuit Court's decision that these judgments were active, as Gordon had been diligent in trying to enforce his judgments, and had brought and pursued this action within the ten-year period. Further supporting the Circuit Court's decision was that Gordon was entitled to collect for these fraudulent conveyances as he had the Estates' assignments which he was pursuing in this litigation. Moreover, Lancaster failed to appeal the Circuit Court's findings of a fraudulent scheme consisting of many transactions over a period of years, so those findings have become the law of the case, and Gordon should be allowed recovery based on those findings.

Based upon the foregoing arguments and citation of evidence and authority, the Respondent, Frank Gordon, Jr., respectfully requests that this Court of Appeals deny Appellant's Petition for Rehearing and affirm the decisions of the Circuit Court in all respects.

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Attorneys for the Respondent

January 13, 2017
Charleston, South Carolina

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096
And 2011-CP-10-8840

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

Respondent.

v.

Donald W. Lancaster,

Appellant.

**Proof of Service for Respondent's Return to
Appellant's Petition for Rehearing**

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I, Justin O'Toole Lucey, Esquire, hereby certify that on January 13, 2017, I served a copy of the *Respondent's Return to Appellant's Petition for Rehearing* submitted by the Respondent, Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, on counsel for Appellant, Donald W. Lancaster, via the United States Mail, postage pre-paid, and addressed as follows:

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Mount Pleasant, SC
January 13, 2017

The South Carolina Court of Appeals

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

v.

Donald W. Lancaster, Appellant.

Appellate Case No. 2014-001247

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FEB 24 2017

SC COURT OF APPEALS

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr.

J.

H. B. Wilkins

J.

Paul C. Thomas

J.

Columbia, South Carolina

cc:

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Alexandra H. Austin, Esquire

FILED

February 16, 2017