THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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S.C. Supreme Court

Martin R. Banks, Special Referee

Opinion No. 5101 (S.C. Ct. App. Filed March 20, 2013)
403 S.C. 203, 742 S.E.2d 672

Case No: 2013-001341

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

vs.

Ronnie F. Judy, J. Todd Judy
Ryan C. Judy and Wanda B.
Judy, Defendants,

of whom Ronnie F. Judy *is,* .... Petitioner.

RETURN OF RESPONDENTS TO PETITION FOR
WRIT OF CERTIORARI

Subject to their Motion to Dismiss filed herewith, Respondents make their Return to the Petition for Writ of Certiorari as follows:

STATEMENT OF THE CASE

On April 11, 2007 a Dorchester County jury found that Petitioner Ronnie Judy had deliberately and maliciously destroyed a pond dam on property that he owned jointly

with Respondent James Judy, awarding actual and punitive damages.[1] (The "Pond Dam Case"). On May 1, 2007 a separate Dorchester County jury found by clear and convincing evidence that Petitioner Ronnie Judy had deliberately and maliciously destroyed a 30 acre mature corn crop belonging to Respondents Bobby and Kevin Judy, awarding actual and punitive damages.[2] (The "Corn Crop Case").

The Pond Dam Case and the Corn Crop Case first appeared on the Dorchester County Common Pleas trial roster at the January 29, 2007 term of court. The cases were continued because of Ronnie Judy's sudden admission to hospital. On February 7, 2007, nine days after the cases had been called for trial, Ronnie Judy conveyed to his co-defendant and son Todd Judy all lands then titled in his name, consisting of 10.9 and 9.29 acres, for a consideration of "$5.00 love and affection" (The "Recent Conveyances").

The within case was filed September 26, 2007 by judgment creditors Jimmy, Bobby and Kevin Judy against Ronnie, Todd and Ryan Judy, seeking to set aside the Recent Conveyances and to restore title to Ronnie Judy's name under the Statute of Elizabeth, South Carolina Code Sections 27-23-10, et. seq., as fraudulent conveyances.[3] The Complaint also sought to set aside two 1998 deeds in which Ronnie Judy conveyed his interests in approximately four hundred thirty acres to his sons Todd and Ryan, also on grounds of "actual moral fraud". (The "Remote Conveyances").

On December 31, 2008, while the within fraudulent conveyance case was pending in circuit court, Todd Judy conveyed to Ronnie Judy's wife, Wanda Judy (also Todd's stepmother) the properties comprising the Recent Conveyances, without consideration. Wanda was then joined as a party to the within case.

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[1] The Judgment was ultimately reversed on *res judicata* grounds. *Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (Sup.Ct. 2011).*

[2] The corn crop judgment was affirmed by the Court of Appeals. *Judy v. Judy, 384 S.C. 634, 682 S.E.2d 836(Ct.App.2009).*

[3] Appeals in the pond dam case and in the corn crop case were pending, but had not yet been decided.

Because the Master in Equity for Dorchester County recused himself, the Chief Administrative Judge referred the within case for trial to the Honorable Martin R. Banks, Master-in-Equity for Calhoun County, as Special Referee. The case was tried before Judge Banks in St. Matthews on July 18, 2011. Petitioner Ronnie Judy and Defendants Todd and Ryan Judy appeared at trial, *pro se*. At trial, only Ronnie Judy testified. Todd and Ryan Judy did not.

Judge Banks filed his order December 28, 2011 finding, *inter alia,* that the Recent and Remote Conveyances had been made by Petitioner Ronnie Judy with actual moral fraud. His Order set aside the conveyances and restored title to Petitioner Ronnie Judy. (Record on Appeal, page 7).

Ronnie Judy filed a *pro se* "Motion to Reconsider and Request for New Trial" on December 29, 2011, which was signed only by him, but ostensibly for "Ronnie F. Judy, et. al." (Record on Appeal, page 98). The reconsideration motion was heard by Judge Banks on January 25, 2012, at which Petitioner was represented for the first time by counsel. The motion was denied by Order filed February 6, 2012. (Record on Appeal, page 47).

The Court of Appeals affirmed the trial court's judgment that the recent and remote conveyances should be set aside, finding evidentiary support for the trial court's findings of actual moral fraud and concurring in the same. ("The Remote Conveyances were voluntary, and while Ronnie may not have had an eye toward a specific future indebtedness to his brothers, the record demonstrates that he recognized that putting his property in his children's names could insulate him from existing and known potential creditors. Additionally, the record demonstrates Ronnie continued to enjoy the benefits of ownership of the property by continuing to farm it, receive income from it, and borrow

money against it. This is clear and convincing evidence of his intention that the conveyances be title-only transfers intended to confound or hinder creditors." And, "With respect to the recent conveyances, our conclusion is the same. Again, the transfers were voluntarily made to a family member. Both were made just a few months prior to the trial of the tort claims against Ronnie, and the record shows he continued to treat the properties as his own." (Opinion No. 5101, Filed 3-20-2013, Advance Sheet Page 59; 403 S.C. 203, 742 S.E.2d 672, 676.)

Only Petitioner Ronnie Judy appealed to the Court of Appeals. Only Petitioner Ronnie Judy has filed the within Petition for Writ of Certiorari with this Court which, as is argued in Respondent's Motion to Dismiss, was untimely filed.

ARGUMENT

1. Petitioner first argues that because Respondents were not "foreseeable future creditors", the Trial Court and the Court of Appeals erred in holding that the remote conveyances were fraudulent and should be set aside under the Statute of Elizabeth. (Petition pages 2-4).

a. The issue is not preserved: It was not argued to the trial court. It was not argued as a ground for Petitioner's motion to the trial court for reconsideration. It was not argued in Petitioner's principal brief to the Court of Appeals; neither was it argued in his reply brief.

Instead, the argument asserting that subsequent creditors asserting a claim of fraudulent conveyance must also be "foreseeable future creditors" at the time of the conveyance was first made by Petitioner in his Petition for Rehearing to the Court of Appeals. As previously noted in Respondent's Motion to Dismiss filed with this Return,

the Petition for Certiorari is but a "cobbled together" version of the Petition for Rehearing that Petitioner presented to the Court of Appeals.

In the case of *Herron, et. al. vs. Century BMW, et. al., 395 S.C. 461, 719 S.E. 2d 640 (Sup. Ct. 2012)*, this Court held:

> "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628, S.E.2d 902, 919* (Ct.App2006).
> At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S,E.2d 731, 733 (1998*).
> It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).*

In the *Herron* case, the United States Supreme Court had remanded the case to this Court for reconsideration of a decision whether a class action was arbitrable under the Federal Arbitration Act. On remand, this Court held that the preemption question had neither been raised to the trial court nor to this Court, before it was argued and decided by the Supreme Court of the United States. This Court further held that "although the issue of preemption was raised in Appellant's rehearing petition, such an attempt was untimely and improper as a party may not raise an issue for the first time in a petition for rehearing." *(395 S.C. at 469).*

Just as in *Herron*, Petitioner in this case neither argued the "foreseeable future creditor" issue to the trial court or to the Court of Appeals, and raised it for the first time in his petition for rehearing to the Court of Appeals. Because the issue was not preserved, the Petition for Certiorari on this ground should be denied.

b. On the merits of Petitioner's first argument he seeks to impose upon the body of South Carolina fraudulent conveyance case law a standard borrowed out of context from other jurisdictions. As recognized by the Court of Appeals in this case, subsequent creditors may have conveyances set aside:

> "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." *Mathis, 319 S.C. at 265, 460 S.E.2d at* 408 (citing *Gentry v. Lanneau, 54 S.C. 514, 32 S.E. 523 (1899)).* "Subsequent creditors must show 'actual moral fraud,' rather than legal fraud." *Id.* at *266, 460 S.E.2d at 409.* Actual moral fraud involves "a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts." *First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 191 S.C. 384, 409, 1 S.E.2d 797, 808 (1939).* With a voluntary inter-family transfer, the burden shifts to the transferee to establish the transfer was valid. See *Windsor Props., Inc. v. Dolphin Head Constr. Co., 331 S.C 466, 471, 498 S.E.2d 858, 860 (1998).*

Petitioner argues, however, that an additional element should be added to South Carolina case law to require that subsequent creditors must be "foreseeable" in order to have standing to set aside a past fraudulent conveyance based upon proof of actual moral fraud. In support of the argument Petitioner cites authorities from other jurisdictions. The proposition is argued by Petitioner out of context; the authorities cited do not say what Petitioner argues; and the proposition should not be adopted.

Petitioner cites six cases as follows:

1) *Leopold v. Tuttle, 378 Pa. Super. 466; 549 A2nd 151 (1988).* This Pennsylvania Decision was decided under Pennsylvania's statutory law, which is markedly different from South Carolina's.

2) *Wantulok v. Wantulok, 214 P2d 477(Wyo 1950)* is a Wyoming

decision that addresses neither "foreseeable future creditors", nor others. In the case, the personal representative of a deceased grantor sought the re-conveyance on behalf of her decedent of lands allegedly fraudulently conveyed. The case does not address the issue of present or future creditors.

3) The same can be said of the third decision, *Weinhart v. Weinhart, 193 Misc 424, 84 NYS2d 375 (1948)*. The *Weinhart* case was also brought by a grantor against the grantee, seeking a re-conveyance of property that had allegedly been fraudulently conveyed. The opinion says nothing about "foreseeable creditors".

4) *City of Philadelphia v. Stephan Chemical Co., 713 F.Supp. 1491 (ED Pa 1989)* is another Pennsylvania case. However, it was not decided under Pennsylvania's Fraudulent Conveyance statute, but rather was decided under the Business Corporation Act of Pennsylvania, having to do with the winding down of a corporation. It says nothing about "foreseeable creditors".

5) *In re: Kusar's Estate 5 Ohio Misc. 23, 211 NE2d 535 (1965)* is an Ohio decision and, like others cited by Petitioner, does not discuss anything about "foreseeable creditors".

6) *In re: Oberst, 91 BR 97 (BC CD Cal 1988),* a 1988 California Bankruptcy Court decision, does not address the "foreseeable creditor" argument that Petitioner seeks to make.

Petitioner's filing and service were untimely. The issue argued was not preserved. On the merits, the arguments are simply not in accord with established South Carolina Law. (*c.f. Mathis v. Burton, 319 S.C 261, 460 S.E.2d 406 (Ct.App. 1995).*

2. Petitioner's second argument is no more than a restatement of the same points

made in Argument I of his principal brief to the Court of Appeals, which was that Respondents had failed to prove that the Remote Conveyances were made with a view to future indebtedness or with an actual fraudulent intent to defraud creditors. (See Appellant's Principal Brief to the Court of Appeals, page 9 and Appellant's Reply Brief to the Court of Appeals Argument 1, pages 1-3.)

As concluded by the trial court, evidence of Ronnie Judy's actual fraudulent intent in consummating the 1998 "remote conveyances" was "manifest from the evidence":

1. First, there was evidence that Ronnie had told his brother Jimmy in 1998 that he intended to make the Remote Conveyances to his sons to avoid a potential judgment by a creditor with whom he was involved in a combine incident;

2. Secondly, Ronnie continued to enjoy the benefits of full ownership of the farmlands and the timberlands, including the taking of all income and government subsidies from them;

3. Ronnie represented, falsely, on financial statements to his farm creditors, and to a bank from whom he borrowed $100,000.00, that he owned and farmed the lands;

4. On his tax returns, Ronnie Judy claimed the deductions for the payment of *ad valorem* taxes on the farmlands, although they were not titled in his name. (See Record on Appeal, pages 20-21).

The Court of Appeals agreed: "Where transfers to members of a family are attacked either on 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",

citing *Windsor Properties, Inc. v. Dolphin Head Construction, Co., 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998).* The grantees in this case, Todd Judy, Ryan Judy and Wanda Judy did not testify at trial, and neither did they appeal the trial court's decision to the Court of Appeals, or to this Court. As for the evidence of actual fraud, the grantees did not even attempt to rebut it. *742 S.E.2d at 675, 676.*

Now, Petitioner seeks from this Court a Writ of Certiorari, arguing the identical points made to the Court of Appeals, and attempting to argue some that were not made. Petitioner argues the bankruptcy case of *In re: Ducate, 355 BR 536, 544 (DSC 2006)* cited by the Court of Appeals, and attempts to argue the succeeding *Ducate* decision, *In Re: Ducate, 369 BR 251 (DSC 2007).* The arguments are misplaced. The fraudulent conveyance principles stated in *Ducate* are the same as cited by Respondents in their arguments to the Court of Appeals; and are the same principles cited by the Court of Appeals in its decision upholding the trial court.

Petitioner also seeks to confuse the arguments by suggesting that "notice" by the Respondents of the fraudulent conveyances made by Ronnie Judy in 1998 somehow makes a difference as to whether Respondents have standing to attack the conveyances. He argues that the reliance by the Court of Appeals on "badges of fraud" was inadequate to prove actual moral fraud.

In the first place, knowledge by Respondents of Ronnie Judy's 1998 conveyances to his sons makes no difference. Respondents are not business creditors of the Petitioner. They did not voluntary engage in a transaction with him or advance credit for money, with knowledge that the fraudulent conveyances had been made. Rather, they were the victims of Ronnie Judy's torts, his willful and malicious destruction of a corn crop owned by Respondents Bobby and Kevin Judy. Respondents are not willing creditors; rather,

they are the victims of Ronnie Judy's wrongdoing, such that their "notice" of Ronnie Judy's fraudulent conveyances makes no difference to their claim.

Likewise, Petitioner's argument that the Court of Appeals' use of the phrase "badges of fraud" somehow makes a difference is of no avail. "Badges of fraud" is simply another way to refer to circumstantial evidence. However, the turning piece of evidence in this case was direct evidence and not circumstantial: Jimmy Judy testified without contradiction that Ronnie had expressed a specific intent in 1998 to convey lands to his sons in order to avoid his creditors. This was not only a "badge of fraud". It was direct evidence of fraud.

The Petition in this case should be dismissed because it was not timely filed and because the arguments made are without merit.

3. Petitioner's third argument is that the Court of Appeals erred in its holding that Petitioner had not preserved for appeal the argument that the Special Referee lacked the authority to reform deeds in the manner that it did in its final order.

The Court of Appeals is correct. The issue was not preserved. Petitioner's argument here is not that the trial court erred in restoring title to the lands described as the "Remote Conveyances", but rather the manner by which the Court did so. Petitioner contends that the Court had no authority to reform prior partition deeds. The Court of Appeals held that the issue was neither raised to nor ruled upon by the trial court, citing *S.C. Department of Transportation v. First Carolina Corp. of S.C., 372 S.C 295, 301-02, 641 S.E.2d 903, 907 (2007)*, (holding that to be preserved for appellate review an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.)

Petitioner now argues to this Court that the issue was raised to and ruled upon by the trial court, contending that the record is "replete with testimony concerning the partition actions", and citing at page 9 of his Petition portions of the trial testimony and colloquy. However, the references to the trial transcript are simply to the occasions during the trial at which the word "partition" was used. In none of those instances was there an objection or assertion by Petitioner that those deeds may not be reformed. With certainty, no objection was "raised to the trial court" by those examples. It follows as well that, no objection having been raised, nothing was "ruled upon" by the trial court, by those trial transcript references.

Petitioner further asserts on page 10 of his Petition that the issue of the ability of the lower court to reform deeds "...was raised in an appropriate Rule 59 motion", citing pages 98-100 of the Record on Appeal. Petitioner's assertion is incorrect.

Even the most liberal construction of the thirteen points expressed in Petitioner's written Rule 59 motion cannot sustain his current assertion that the argument that he now seeks to make was "raised to the trial court with sufficient specificity". *S. C. DOT v. First Carolina Corp, supra.* The issue was not mentioned at all.

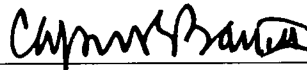
CONCLUSION

If the Petitioner's grantees, Todd, Ryan and Wanda Judy, truly believe that they held title to the properties comprising the Recent and Remote Conveyances, they would have testified to the trial court to explain the bona fides of the conveyances. They did not testify. Instead, Ronnie Judy testified and conducted the entire defense of the case. If they were the true title holders, they would have prosecuted an appeal to the Court of Appeals. However, only Ronnie Judy has prosecuted an appeal.

The Petition filed by Ronnie Judy was untimely. It does not comply with SCACR Rule 242. It presents arguments that were not preserved at trial or before the Court of Appeals. Respondents believe that the Petition was filed only for the purpose of delay. Respondents believe that Ronnie Judy is fully aware that the judgment filed in the Corn Crop case will expire ten years from its filing in May of 2007. The Petition should be summarily dismissed, but if the Court deems it appropriate to address the merits, it should be denied.

Respectfully Submitted,

BARR, UNGER & MCINTOSH



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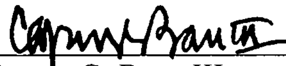
PROOF OF SERVICE

I certify that I have served a copy of the following: Motion of Respondents to Dismiss Petition for Writ of Certiorari and Return of Respondents to Petition for Writ of Certiorari on Ronnie F. Judy by depositing a copy of same in the United States Mail, postage prepaid, on July 18, 2013, addressed as follows:

Ronnie F. Judy
1872 Sandridge Road
Dorchester, S. C. 29437

Signature line on following page

BARR, UNGER & MCINTOSH



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