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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, Master In Equity and Special Circuit Court Judge
Trial Court Case No. 2022CP07-02454

Appellate Case No. 2023-000411

Blue Bell Holdings, LLC ..... Appellant,

v.

Gary C. Johnson, Stephen D. Halpern, Holly A. Angel, Holly Ann, LLC, Belmont Properties, LLC, Shoreline Funding, LLC and Orange Capital, LLC (Nevis)..... Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

This appeal concerns whether a trial court should enjoin a defendant facing a multi-million-dollar judgment in civil litigation from voluntarily gifting, transferring, or otherwise disposing of his individual assets for no consideration after a plaintiff files a lawsuit against him. Irrespective of the purpose of the transfers—which (as explained below) the plaintiff is not required to prove—the transfers leave the defendant insolvent and place his pre-suit individual assets into the hands of third parties, farther away from the plaintiff's reach, and potentially into the hands of offshore entities outside the court's reach. Well-established South Carolina law, fundamental fairness, and common logic say a defendant should not be allowed to do so.

In this case, the defendant should be enjoined from immunizing himself from a seven- or eight-million-dollar liability and making himself insolvent by giving or transferring all his assets away. In the alternative, defendant should be enjoined from making it immensely more difficult, if not impossible, for the plaintiff to collect on a judgment after the plaintiff has commenced a legal action and later presented clear evidence of the defendant's continued fraud. Finally, the defendant should be enjoined from engaging in additional fraudulent transfers, which would render a judgment finding the transfers challenged here meaningless if a defendant can engage in future transfers to parties who are not before the court.

And that is initially what happened here. Originally, in this fraudulent transfer action, the trial court entered an *ex parte* temporary restraining order ("TRO"), restraining the defendant from transferring his assets and finding that the failure to enter a TRO would leave the plaintiff irreparably harmed and with an inadequate legal remedy. However, for reasons unknown, the trial court did an abrupt about-face, declined to convert the TRO into a temporary injunction, completely reversed its prior decision, and declined to provide any legal reasoning to justify its reversal of course. This left the defendant free to continue taking steps to thwart the ultimate goal

of legal action for money damages, collecting on a money judgment, and the ultimate goal of a fraudulent conveyance action, setting aside fraudulent conveyances so that defendant's assets can be used to satisfy creditors.

The result here renders civil litigation futile and gives bad-actor civil defendants the legal authority to frustrate a plaintiff's efforts to enforce rights in court. A system of justice cannot allow a defendant to proceed in this manner. Allowing this behavior will open the flood gates to civil defendants transferring and obscuring assets for no consideration to avoid civil judgments after an initial lawsuit has been filed. It will make the pursuit of a money judgment merely a single step down the path to more litigation setting aside fraudulent transfers, and require successive fraudulent conveyance actions with the hope of obtaining a judgment before another fraudulent conveyance occurs. It will require plaintiffs to litigate with other third-party transferees and attempt to enforce judgments in foreign countries. It will cause plaintiffs to throw up their hands at the prospect of multiple rounds of civil litigation, or worse, cause plaintiffs to abandon efforts to hold a wrongdoer accountable in court. Ultimately, it will give bad actors a toolbox full of judgment avoidance scams to frustrate the purpose of civil litigation and the work of the courts. This cannot be the law in South Carolina, and this Court must speak decisively and with conviction to ensure this does not occur here.

Here, the refusal to convert the TRO into a temporary injunction was unexplained, manifest error, at odds with South Carolina law, wholly inequitable, and an abuse of discretion. Appellant asks this Court to correct this injustice, to reverse the trial court's decision declining to convert the TRO into a temporary injunction, and to maintain the status quo until its claims for a money judgment against Johnson, and the subsequent fraudulent-transfer claims, are adjudicated.

STATEMENT OF ISSUE ON APPEAL

Did the trial court err by refusing to convert a TRO into a temporary injunction because Plaintiff did not establish irreparable harm and an inadequate remedy at law where Defendant has engaged in fraudulent transfers to avoid judgment after Plaintiff filed causes of action?

STATEMENT OF THE CASE

I. Introduction

Appellant Blue Bell Holdings, LLC ("BBH," "Appellant," or "Plaintiff") filed an initial complaint against Respondent Gary C. Johnson ("Johnson," "Respondent," or "Defendant") on October 26, 2021, regarding the LLCs the two parties owned, asserting claims, *inter alia*, of breach of fiduciary duty, conversion, and breach of contract. BBH sought $5,166,672.11 dollars in actual damages alone (hereinafter "Initial Suit" or "Initial Complaint"). The Initial Suit was given civil action number 2021-CP-07-01953.

After the Initial Suit was filed, BBH discovered that Johnson was using a variety of illegal creditor protection scams to render himself judgment-proof. For example, Johnson used a company named "Lawyers Limited," which is not a law firm and does not provide legal advice, to facilitate fraudulent transfers related to millions of dollars of his individual real estate holdings. *See* Motion to Reconsider, Exhibit A ("[O]ur services are limited in scope as we have attorneys on staff but are not a law firm. Our company does not offer legal, tax or other professional services. For those services, seek the appropriate attorney or accountant.") Nonetheless, Lawyers Limited touts on its website that its "key focus" is "in the area of the protection of financial assets and valuables from creditors, divorces, lawsuits and judgements" and that strategies "to protect real estate from lawsuits include . . . equity stripping liens to make the confiscation of real estate assets less likely." *Id.* The Lawyers Limited website explains that one of the "main strategies" it uses to

protect customers like Johnson from lawsuits is an "equity stripping transaction." *Id.* Lawyers Limited explains how this plan is designed to work best: "[S]et up a separate LLC and have it mortgage the equity in your investment property. This is a publicly recorded equity line of credit type of mortgage or deed of trust recorded in the county recorder's office against each property. Doing this strips the equity out of your properties." *Id.* Accordingly, to Lawyer's Limited, "equity stripping strategies" are used to "make the property less attractive to creditors" and acts "as a powerful deterrent to creditors." *Id.* "Then, when 'bad things' happen and you are in legal hot water," Lawyer's Limited involves "offshore" entities "beyond the reach of local courts." *Id*. Johnson also engaged in numerous other illegal creditor protection scams amounting to fraudulent transactions as more fully outlined below.

This malfeasance caused BBH to quickly file a second action seeking to set aside the scam transactions alleging, *inter alia*, that they violated the Statute of Elizabeth. This suit was given civil action number 2022-CP-07-02454 (hereinafter "Second Suit" or "Second Complaint"). BBH also sought and obtained an *ex parte* TRO in the Second Suit to prevent Johnson from further transferring and disposing of his assets until the Court could consider a temporary injunction. Significantly, in granting the TRO, the trial court found that Plaintiff made a *prima facie* showing that (a) "after learning of a lawsuit against him, Johnson began to transfer and or encumber his assets to make it practically impossible for Plaintiff to use them in the future to satisfy a judgment;" that (b) "Johnson has engaged in a series of fraudulent conveyances prohibited under South Carolina law;" that (c) Johnson used offshore/foreign LLCs as part of the scam which would make future actions to set aside additional fraudulent transfers potentially "cost prohibitive;" that (d) "Plaintiff was likely to succeed on the merits of its underlying fraudulent transfer claims;" that (e) "[t]he brazen nature of these actions sufficiently establishes that if Johnson were given notice of

Plaintiff's attempt to obtain the within temporarily relief, Johnson might engage in additional behavior in between the time of learning of Plaintiff's effort and the time a noticed hearing could take place;" and that (f) "if Plaintiff is correct, this would clearly cause irreparable injury, loss, or damage to Plaintiff." (Order granting TRO)

However, the trial court subsequently declined to convert the TRO into a temporary injunction, lifted the TRO, provided no explanation for its decision, and essentially turned Johnson loose to engage in more fraudulent transactions.[1] Because lifting the TRO would have allowed Johnson to continue to transfer and obscure his assets, Appellant quickly filed a Notice of Appeal to invoke the protections of the automatic stay, staying the relief ordered in lifting the TRO. Rule 241(a), SCACR (the filing of a Notice of Appeal will "automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order.").

II. Initial Complaint

On October 26, 2021, BBH filed its Initial Complaint against Johnson for his malfeasance against two LLCs the parties own as 50/50 owners: 30 Haul Away, LLC and Island Funding, LLC. (Compl. Oct. 26, 2021.) Additionally, BBH's predecessor and Johnson owned a third LLC, which has since dissolved: 6 Shelly Court, LLC. (*Id.*) All three LLCs were formed to acquire distressed real properties and manage them for future sale at a profit. (*Id.* ¶¶ 5-6.) In the Initial Complaint, BBH alleges that Johnson provided the day-to-day management of BBH, including managing the LLCs bank accounts, selecting properties to purchase and to sell, managing the properties, working with the LLCs' accountant, and distributing profits to the two members. (*Id.* ¶ 11.)

[1] For example, while not part of the record below, BBH now knows that Johnson transferred over $1,700,000 to other LLCs for no consideration and has used another LLC, called Boardwalk Properties, LLC, to mortgage properties, which were also unsupported by consideration.

BBH alleges that Johnson was breaching his fiduciary duties to BBH by stealing money from the LLCs and by also competing with and misappropriating business opportunities to another one of Johnson's companies called Shoreline Funding, LLC, and by usurping the corporate opportunities for himself and converting LLC money to himself. (*Id.* ¶ 13.) Additionally, BBH alleges that Johnson improperly characterized advances to the three LLCs to benefit himself at the expense of BBH. (*Id.* ¶¶ 14-18.) Specifically, BBH alleges that Johnson would characterize BBH's cash advances to the LLCs as "capital contributions" instead of loans as required by the operating agreements of the LLCs. (*Id.*) Thus, the loans that BBH was contributing to the LLCs were not accruing interest, which damaged BBH and benefited Johnson. Moreover, BBH alleges that Johnson surreptitiously violated the operating agreement, which requires cash distributions to be approved by both members and to be made equally to both members, by issuing himself substantially larger distributions than he did to BBH. (*Id.*)

The damage caused by Johnson is significant. BBH alleges that Johnson owes $2,273,901.79 with respect to 30 Haul Away, LLC; $2,582,770.32 with respect to Island Funding, LLC; and $310,000 with respect to 6 Shelley Court, LLC, for a total in actual damages of $5,166,672.11. (*Id.*) After discovering this initial conduct, BBH filed its Initial Complaint asserting the following causes of action: (1) Appointment of Receiver and Issuance of Injunction and TRO, (2) Breach of Fiduciary Duties, (3) Conversion, (4) Breach of Contract/Breach of Obligation of Good Faith and Fair Dealing, and (5) Judicial Dissociation/Expulsion of Johnson. Importantly, in addition to the actual damages of over $5 million, BBH seeks attorney's fees and punitive damages for Johnson's wanton, willful, and intentionally harmful conduct. If BBH's allegations are true, this case is an excellent candidate for a punitive damages award. Significantly,

BBH did not move to enjoin Johnson from transferring his assets in this action to preserve assets for a potential money damages judgment.

III. Consent Order Regarding LLCs

The Initial Complaint seeks the appointment of a receiver for the jointly owned LLCs, and BBH moved for one to ensure Johnson could not transfer additional jointly owned LLC assets to himself. In lieu of having a receiver appointed for the jointly owned LLCs, Johnson voluntarily agreed to enter into a consent order that restrained and prohibited him from using any account or other LLC assets for any reason other than for the purpose of paying a legitimate and proper expense of the LLCs, and then, only after receiving the agreement from BBH that said expense was in fact legitimate and proper.[2] (Consent Order)

IV. Second Complaint

After BBH realized that Johnson was orchestrating an illegal creditor protection scam for the purpose of protecting assets from BB in the Initial Suit," BBH filed the Second Complaint on December 22, 2022. The Second Complaint details Johnson's scheme. With the help of his partner Stephen Halpern ("Halpern"); Halpern's LLC, Belmont Properties, LLC ("Belmont"); live-in girlfriend Holly Angel ("Angel"); Angel's LLC, Holly Ann, LLC; Shoreline Funding, LLC ("Shoreline"); and Orange Capital, LLC (Nevis) ("Orange Capital); Johnson orchestrated a creditor protection scam to voluntarily divest himself of all assets to render himself judgment proof in light of the roughly $5 million dollar liability that he was facing in the Initial Complaint. More specifically, by the time the Second Complaint was filed, Johnson and his co-conspirators engaged in at least seven fraudulent transfers and/or equity stripping transactions. Importantly, Johnson

[2] While not before this Court, BBH alleges that Johnson has violated the trial court's order by using LLC bank accounts without BBH's agreement.

began transferring his assets immediately after BBH filed its Initial Complaint. As described by Lawyers Limited, Johnson was now in "legal hot water" and began to follow the Lawyers Limited plan to "make [his] property less attractive to creditors" and serve "as a powerful deterrent to creditors." (*See* Motion to Reconsider, Exhibit A)

First, and not in chronological order, Johnson engaged in a transaction involving eight parcels of real estate he owned called the "Gary Johnson Land Portfolio." (*Id.* ¶¶ 58-66.) Johnson formed a fraudulent entity in the Caribbean island of Nevis and called it Orange Capital, LLC (Nevis). (*Id.* ¶ 63.) On August 16, 2022, Johnson recorded mortgages on each parcel identified in the Gary Johnson Land Portfolio in favor of Orange Capital, purportedly in exchange for a $1 million line of credit. (*Id.* ¶ 60.) However, there is no evidence to support the assertion that Orange Capital extended any credit to Johnson. Moreover, Counsel for Johnson conceded before the trial court that no consideration was provided by Orange Capital, LLC in exchange for the mortgages it received. (Hearing Transcript p. 10, ln 1-9.) And, as such, there was ***no consideration*** for the transfers. Significantly, Johnson, a licensed real estate broker with more than thirty years of experience, prepared and recorded the mortgages on behalf of Orange Capital and had the mortgage returned directly to himself, in a clear violation of South Carolina law.[3] (Second Complaint ¶ 64.) This transaction is a fraudulent transfer.

The **second** transaction occurred in November of 2021, one month after the filing of the Complaint. In November 2021, Johnson entered a contract to buy a condo at 17 Harborside Lane, Hilton Head, South Carolina for $501,000. (2d Comp. ¶ 34.) He purchased the condo with his individual funds. (*Id.* ¶ 35.) Then, he asked an attorney to assign the contract to "Holly Ann,

[3] *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 433-34, 357 S.E.2d 15, 19 (1987) (providing laypersons handling mortgage closings and recording instruments is the unauthorized practice of law).

LLC," the LLC of his live-in girlfriend, Ms. Angel, and asked the attorney to create a "ready to record" mortgage from Holly Ann, LLC for $600,000. Johnson proceeded with the closing and had the condo titled in Holly Ann, LLC's name. (*Id*. ¶¶ 39-40) This transfer was not supported by *any* consideration, took place shortly after the first complaint was filed, was a departure from Johnson's usual method of business, and was fraudulent under South Carolina law. (*Id.* ¶ 40-41.)

To add insult to injury, Johnson took additional illegal steps to distance himself from the transfer and his connection to Holly Ann, LLC, as it is well known that Ms. Angel is Johnson's live-in girlfriend and Holly Ann, LLC is Ms. Angel's LLC. (*Id.* ¶ 42.) So, on the day of closing and before the deed was recorded, Johnson and Ms. Angel fraudulently changed the registered agent for Holly Ann, LLC from Ms. Angel to "Emily Higgins." (*Id.* ¶ 43.) Emily Higgins is a relative of Ms. Angel—and she was required to sign the South Carolina Secretary of State's form authorizing the change and agreeing to serve as the registered agent. However, Ms. Angel admitted that she forged Higgins's name on the form and filed it with the Secretary of State. (*Id.* ¶¶ 44-45.) Further, when Ms. Angel forged Ms. Higgins's name, Angel falsely stated that Ms. Higgins is a "member" of Holly Ann, LLC, when Ms. Angel is the sole member. (*Id.* ¶ 46.) Then, in an effort to distance himself further from the LLC in Hilton Head, Johnson and Angel listed a Traveler's Rest address for the registered agent's office for Holly Ann, LLC. (*Id.* ¶ 46-47.) However, Ms. Higgins, the purported new registered agent, does not live in Traveler's Rest. The entire filing with the Secretary of State's office is false and fraudulent.

The **third** transaction involved a property at 197 Buck Island Road in Bluffton, South Carolina. (*Id.* ¶¶ 50-57.) The property was jointly owned by Johnson and his partner Halpern as tenants in common. BBH alleges that Halpern knew his partner was fearful of the Complaint and that BBH would obtain a multi-million-dollar judgment against him, so Johnson conspired with

him to defraud BBH. (*Id.* ¶¶ 51-52.) On January 28, 2022, Johnson and Halpern "sold" the Buck Island property to Belmont Properties, LLC, which is solely owned by co-conspirator Halpern, ***for no consideration***. (*Id.* ¶¶ 53-54.) Like the previous transaction, no consideration (or nominal consideration) was given for the transfer. It was a fraudulent conveyance to hide assets.

The **fourth** transaction involves two properties owned by Johnson located on Wild Horse Road in Hilton Head. (*Id.* ¶¶ 67-72.) He again used his fraudulent company, Orange Capital, to "give" a line of credit to Johnson in exchange for a mortgage of $650,000 to Orange Capital. (*Id.* 68.) This mortgage was placed on the Wild Horse Road property, and again, Johnson prepared and filed the mortgage on behalf of Orange Capital and had the Register of Deeds return it to him, personally, in violation of *State v. Buyers*. (*Id.* ¶¶ 68-72.) However, there is no evidence to support the assertion that Orange Capital extended credit to Johnson, and as such, there was ***no consideration*** for the transfers. Yet, another fraudulent transaction consummated to insulate Johnson from liability.

The **fifth** transaction involves putting the condo Johnson purchased in Holly Ann, LLC's name with the fraudulent company of Orange Capital. (*Id.* ¶¶ 73-80.) On August 16, 2022, Holly Ann, LLC, acting through Johnson, purportedly gave a mortgage of $650,000 to Orange Capital on the condo, and Johnson recorded it. (*Id.* ¶¶ 74, 78.) The mortgage was fraudulently executed by Johnson as the "managing member" of Holly Ann, LLC. (*Id.* ¶¶ 75-76.) This is true even though (1) Johnson is not the "managing member," (2) has no interest in or authority to sign for Holly Ann, LLC, and (3) *no entity has ever loaned $650,000 to Holly Ann, LLC*. (*Id.* ¶ 76.) Accordingly, there was ***no consideration*** for this transfer. This fifth fraudulent transfer is replete with fraud from stem to stern.

The **sixth** transaction involves a parcel at 109 Sandcastle Court, Hilton Head, which Johnson owned through Shoreline Funding, LLC, an entity owned 100% by Johnson. (*Id.* ¶¶ 81-88.) On August 16, 2022, Shoreline Funding, LLC purported to give Orange Capital a mortgage of $650,000, and Johnson recorded it, identifying himself as the "managing member" of Shoreline. (*Id.* ¶ 83-84). Again, there is no evidence to support the assertion that Orange Capital extended credit to Johnson related to this transaction, and as such, there was ***no consideration*** for the transfer. This is yet another fraudulent transfer within one year of the filing of the Complaint.

The **seventh** transaction involves the property at 197 Buck Island Road in Bluffton, South Carolina. (*Id.* ¶¶ 89-98.) This property was owned by Johnson and Halpern. (*Id.* ¶ 89.) On August 16, 2022, Belmont Properties, LLC (the new owner of 197 Buck Island) purportedly gave a mortgage of $300,000 to Orange Capital. (*Id.* ¶ 90.) Halpern executed the mortgage as "managing member" of Belmont and stated the mortgage would encumber 197 Buck Island. (*Id.* ¶ 91.) Like the others, Johnson prepared and filed the mortgage on behalf of Orange Capital and had it returned directly to him. (*Id.* ¶ 93.) However, there is no evidence to support the assertion that Orange Capital extended credit to Johnson, and as such, there was ***no consideration*** for the transfers. This is another fraudulent transfer.

These paragraphs detail the seven fraudulent transfers that BBH had discovered by the time it filed the Second Complaint. Astonishingly, Johnson admits these voluntarily and consideration-less transfers were made to "**protect my interests**" and "preserve **my ability** to raise capital" and were made due to Johnson's concern over his ability "to get a loan/mortgage on any of my properties from traditional financing sources **due to the fact that this lawsuit is pending**." (Johnson Aff. Para. 60-61) (emphasis added) Johnson seeks to protect his interest and his ability

to use his assets for his own benefit over BBH's right to use them to satisfy a judgment in its lawsuit.

Due to the scheme described above undertaken immediately after Johnson learned of the Initial Suit, BBH fears that there are more based on the systematic transfers of properties conducted by Johnson with the assistance of the others described above to avoid liability from BBH's lawsuit. Once BBH learned of and was able to understand how the scam worked related to these fraudulent conveyances, it filed the Second Complaint asserting claims of (1) TRO, Injunction, and Appointment of Receiver, (2) Statute of Elizabeth, (3) Civil Conspiracy, (4) Constructive Trust, (5) Resulting Trust, (6) Accounting. BBH's manager, David A. Brosman, M.D. verified the Second Complaint.

V. BBH moves for an *Ex Parte* TRO

In light of Johnson's systematic divestiture of his properties in an obvious attempt to thwart BBH's Initial Complaint, BBH filed a Motion for an *ex parte* TRO as to Johnson on December 22, 2022, the same day it filed the Second Complaint. (Pl's Mot. for Ex Parte TRO) BBH first argued, "Plaintiff will suffer irreparable harm and/or loss in the absence of the issuance of an injunction as Johnson will likely take more actions to transfer and encumber his assets through foreign companies." (*Id.* at 7) Second, BBH contended, "Plaintiff will likely succeed on the merits of this case at trial . . . [because] Johnson's actions, coupled with the sworn testimony of his live-in girlfriend, lead to the inescapable conclusion that Johnson is attempting to purposefully manipulate the system and transfer and encumber all of [these] valuable assets." (*Id.*) Third, BBH asserted, "Plaintiff has no other adequate remedy at law that can rectify the situation . . . [because] Plaintiff will be left with no assets to collect against, and Johnson will have succeeded in not only

stealing millions of dollars from Plaintiff, but also in transferring and encumbering his assets to keep them out of reach of Plaintiff." (*Id.*)

On the same day, December 22, the trial court granted BBH's motion for an *ex parte* TRO. The court found,

> Plaintiff has sufficiently established a prima facia showing that Johnson has engaged in a series of fraudulent conveyances prohibited under South Carolina law. Specifically, Plaintiff has made a prima facia showing that after learning of a lawsuit against him, Johnson began to transfer and or encumber his assets, or the assets of LLCs in which he has an ownership interest, to make it practically impossible for Plaintiff to use in the future to satisfy a judgment. The brazen nature of these actions sufficiently establishes that if Johnson were given notice of Plaintiff's attempt to obtain the within temporarily relief, Johnson might engage in additional behavior in between the time of learning of Plaintiff's effort and the time a noticed hearing could take place. The Court agrees that if Plaintiff is correct, this would clearly cause irreparable injury, loss, or damage to Plaintiff.

(Order granting TRO). The trial court set a hearing to convert the TRO into a temporary injunction for December 29, 2022.

On that date, Johnson and BBH entered into a consent order. (Consent Order) The order permitted Johnson to pay his customary and ordinary living expenses and bills. Most significantly, the order kept the *ex parte* TRO in place until "a hearing can be held on this matter." (Consent Order)

On February 9, 2023, Johnson filed a memorandum in opposition to the *ex parte* TRO and conversion, requesting the trial court dissolve the TRO. (Johnson MIO) Johnson contested the showing on the three elements for injunctive relief and primarily argued BBH could not establish the elements for a temporary injunction. Johnson hollowly insisted that there "is no basis from which this Court can conclude that BBH has been defrauded by the conveyances at issue because BBH does not have a presently enforceable debt." (*Id.*) In addition, because part of the fraudulent transfer analysis requires the court to examine whether Johnson retained sufficient assets following

the transfers, Johnson also submitted an affidavit to the court in which he baldly represented that his net worth was "somewhere around $3,000,000." (Johnson affidavit). Johnson provided no information detailing how he arrived at that figure and provided not a single document to support it.

A new hearing was set for first week of March 2023 on BBH's motion to convert the TRO into a temporary injunction. No court reporter was present at the courthouse and there is no transcript of the hearing. Nevertheless, following the hearing, the Court took the injunction under advisement.

VI. BBH files a motion to stay any potential decision

The day after the hearing, BBH filed a motion to stay any potential decision the Court might be considering lifting the TRO pending more reliable discovery on how Johnson arrived at his "somewhere around $3,000,000" net worth representation. (Motion to Stay) Significantly, BBH had already served discovery on Johnson in the Initial Suit requesting that he state his net worth and provide evidence to support his net worth. (Motion to Reconsider, Exhibit B) BBH also produced the affidavit of George DuRant, forensic accountant, to its Motion to Stay, who confirmed that Johnson's "somewhere around $3,000,000" representation was unsupported, unreliable and could not be used to verify Johnson's net worth in any meaningful way. (Durant Affidavit) Thereafter, Johnson did not provide any additional information in support of his net worth assertion, and never responded to BBH's motion to stay.

VII. Order Denying Conversion to Temporary Injunction

In a complete 180-degree reversal from its previous ruling, on March 8, 2023, the trial court denied the Motion to Stay, and denied BBH's request that the TRO be converted into a temporary injunction. (Order denying conversion and stay) The court issued only a conclusory

statement supporting its reversal: "I find that the Plaintiff cannot show a lack of an adequate remedy at law or irreparable harm." (Order denying conversion and stay) Significantly, however, the trial court did not find that BBH was unlikely to succeed on the merits of its underlying claims.

BBH immediately filed and served a timely notice of appeal on March 10, 2023. At the same time, BBH moved for reconsideration before the trial court and filed a motion for a limited remand[4] with the Court of Appeals so that the case would be remanded to the trial court solely for the purpose of considering the motion to reconsider. This Court granted the motion to remand in an order dated May 16, 2023.[5]

VIII. Order Denying Motion for Reconsideration

In support of its Rule 59(e) motion, BBH argued that it (1) does not have an *adequate* remedy at law and (2) will suffer irreparable harm if the status quo was not maintained. (Motion to Reconsider) During the hearing on the motion to reconsider, BBH respectfully requested that the court explain why the court had come to diametrically oppose its prior conclusion on the inadequacy of a legal remedy and the existence of irreparable harm. Most significantly, BBH also clarified that it was not seeking an injunction that would prevent Johnson from engaging in all transactions related to his assets, and agreed Johnson could continue to engage in "good faith transaction[s] for value that he disclose[s] to the Court and the Court approve[]." (Hearing Transcript p. 10 ln 25, and 1-15.)

Following the reconsideration hearing, the trial court maintained its original ruling finding that Plaintiff "did not show a lack of an adequate remedy or irreparable harm." (Order dated June

[4] Johnson did not oppose this motion.

[5] This came after the Court granted a motion for a full remand. BBH filed a motion to reconsider, and the Court issued a new order granting only a limited remand.

7, 2023) BBH proceeded to file another notice of appeal from the Amended Order on June 7, 2023.

STANDARD OF REVIEW

The grant or denial of an injunction is subject to an abuse of discretion standard. *Levine v. Spartanburg Regional Services District, Inc*., 367 S.C. 458, 626 S.E.2d 38, 41 (Ct. App. 2005). "An abuse of discretion occurs where the trial court is controlled by an error of law or where the Court's order is based on factual conclusions without evidentiary support." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520–21 (2000). "An abuse of discretion may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (internal quotation omitted). "An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008).

"Actions for injunctive relief are equitable in nature." *Doe v. S.C. Medical Malpractice Liability Joint Underwriting Assn*., 347 S.C. 642, 557 S.E.2d 670, 672 (2001). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *Id.*

ARGUMENT

Rule 65, SCRCP, provides for the conversion of a TRO into a temporary injunction. The order denying the conversion of the TRO into a temporary injunction is immediately appealable. S.C. Code Ann. § 14-3-330 ("The [appellate court] shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . (4) An interlocutory order or decree

in a court of common pleas granting, continuing, modifying, or **refusing an injunction** or granting, continuing, modifying, or refusing the appointment of a receiver." (emphasis added)).

"Generally, for a preliminary injunction[6] to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits[7] of the litigation; and (3) there is an inadequate remedy at law." *Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569–70 (2021) (quoting *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009)).

"[T]he sole purpose of a temporary injunction is to preserve the status quo." *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). "A plaintiff's entitlement to an injunction requires the complaint to allege facts sufficient to constitute a cause of action for injunction while also showing an injunction must be reasonably necessary to protect the legal rights of the plaintiff pending in the litigation." *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

Johnson opposed an injunction arguing there "is no basis from which this Court can conclude that BBH has been defrauded by the conveyances at issue because BBH *does not have a presently enforceable debt*." (MIO Injunction p. 10.) (emphasis added) The trial court apparently agreed with this argument, but the argument is without merit.

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[6] South Carolina courts have used "temporary injunction" and "preliminary injunction" interchangeably.

[7] Again, the court did not rule on this element: "Specifically, I find that the Plaintiff cannot show a lack of an adequate remedy at law or irreparable harm." (Order denying conversion) This indicates the court believed there to be a likelihood of success on the merits. Nevertheless, we address it to provide this Court with a full analysis. BBH reraised this argument before the trial court in its motion to reconsider. (Motion to Reconsider 4 n.3) For consistency of analysis, we present the Court these arguments sequentially in their typically cited order.

First, the Statute of Elizabeth is not limited to those who have judgment or presently enforceable debt, and by its expressed terms applies to,

> [e]very gift, grant, alienation, bargain, transfer, and conveyance . . . 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 . . . to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code § 27-23-10 (emphasis added). Plainly, the Statute of Elizabeth is simply not limited to creditors who have judgments or "presently enforceable debts."

Second, for purposes of the Statue of Elizabeth, Johnson was in fact "indebted" to Plaintiff at the time the Initial Suit was filed because it is,

> only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer. **It may be reduced to judgment at a later date**. **To determine whether a person is such an existing creditor as can invoke the protection of the statute the inception of the debt or obligation is the time which controls; and not the date of the subsequent entry of judgment**. The plaintiff's case is not based upon their contract,—it proceeds upon the fraud, and undertakes to show that, by its consummation, they have lost all possibility of collecting their debt. Whether it was due or not is, in this view, wholly immaterial.

Matthews v. Montgomery, 193 S.C. 118, 133, 7 S.E.2d 841, 848 (1940) (emphasis added); *see also PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 127 F. Supp. 3d 568, 593 (D.S.C. 2015), *vacated in part*, No. 2:09-CV-03171-MBS, 2018 WL 11424153 (D.S.C. Mar. 8, 2018), *and dismissed sub nom. by PCS Nitrogen Inc. v. Ross Dev. Corp. Rivers*, No. 16-1540 (L), 2018 WL 2111081 (4th Cir. 2018). This Court has followed the rule laid down in *Matthews* as recently as 2019. *See China Constr. Am. of S.C., Inc. v. MS Prod. Sols. LLC*, No. 2016-001787, 2019 WL 3946089, at *4 (S.C. Ct. App. Aug. 21, 2019) (finding "it is not necessary to limit the determination of fraudulent transfers

to those after the entry of judgment" and that it is only "necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer.")

Moreover, the trial court did not find that BBH was unlikely to succeed on the merits of its Statue of Elizabeth claims. Presumably, on this point, the court agreed with its initial determination finding "Plaintiff has sufficiently established a prima facia showing that Johnson has engaged in a series of fraudulent conveyances prohibited under South Carolina law. Specifically, Plaintiff has made a prima facia showing that after learning of a lawsuit against him, Johnson began to transfer and/or encumber his assets, or the assets of LLCs in which he has an ownership interest, to make it practically impossible for Plaintiff to use in the future to satisfy a judgment." (Order granting TRO)

The trial court based its ruling on findings that BBH had an adequate remedy at law and would not be irreparably harmed without an injunction. But there is no legal or evidentiary support for these two findings, and they amount to an error of law as well as an abuse of discretion.

I. The trial court's order was based on an error of law.

Fundamentally, there is a difference between suits raising legal claims and seeking a money damages remedy and a suit raising equitable claims seeking an equitable remedy. Courts have grappled with this distinction in the context of whether a pre-judgment injunction order can be entered restraining a defendant and his assets. In a case involving physician defendants transferring assets to Nevis after a suit was brought for fraudulent billing schemes, the Fourth Circuit Court of Appeals considered,

> First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor's use of his property before obtaining judgment. A debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor's assets.

> On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested.

U.S. ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 496 (4th Cir. 1999). There are clearly two situations. While BBH understands plenty of case law illustrates the denial of an injunction based on the first situation, BBH seeks relief under the second. In recognizing this distinction, the Fourth Circuit determined, "It is clear that this case does not present the pure money damage claim . . . [o]n the contrary, its equitable claims fall squarely within the traditional equity powers." *Id.* at 498.

BBH pleaded equitable claims for a violation of the Statute of Elizabeth and sought equitable relief of unwinding the transactions in the Second Suit. BBH sought a preliminary injunction to ensure additional fraudulent transfers did not take place to make sure the trial court could order the equitable relief requested. The TRO and injunction were sought to enjoin further transfer of those identifiable assets. Enjoining further transfers necessarily makes the equitable relief sought possible: unwind the transfers, bring the assets back into Johnson's possession, so they can be used to satisfy a creditor. Without an injunction, future transfers can continue to take place, which will render BBH's current fraudulent transfer action meaningless.

It is clear from Johnson's argument on the motion to reconsider that he conflates these two principles of law by arguing BBH asks "this Court to take this huge inferential leap that a judgment will some day be rendered against [Johnson] and that [Johnson] will lack the assets to satisfy it because of transactions that he may enter into between now and then." (Motion to Reconsider Hearing 18) But this apparently distracted the Court by focusing on the legal relief sought in the First Suit and ignores the equitable claims and equitable remedy sought in the Second Suit.

The final remedy BBH seeks in the Second Suit is a ruling that the transfers were fraudulent, a ruling that the transfers are required to be unwound, and that the assets should be held by Johnson individually. This simply cannot occur if Johnson is allowed to engage in future additional transfers. Therefore, the trial court abused its discretion when declining to convert the TRO into an injunction based on an error of law.

II. BBH is entitled to a temporary injunction.

a. BBH will suffer irreparable harm if the injunction is not granted.

"Whether 'a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules.'" *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34 (Ct. App. 2005) (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). Cases where South Carolina appellate courts have held there to be irreparable harm to the movant include the loss of professional practice, *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005), the interference with the use and enjoyment of property, *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51–52, 674 S.E.2d 505, 509 (Ct. App. 2009) (stating an affidavit establishing commercial activity on property was sufficient to establish irreparable harm), and the improper transfer of movant's assets due to fraud and undue influence, see *Grosshuesch v. Cramer*, 361 S.C. 1, 623 S.E.2d, 833 (2005) (agreeing with and adopting the trial court's finding of irreparable harm given the facts). It is well settled in the law that "[o]n a proper showing, a threatened conveyance or transfer of property may generally be enjoined at the instance of creditors or other persons who would be defrauded by the conveyance. Fraudulent transfers are especially amenable to interlocutory injunctive relief, including permanent injunctive relief." 37 C.J.S. Fraudulent Conveyances § 163. Again, South Carolina law clearly provides that in determining whether "a

person is such an existing creditor as can invoke the protection of the statute the inception of the debt or obligation is the time which controls; and not the date of the subsequent entry of judgment." *Matthews*, 193 S.C. at 133, 7 S.E.2d at 848.

While reported South Carolina cases have not addressed the inability to recover on a forthcoming money judgment or the inability to provide a meaningful equitable remedy as constituting irreparable harm —likely because defendants do not attempt to blatantly engage in fraudulent transfers in a transparent attempt avoid judgment in a pending lawsuit—other jurisdictions provide persuasive authority prohibiting such behavior.

In *Pineda v. Skinner Servs., Inc.*, the plaintiff moved for a preliminary injunction, which was granted, and the First Circuit Court of Appeals held that "[The plaintiff] likely will suffer irreparable harm because [the defendant] may dissipate or conceal [its] assets to avoid judgment." 22 F.4th 47, 55 (1st Cir. 2021). There, the plaintiff filed the action against its employer and four individual defendants in 2016, alleging claims under the FLSA[8] and Massachusetts law. *Id.* at 51. As the suit progressed, the plaintiff learned that the four individual defendants in the case created four new entities. *Id.* The record indicated the defendants created the entities to "transfer corporate assets and prevent [p]laintiffs from recovering damages should they prevail on their claims." *Id.* The plaintiff further argued the companies served the purpose of transferring and sheltering assets. *Id.* The First Circuit reasoned that, although a defendant not having enough to satisfy a judgment does not always make out a showing of irreparable harm, "the story is quite different when there is a strong indication that the defendant may dissipates or conceals assets." *Id.* at 56 (quoting *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005); see also *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881 (9th Cir. 2003) (finding that a

[8] This acronym refers to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

defendant attempts to "conceal or dissipate assets" after a lawsuit is filed, irreparable injury was shown); *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 141 (3d Cir. 2000) (finding "dissipation can satisfy" the irreparable harm inquiry for purposes of an injunction).

In June of 2023, the Texas Court of Appeals reached the same result in *Kalkan v. Salamanca*, 672 S.W.3d 725, 731 (Tex. App. 2023). In *Kalkan*, a personal injury plaintiff brought a negligence suit against a corporate defendant. While the negligence action was pending, the plaintiff discovered fraudulent real estate transactions involving the defendant. Plaintiff then brought a second fraudulent conveyance suit, seeking to set aside the fraudulent conveyance under the Texas equivalent of South Carolina's Statue of Elizabeth.

In the fraudulent conveyance action, the trial court granted a temporary injunction prohibiting the defendant from transferring assets during pendency of negligence action, and the Texas Court of Appeal affirmed. In doing so, it found that even though the "recovery under his negligence claim is disputed and has not been reduced to judgment, Salamanca nonetheless has a 'claim' . . . because he filed suit against the owner or owners of the Mira Vista Apartments seeking money damages for personal injuries." *Kalkan v. Salamanca*, 672 S.W.3d at 730 (Tex. App. 2023). The court went on to find a "plaintiff does not have an adequate remedy at law if the defendant is insolvent" and that "without the temporary injunction, appellants would continue their practice of transferring assets and essentially render [defendant] judgment-proof," which would constitute "irreparable, imminent harm if the injunction did not issue." *Id.* Here, BBH risks losing the same opportunity, to collect on a judgment using Johnson's individual assets as did the plaintiff in *Pineda*, which the Texas Court of Appeals found was irreparable harm.

Of course, BBH will also be irreparably harmed if – by the time it succeeds in its fraudulent conveyance action – Johnson has engaged in additional fraudulent transfers to other entities or

individuals. For example, if no injunction is entered, Johnson could have Orange Capital sell the mortgages to Red Capital, who could sell the mortgages to Blue Capital, and so on. Even if BBH obtained an order requiring Johnson to unwind the initial transfers, the order will be meaningless if subsequent fraudulent transfers have taken place. The only way to stop the fraudulent transfer cycle, and ensure the court can provide for a meaningful equitable remedy when the Statute of Elizabeth has been violated, is to ensure the status quo is maintained. Otherwise, BBH will be irreparably harmed, seeking to enforce a money judgment against an insolvent defendant, or seeking to enforce a fraudulent transfer order against parties who no longer hold any rights in the assets.

Other courts have granted injunctive relief in the same scenario this court is presented with here. *See also, e.g.*, *In re Est. of Ferdinand Marcos, Hum. Rts. Litig.*, 25 F.3d 1467, 1480 (9th Cir. 1994) ("We join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment. This holding is thus restricted to only *extraordinary* cases in which equitable relief is not sought. Our conclusion thus avoids the concern in *De Beers* of the 'sweeping effect' that a plaintiff in any action requesting damages can apply for an injunction to sequester his or her opponent's assets." (internal citation omitted)); *JBF Interlude 2009 Ltd, v. Quibi Holdings LLC*, No. 220CV02250CASSKX, slip copy at *26 (C.D. Cal. Dec. 30, 2020) ("An asset freeze is appropriate where the plaintiff can demonstrate considerable evidence that irreparable harm will occur absent an injunction due to prior fraudulent conveyances by the defendant or otherwise that there is a likelihood of dissipation of the claimed assets, or other inability to recover money damages." (internal quotations omitted)); *Liberty Mut.*

Ins. Co. v. Frank Coluccio Constr. Co., No. C19 1652 MJP, 2019 WL 5802071, at *2 (W.D. Wash. Nov. 7, 2019) ("[W]here courts have granted injunctive relief based on a likelihood of dissipation of assets, there was evidence that the defendants were fraudulently concealing assets."); *Kalkan v. Salamanca*, 672 S.W.3d 725, 727, 731 (Tex. Ct. App. 2023) ("We hold that the evidence supports the trial court's finding that Salamanca faced the threat of irreparable, imminent harm if the injunction did not issue," under the Texas Uniform Fraudulent Transfer Act, where the plaintiff received a temporary injunction to stop "related entities from transferring or encumbering certain assets during the pendency of a plaintiff's fraudulent transfer claim.").

Here, BBH risks losing the same opportunity to collect on a judgment using Johnson's individual assets as did the plaintiff in *Pineda*, resulting in irreparable harm, and the right to have effective equitable relief ordered. Significantly, BBH did not simply file its Initial Suit and then immediately seek to enjoin Johnson's assets as a preventative measure in the run-of-the-mill tort case. BBH agrees that injunctive relief is generally not available to a plaintiff solely because a plaintiff seeks to ensure a defendant has money or assets in the future to satisfy a potential judgment. Here, like the plaintiff in *Pineda*, BBH filed its Initial Suit seeking money damages. Then, when it became apparent that Johnson was actively engaged in a fraudulent scheme to thwart Plaintiff's efforts by making voluntary transfers without consideration, it filed the Second Suit, seeking to set aside the scam transactions as fraudulent conveyances and seeking injunction relief to prevent additional fraudulent transfers.[9]

[9] Further, in the balance of equities, BBH did not request that Johnson's assets be completely frozen. BBH clarified during the hearing on the motion to reconsider that it was not seeking an injunction that would prevent Johnson from engaging in all transactions related to his assets and agreed Johnson could continue to engage in "good faith transaction[s] for value that he disclose[s] to the Court and the Court approved." (Hearing Transcript p. 10 ln 25, and 1-15.) In this way, Johnson would have been allowed to sell his assets for good faith value, purchase assets for good faith value, and engage in other good faith transactions regarding his individual assets. However,

Therefore, BBH faces irreparable harm from Johnson's conduct if the equitable remedy of an injunction is not granted. The trial court abused its discretion in finding BBH did not establish irreparable harm.

b. BBH is likely to succeed on the merits in its lawsuits.

The trial court found in its TRO that BBH was likely to succeed on the merits of its fraudulent transfer claims. (TRO). The trial court did not change that ruling in the challenged orders, and further did not base its denial of the injunction on BBH's failure to show it would succeed on the merits. Therefore, this court is not required to address this element. However, BBH can show that the trial court correctly determined that is likely to succeed on the merits.

"In determining whether a temporary injunction should issue, the trial judge should not consider the merits of the case, except as they may enable the trial court to determine whether a prima facie showing has been made." *Curtis v. State*, 345 S.C. 557, 576, 549 S.E.2d 591, 601 (2001). "When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Id.* at 576, 549 S.E.2d at 601. "When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present 'a fair question to raise as to the existence of such a right.'" *Levine*, 367 S.C. at 465, 626 S.E.2d at 42 (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)).

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the Court dissolved the TRO with no strings attached, essentially giving Johnson license to engage in other fraudulent transactions with the implied consent of the court. This result would be catastrophic, and Johnson would no doubt use it to engage in additional "strategies" to make his assets "less attractive to creditors" and serve "as a powerful deterrent to creditors." Such a result is repugnant to equity.

There are two paths to succeed on Statute of Elizabeth claims. First, when a challenged transfer is made for valuable consideration, the plaintiff must establish (1) the transfer was made by the grantor with actual intent to defraud creditors, (2) the grantor was indebted at the time of transfer, and (3) the grantor's intent is imputable to the grantee. 12 S.C. Jur. *Equity* § 23.5 (citing *Leasing Enters. v. Goodwin*, 312 S.C. 122, 439 S.E.2d 294 (Ct. App.1993); *First Union Nat'l Bank v. Smith*, 314 S.C. 459, 445 S.E.2d 457 (Ct. App. 1994); *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993); *Jeffords v. Berry*, 247 S.C. 347, 147 S.E.2d 415 (1966)). Second, where a transfer is made without valuable consideration, the plaintiff has a lower bar and need only show (1) the grantor was indebted to the plaintiff at the time of transfer, (2) the conveyance was voluntary, and (3) the grantor failed to retain sufficient property to pay the plaintiff in full. *Id.* Because no consideration was given related to the challenged transfers, Blue Bell can proceed down the second path.

First, there is no question that Johnson was indebted to BBH at the time of the transfers because it is "only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer. **It may be reduced to judgment at a later date**. To determine whether a person is such an existing creditor as can invoke the protection of the statute the inception of the debt or obligation is the time which controls; and not the date of the subsequent entry of judgment. The plaintiff's case is not based upon their contract,—it proceeds upon the fraud, and undertakes to show that, by its consummation, they have lost all possibility of collecting their debt. Whether it was due or not is, in this view, wholly immaterial." *Matthews v. Montgomery*, 193 S.C. 118, 133, 7 S.E.2d 841, 848 (1940) (emphasis added).

Second, Johnson conceded through counsel the transfers were made without consideration, (Motion to Reconsider Hearing Tran), and there is no evidence that consideration was given for any of the transfers.

Third, Johnson failed to retain sufficient property to pay the plaintiff in full. In opposing BBH's injunction, Johnson stated in an affidavit that he has a net worth of "somewhere around $3,000,000," presumably aimed at convincing the trial court that BBH would not succeed on the merits of its fraudulent conveyance claims. But the trial court would have abused its discretion if it accepted this bald assertion and in not requiring Johnson to provide any support for this assertion. In addition, while subsequent discovery not before the Court shows that Johnson misrepresented his net worth, his stated net worth will not even cover the amount sought in the initial suit. In other words, Johnson "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." 12 S.C. Jur. *Equity* § 23.5 (emphasis added) (citations omitted).

In addition, because all the transfers here were either to companies owned by Johnson or other family members and or insiders, Johnson has the burden to prove the validity of these transactions. "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**." 12 S.C. Jur. Equity § 23.5 (emphasis added) (citating *First Union Nat'l Bank v. Smith*, 314 S.C. 459, 445 S.E.2d 457 (Ct. App. 1994) (emphasis added)."[10]

[10] Johnson admits that he is Orange Capital, LLC. See Johnson Affidavit at ¶ 59 ("I have never tried to hide my association with Orange Capital"). Additionally, in *Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 498 S.E.2d 858, 861 (S.C. 1998), the South Carolina Supreme Court approved the shifting of the burden of proof where the challenged transfer was made between intrafamily wholly owned companies and family members.

BBH pleaded and proffered more than sufficient evidence to establish Johnson's indebtedness and his failure to retain sufficient property and that it had a *likelihood* of success based on a plain reading of the law and the facts alleged.

c. There is an inadequate remedy at law for BBH.

"In order to justify a court of equity in refusing to take jurisdiction, the remedy at law must be adequate, and must attain the full end and justice of the case. It is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity. Stated differently, the remedy at law must be as 'certain' and 'complete' as the equitable remedy.*"* *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 126 F. Supp. 3d 611, 645–46 (D.S.C. 2015), dismissed sub nom. *PCS Nitrogen Inc. v. Ross Dev. Corp. Rivers*, No. 16-1540 (L), 2018 WL 2111081 (4th Cir. Mar. 19, 2018).

First, neither the trial court nor Johnson identified any possible adequate legal remedy, nor how any such remedy might be as practical, efficient, prompt, certain, and complete to "attain the full end and justice of the case" as the equitable temporary injunction remedy. "[T]he sole purpose of a temporary injunction is to preserve the status quo." *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973); *see also MailSource, L.L.C. v. M.A. Bailey &Assoc's*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2005) ("A temporary injunction is used to preserve the subject of controversy in the condition which it is at the time of the [o]rder until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation."). The equitable remedy of a temporary injunction prohibits Johnson from engaging in any additional asset transfers without Court approval. Clearly, if Johnson continues to give away, sell, transfer, or encumber his assets, Johnson will have no assets to satisfy a judgment in favor of

BBH, and no assets for which the Court to order returned. This is especially true when Johnson is forming Nevis LLCs and encumbering assets in favor of an offshore Nevis LLC.

Cases from this Court, discussed below, show an adequate legal remedy requires more than just the existence of a legal remedy. Nevertheless, in *Scratch Golf Co. v. Dunes West Residential Golf Props., Inc.*, our Supreme Court identified attachment as an alternative, legal remedy for the harm suffered in that case. 361 S.C. 117, 123, 603 S.E.2d 905, 908 (2004). There, the plaintiff moved for an injunction at the time of filing its initial complaint seeking only money damages. In finding that an injunction was improper, the Court found respondent had an adequate legal remedy of attachment. However, attachment is not available to BBH, and facts and law of *Scratch Golf* diverge completely from the harm faced by BBH, here.

In *Scratch Golf*, the respondent who benefited from the grant of an injunction below, *only feared* the appellants would remove assets out of state if the respondent obtained a potential judgment. *Id.* at 122, 603 S.E.2d at 908. Here, Johnson has already transferred his assets in a fraudulent scheme during litigation. In *Scratch Golf*, the appellants were "threatening" to sell property in an arm's length and bona-fide real estate transaction, and then move funds from the sale out of the state. Here, the transfers have occurred, for no consideration, and the real estate at issue remains in South Carolina. Because invocation of attachment required assets to be moved out of state, is not available under these facts here. In *Scratch Golf*, the trial court below required an escrow of $4.5 million when it granted the injunction. *Id.* at 120, 603 S.E.2d at 907. Here, BBH only seeks an injunction preventing further transfers without court approval. Finally, when remanding *Scratch Golf*, the Supreme Court **preserved the status quo** with the escrow and the security bond. *Id.* at 123, 603 S.E.2d at 908. Here, BBH has no other way to preserve the status quo other than obtaining a temporary injunction against Johnson.

Regardless, in *Scratch Golf*, there was no allegation of fraudulent conveyances or insider transactions. Here, BBH has shown, and the trial court has found, that BBH is likely to succeed on the merits of these claims.

Therefore, *no adequate* remedy at law exists for BBH to pursue. Even if an alternate remedy exists, it is not adequate, given the facts pleaded by BBH, and the trial court erred in finding BBH cannot show a lack of an adequate remedy at law.

CONCLUSION

Due to the unique facts of the case, the irreparable harm BBH will suffer if an injunction is not granted, as the lack of any legal remedy that can protect BBHs, BBH is entitled to a temporary injunction, and the trial court abused its discretion in finding otherwise based on a lack of irreparable harm and an inadequate remedy at law. Appellant BBH respectfully requests that the Court reverse the trial court's order declining to convert the TRO into a temporary injunction.

Respectfully submitted,

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