

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Martin R. Banks, Special Referee

RECEIVED
JUN 21 2013
SC Court of Appeals

Opinion No. 5101 (S.C. Ct. App. Filed March 20, 2013)

James T. Judy, Bobby R. Judy, and Kevin Judy, Respondents,

v.

Ronnie F. Judy, J. Todd Judy, Ryan C. Judy and Wanda B. Judy, Defendants
Of Whom Ronnie F. Judy is the Petitioner.

PETITION FOR WRIT OF CERTIORARI
AND MEMORANDIUM IN SUPPORT

Appellant, Ronnie F. Judy, hereby moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an Order granting Writ Of Certiorari and submits the memorandum below in support of same. Appellant respectfully submits that the Court may have overlooked or misapprehended certain points, as the following shows:

I. Respondents were not foreseeable future creditors entitled to relief under S.C. Code § 27-23-10.

Respectfully, the Appellant submits that the declaration by the Court that the Respondents were subsequent creditors as contemplated by the statute at the time of the transfers misapplies the law regarding such classification. S.C. Code § 27-23-10 derives from the Statute of Elizabeth enacted in 1570. This law declares “utterly void” conveyances designed to “delay, hinder, or defraud creditors.” S.C. Code Ann. § 27-23-10, et seq. (1976).

S.C. Code § 27-23-10 and the case law cited by the Court provides the basis by which existing and future creditors might seek the avoidance of fraudulent transfers and Appellant does not contend that the Court’s reliance thereon is in error. However, there exists no statute or case law in South Carolina delineating a bright-line answer to whether a transfer was made sufficiently in advance of the accrual of a creditor obligation so as not to be deemed fraudulent.

At the risk of oversimplifying the issue, Appellant contends that there are three categories of creditors one must consider in whether considering whether a transfer is fraudulent under S.C. Code § 27-23-10: present creditors, foreseeable subsequent creditors, and unknown future creditors. As there is no doubt that the Respondents were not present creditors at the time of the complained of transfers, the Court seemingly addresses the Respondents as if they were foreseeable future creditors, which Appellant contends is error. The Court correctly identifies the standard for assessing a claim by a foreseeable future creditor, however the Appellant contends that analysis under this standard is inapplicable because the Respondents are unforeseen future creditors.

An unforeseeable future creditor is a creditor whom a debtor cannot reasonably foresee; for example, a party injured by a liable debtor in an auto accident at some future date after a transfer. Courts and scholars across the nation have focused on protecting only those creditors whose

claims are proximate in time to the asset transfer. (See *Leopold v. Tuttle*, 378 Pa. Super. 466; 549 A2nd 151 (1988) (finding the term 'future creditor' to mean a creditor whose claim has not matured and whose claim is reasonably foreseen as arising in the immediate future; a 'future creditor' does not exist unless a conveying party can reasonably foresee incurring the costs of a claim at the time of the conveyance); Peter Spero, *Asset Protection: Legal Planning and Strategies*, 1994 (a person whose claim arises after the fraudulent transfer can qualify as a future creditor capable of voiding the transfer as fraudulent if the transfer was made with the intent to defraud that particular creditor); Henkel, *33rd Annual Philip E. Heckerling Institute on Estate Planning, Asset Preservation Aspects of Domestic Estate Planning*, 1999 (a future creditor must be reasonably foreseeable). Unknown future creditors separated by years and events from the asset transfer have generally not been protected by the courts. *Id.*

There is no foundation in the law that an individual must preserve his assets for the satisfaction of unknown future claims. If this were not the case, inter vivos transfers of all sorts would be prohibited: gifts to children, charitable contributions, or settlement of trusts for the benefit of others. In order to establish that a conveyance is fraudulent and voidable, there must be evidence that an obligation was present or not so remote as to have been foreseeable in order for that conveyance to be voidable under the Statute of Elizabeth. *Wantulok v. Wantulok*, 214 P2d 477, 484 (Wyo 1950); *Weinhart v. Weinhart*, 193 Misc 424, 84 NYS2d 375 (1948) ("To constitute a fraudulent conveyance there must be a creditor [who could] be defrauded"); *City of Philadelphia v. Stephan Chemical Co.*, 713 F Supp 1491 (ED Pa 1989); *In re Kusar's Estate*, 5 Ohio Misc 23, 211 NE2d 535 (1965); *In re Oberst*, 91 BR 97 (BC CD Cal 1988) *see also* Peter A. Alces, *The Law of Fraudulent Transactions* ¶ 5.79 (1989). In the present case the Court recognized that Appellant did not have an eye towards the future indebtedness to the

Respondents. Accordingly, Appellant contends that, because the Respondents were not foreseeable future creditors at the time of the disputed transfers they lack standing to set aside the disputed Remote Conveyances.

II. Even if the Respondents were foreseeable future creditors with standing to claim relief under S.C. Code § 27-23-10, the Court misapplies the standard to the facts in the present action.

The Statute of Elizabeth authorizes avoidance of fraudulent transfers by both existing and subsequent creditors. *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995). The standard for avoiding a specific transfer depends on the status of the creditor.

For existing creditors, conveyances can be set aside in two instances: First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full--not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.

Id. (Citing *Gentry v. Lanneau*, 54 S.C. 514, 32 S.E. 523 (S.C.1899)).

The standard applied when a subsequent creditor challenges a transfer as fraudulent is also set forth in *Gentry v. Lanneau*,

While it is unquestionably true that the mere fact that a deed is without consideration--a voluntary deed--will not render it fraudulent as to subsequent creditors, *especially when they have notice*; yet if, in addition to its being voluntary, it was made with a view to future indebtedness, or attended with some circumstances of fraud other than what arises from its being voluntary, then it may be declared null and void for fraud, even at the instance of

subsequent creditors. While, therefore, an existing creditor may assail a voluntary deed, even though executed without any evil intent or fraudulent purpose whatever, and even if the motive which prompted the act should be of the most praiseworthy character, yet a subsequent creditor is not permitted to do so without showing some actual moral fraud. *Walker, Evans & Cogswell v. Bollmann Bros.*, 22 S.C. 512, and cases therein cited. In other words, when a subsequent creditor with notice attacks the voluntary deed of his debtor, there is no irrebuttable presumption of fraud arising from the fact that the transfer is without consideration, and the fact of indebtedness at the time; but all the circumstances must be weighed by the Court or jury trying the issue, for the purpose of ascertaining whether fraud, actual and positive, as distinguished from what is called "legal fraud," really existed at the time.

[emphasis added] *Gentry v. Lanneau*, 54 S.C. 514, 515-516, 32 S.E. 523 (S.C.1899)(Citing *Jackson v. Plyler*, 38 S.C. 496, 17 S.E. 255 (S.C.1893)).

Interestingly, the Court seemingly relies upon *In re Ducate*, 355 B.R. 536 (D.S.C. 2006) in reaching the conclusion that the Remote Conveyances were voluntary and presumed fraudulent, and while not with an eye toward a specific future indebtedness to Respondents, with an eye towards existing and known potential creditors, and therefore voidable as fraudulent. However, the Court's reliance upon *In re Ducate*, 355 B.R. 536 (D.S.C. 2006) is misplaced as the opinion therein addressed the propriety of summary judgment and not a determination on the merits. Instead, the Court should have relied upon *In re Ducate*, 369 B.R. 251 (D.S.C. 2007). *In re Ducate*, 369 B.R. 251 (D.S.C. 2007) is as close of a case directly on point as exists in South Carolina jurisprudence (even though it is admittedly only persuasive precedent). In *In re Ducate*, 369 B.R. 251 (D.S.C. 2007) the court, much like the instant case, was faced with creditor(s) not in existence at the time of the complained of transfer, through the bankruptcy trustee, seeking to avoid the transfer(s) as subsequent creditors. (The only creditor in existence at the time of the disputed transfer(s) in *In re Ducate*, 369 B.R. 251 (D.S.C. 2007) was barred by the statute of

limitations from pursuing its claim, as was one of the two creditors pointed to by the Respondents herein). The analysis of the *Ducate* Court is therefore very persuasive when applied to the within facts.

The *Ducate* Court reasoned that a complaining subsequent creditor carries the burden of establishing both that the complained of transfer was voluntary and that it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud that creditor. *Id.* (Citing *Campbell v. Collins (In re Collins)*, C/A No. 03-04179-JW, Adv. Pro. No. 04-80284, 2005 Bankr.LEXIS 2924, 16-176(Bankr.D.S.C. April 26, 2005). In *Ducate*, as in the instant action, the debtor stipulated that the transfer was voluntary. Thus, the only issue before the *Ducate* Court and this Court was whether the transfers were made with an actual fraudulent intent to defraud creditors or were made with a view to future indebtedness.

The evidence in the *Ducate* case, as in the present action, established that the debtor was solvent at the time of the transfers. (Appellant satisfied the only existing creditor at the time of the transfers, a 1997 judgment creditor, in 2000 (R.p. 372, 635; Defendant's Exhibit 10, Plaintiffs Exhibit 40, p. 32; The only other creditor in existence at the time of the transfer was speculative and such claim has now been barred by the statute of limitations.)

In the *Ducate* case, as in the instant action, there was no evidence to suggest that at the time of the disputed transfer that the debtor had any indication that he would become liable to the subsequent creditor. Certainly, it cannot be disputed that Appellant did not have knowledge at the time of the disputed transfers that he would subsequently become liable for alleged intentional torts committed upon Respondents and there certainly was not evidence or testimony to that effect offered in the lower court.

In the *Ducate* case, as in the case herein, at the time of disputed transfer(s) the subsequent

creditor had constructive notice of the transfer(s). (Appellant's Remote Conveyances in 1998 were a matter of public record; Respondents had actual knowledge the Remote Conveyances by virtue of their involvement in partition actions concerning the same (R.pp. 391-394; Plaintiffs Exhibit 4) and (R.pp. 397-400; Plaintiffs Exhibit 6)). "If a creditor is a subsequent one with notice, as such he can have no ground upon which he can say that a gift is a fraud upon him." *Walker, Evans & Cogswell v. Bollmann Bros.*, 22 S.C. 512, 1885 WL 3614 (S.C.1885). "In other words, it would be unjust to allow a subsequent creditor to avoid a transfer, even one that is voluntary, as fraudulent if the creditor knew or should have known of the transfer before the debt was incurred." *In re Ducate*, 369 B.R. 251, 260-61 (D.S.C. 2007)

In *Ducate*, as in the present case, the creditor(s) relied on the "badges of fraud" recognized in *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973) to prove the debtor possessed fraudulent intent when he made the disputed transfer. However, the Court in *Ducate* reached a different and, in the opinion of the Appellant, proper conclusion that "[u]nder South Carolina law a subsequent creditor, especially one with knowledge, may not rely only on 'badges of fraud' (i.e., constructive fraud) to prove fraudulent intent." *In re Ducate*, 369 B.R. 251, 261 (D.S.C. 2007). The *Ducate* Court went on to reason that a subsequent creditor bears the burden of proof to establish fraud in fact, or actual moral fraud. *Id.* (Citing *37 Am Jur 2d Fraudulent Conveyances and Transfers* § 128 (Citing *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406, 408 (Ct. App. 1995))).

This Court has acknowledged that Appellant may not have had an eye toward the specific future indebtedness to the Respondents. However, this Court relies upon the badges of fraud to reach the conclusion that there was actual moral fraud on the part of Appellant. This Court goes on to state that "[e]ven if we concluded clear and convincing evidence of actual moral fraud had

not been adduced ..., because the Remote and Recent Conveyances were to family members and voluntary, the burden shifted from the [Respondents] to the grantees to establish the bona fides of the transfers.” As it pertains to the Remote Conveyances, Appellant respectfully suggests that such a ruling is in error as to the Remote Conveyances because a subsequent creditor, especially one with knowledge, may not rely only on ‘badges of fraud’ to prove fraudulent intent and, instead, the subsequent creditor bears the burden of proof to establish fraud in fact, or actual moral fraud. *In re Ducate*, 369 B.R. 251, 261 (D.S.C. 2007) (Citing *37 Am Jur 2d Fraudulent Conveyances and Transfers § 128* (Citing *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406, 408 (Ct. App. 1995))). Accordingly, Appellant urges that, given the undisputed evidence in this case, there exists no competent evidence that Appellant’s transfers were made with actual moral fraud as to the Remote Conveyances and the same are therefore immune from challenge under the Statute of Elizabeth.

Moreover, creating a presumption of fraud as to remote subsequent creditors has sweeping negative effects on the public at large. Such a presumption would put in jeopardy seemingly countless transfers and would jeopardize existing estate planning in this State. Under such a ruling, a remote subsequent creditor would be entitled to a presumption of fraud for gifts made *inter vivos*. Therefore, a completely solvent debtor attempting to make gifts for estate planning purposes or otherwise, would have the burden of proving that the gifts were bona fide if that debtor were later involved in a car accident, sued for professional negligence, or were involved in a divorce. Even more, this presumption could seemingly be raised in perpetuity, with no relation to the timing or circumstances at the time of the transfer. Such an outcome could place in jeopardy numerous gifts, trusts, etc. and such a ruling should be avoided as a matter of public policy.

III. The Court's conclusion that the Appellant's challenge to special referee authority to reform deeds issued in partition actions filed after the Remote Conveyances was neither raised to nor ruled upon by the special referee misapprehends the record. Moreover, the challenge raises a question of subject matter jurisdiction which can be raised for the first time on appeal.

A. The challenge to the special referee's authority was raised and ruled upon.

This Court held that the issue of the authority of the special referee to reform deeds was unpreserved. An appellate court will not consider issues raised for the first on appeal. *Hoffman v. Power* 298 S.C. 338, 380 S.E.2d 821 (1989). The purpose of an appeal is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him. *Roche v. S.C. Alcoholic Beverage Control Commission*, 263 S.C. 451, 211 S.E.2d 243 (1975).

However, in the present case the issue of the partitions and the ability of the court to reform deeds issued in partition actions filed after the Remote Conveyances was both raised and ruled upon by the special referee. The record is replete with testimony concerning the partition actions. Early on in the case Appellant made motion for sanctions (treated by the lower court as a motion for summary judgment) predicated in part upon certain portions of the Remote Conveyances being part of a partition action (R. p. 109, line 11 to R. p. 111 line 18 (raised by Appellant and summary judgment denied by the lower court). The parties repeatedly offered testimony of the partition deeds. (R. p. 192-94; R. p. 207; R. p. 212-14; R. p. 237-38; R. p. 240; R. p. 285- 89). In fact in the last citation to the record *supra*, the Court was making a determination as to the admissibility of certain documents into the record and Appellant was attempting to impress upon the import of the partition actions and deeds. (R. p.285-89). In response to this the lower court ruled

“this whole action is bent on uprooting – not this finding [of the partition court], but the situation through the Court of Equity, because the Court of Law is a little bit different. This is a Court of Equity where we’re actually – *we see what the paperwork says and there might be some underlying factors in equity that would make [the rulings or deeds of the partition courts] no longer.*”

[emphasis added] (R. p. 288 line 22 to R. p. 289 line 4).

Moreover, the trial court’s order, *sua sponte*, deems the respective partition deeds reformed “as if [Appellant] were a party to the partition actions”. (R.p. 22; Order, p. 16). Because this action was done by the court *sua sponte* in the Order, the Appellant could not have contemporaneously objected to the special referee decision. The issue of the ability of the lower court to reform deeds issued in partition actions filed after the Remote Conveyances was raised at in an appropriate Rule 59 motion. (R.p. 98-100). Thus, the issue was raised and ruled upon by the lower court, and therefore appropriate for determination by this Court.

B. The authority of the special referee involves subject matter jurisdiction and can be raised for the first time on appeal.

The question the authority of the special referee to reform deeds issued in partition actions filed after the Remote Conveyances is a challenge to the subject matter jurisdiction of the lower court. It is well-settled that issues relating to subject matter jurisdiction may be raised at any time. *See Johnson v. State*, 319 S.C. 62, 459 S.E.2d 840 (1995); *GNOC Corp. v. Estate of Rhyne*, 312 S.C. 86, 439 S.E.2d 274 (1994); *State v. Gorie*, 256 S.C. 539, 183 S.E.2d 334 (1971). Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Goldkist*, 314 S.C. 235, 442 S.E.2d 598 (1994); *Watson v. Watson*, 319 S.C. 92, 460 S.E.2d 394 (1995).

In this case, the special referee granted the remedy of subjecting the Appellant, to the outcomes reached in partition actions to which he was not a party. The trial court “declare[d],

sua sponte, that the respective partition deeds that were the product of fraudulent conveyances be deemed reformed, the same as if [Appellant] were a party to the partition actions and putative grantor or grantee, as the case may be, to the partition deeds". (R.p. 22; Order, p. 16). The court even notes that the consequence of its ruling is to treat the Appellant, a party who admittedly had no interest in the partition actions concerning the remote conveyances, as if he "were the real party in interest in the partition proceedings". (R.p. 22; Order, p. 16)

The remedy of subjecting the Appellant to the outcomes reached in partition actions to which he was not a party implicates subject matter jurisdiction. Although there is no doubt that the special referee had the authority to hear the case concerning the Statute of Elizabeth. However, in fashioning a remedy that, *sua sponte*, modifies orders of other courts, the lower court exceeded the subject matter jurisdiction conferred upon it. The referee could no more adjudicate the rulings of other courts than a family court judge could make a ruling on a breach of contract action, even if the same were made as part of an action to which the judge/referee was properly exercising jurisdiction. Nor could a bankruptcy judge grant divorce in a bankruptcy proceeding, even if it seemed like the only way to fashion the appropriate remedy amongst the parties. Similarly, Appellant's interest in Parcels C - G, as revived by the order within, was not adjudicated in the partition actions and the trial court lacked the subject matter jurisdiction to, *sua sponte*, deem the respective partition deeds reformed "as if [Appellant] were a party to the partition actions". (R.p. 22; Order, p. 16) In short, the subject matter jurisdiction conferred upon the special referee was limited to only those challenged conveyances, or portions thereof, that were not the subject of determinations by other courts.

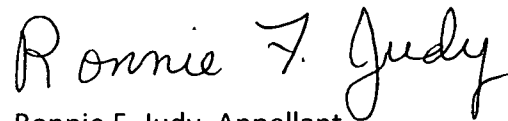
Please take notice that in the Court of Common Pleas FOR THE FIRST JUDICIAL CIRCUIT, Civil Action No. 01-CP-18-122 in the NOTICE OF MOTION AND MOTION TO DISMISS AS TO RONNIE F. JUDY AS A PARTY DEFENDANT in The State Of South Carolina – v - J. Todd Judy and Ronnie F. Judy, Ronnie F. Judy was dismissed as a party Defendant on the grounds that Defendant does not claim an ownership interest in the property described in the Summons and Complaint filed with the Court as written by William E. McIntosh, III, Attorney for Plaintiff (copy attached) and the Judgment on Trial or Order by the Court filed August 7, 2001 granted Motion to Dismiss Ronnie Judy and signed by Circuit Court Judge, Rodney A. Peebles on August 6th, 2001. This information was intentionally left out of the transcript of the Record of Appeal dated July 18, 2011. The transcript is not verbatim. When a request for a copy of the Court Tape of said Hearing, an employee of the A. William Roberts, Jr. and Associates Court Reporting stated the law only requires a tape to be saved for six (6) months and then they were destroyed. Under Rule 607 of The South Carolina Court of Administration, it states recordings are to be kept five (5) years before destroying.

Point in reference: Judge Martin R. Banks called Ronnie Judy down in Court for cursing in his Court Room. Judy replied he had not cursed. The Judge then asked the opposing Attorney, Caper Barrs for clarity. Barrs stated Judy was referring to the pond dam in question at the time. In the transcript cursing was changed to "swearing" (page 88 of the transcript, line 18). The Judge **did not** apologize to Judy at this time. (page 88, line 21)

Please take notice the February 2013 Roster for the South Carolina Court of Appeals, stated the Judges scheduled to hear Judy's Appellate Case No. 2012-209028 were Few, Geathers and Lockemy. However, Huff, Williams, and Konduros acquaintances of the opposing Attorney Caper Barrs were there to rule.

Ronnie F. Judy does not feel the Court has upheld his Constitutional Rights to fair and impartial hearings in the above mentioned matters.

WHEREFORE Appellant prays for an Order For Writ of Certiorari brought forth in the issues afore mentioned.



Ronnie F. Judy, Appellant
1872 Sandridge Road
Dorchester, S. C. 29437
(843)563-3630

Other Counsel of Record:

Capers G. Barr, III
P.O. Box 1037
Charleston, S. C. 29402-1037
(843)577-5083

South Carolina Court of Appeals
1015 Sumter Street
Columbia, S. C. 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Martin R. Banks, Special Referee

Opinion No. 5101 (S.C. Ct App. Filed March 20, 2013)

James T. Judy, Bobby R. Judy, and Kevin Judy, Respondents,

v.

Ronnie F. Judy, J. Todd Judy, Ryan C. Judy and Wanda B. Judy, Defendants
Of Whom Ronnie F. Judy is the Petitioner.

PETITION FOR WRIT OF CERTIORARI
AND MEMORANDIUM IN SUPPORT

CERTIFICATE OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Petition for Writ of Certiorari to the Respondents, James T. Judy, Bobby T. Judy, and Kevin Judy, by depositing a copy of it in the United States Mail, postage prepaid, on June 21, 2013, addressed to their attorney of record, Capers G. Barr, III, Post Office Box 1037, Charleston, South Carolina 29402-1037 and a copy to the South Carolina Court of Appeals/¹⁰¹⁵ Sumter Street, Columbia, South Carolina,

Ronnie F. Judy, Pro Se
1872 Sandridge Road
Dorchester, S. C. 29437
(843)563-3630

