THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM THE KERSHAW COUNTY
Court Of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

---

CIVIL ACTION NO.: 2006-CP-28-0433
APPELLATE CASE NO.: 2014-002455

---

Palmetto Residential Builders, LLC ..... Appellant,

v.

Michael Cox and Elizabeth Cox. ..... Respondents.

---

# FINAL BRIEF OF APPELLANT

---

March 12, 2015

Benjamin C. Bruner, Esquire
Joey R. Floyd, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
*Attorneys for Appellant*

Other Counsel of Record:

R. Charles Richards, Esquire
Richards Law Firm, LLC
1622 Sunset Boulevard
West Columbia, South Carolina 29169
(803) 793-9982
*Attorney for Respondents*

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM THE KERSHAW COUNTY
Court Of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

---

CIVIL ACTION NO.: 2006-CP-28-0433
APPELLATE CASE NO.: 2014-002455

---

Palmetto Residential Builders, LLC . . . . . .Appellant,

v.

Michael Cox and Elizabeth Cox. . . . . Respondents.

---

# FINAL BRIEF OF APPELLANT

---

March 12, 2015

Benjamin C. Bruner, Esquire
Joey R. Floyd, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
*Attorneys for Appellant*

Other Counsel of Record:

R. Charles Richards, Esquire
Richards Law Firm, LLC
1622 Sunset Boulevard
West Columbia, South Carolina 29169
(803) 793-9982
*Attorney for Respondents*

## Table of Contents

## Table of Authorities

**Cases**



**Statutes**

## STATEMENT OF ISSUES ON APPEAL

I. Does a judgment debtor have a right to voluntarily transfer non-exempt funds to a retirement account in preference of a judgment creditor and then claim the funds are exempt from attachment?

II. Did the Master-in-Equity err when he held federal law barred avoidance of the fraudulent transfers notwithstanding the law of the case that the anti-alienation provision of ERISA and the Internal Revenue Code does not preclude avoidance of fraudulent transfers?

III. Did the Master-in-Equity err when he held the voluntary, post-judgment contributions were not fraudulent conveyances because they were made for valuable consideration and there was no evidence of actual intent to defraud the judgment creditor?

IV. Did the Master-in-Equity err when he found Mr. Cox did not increase the amount of contributions to his Retirement Account after entry of the judgment when there was no evidence to support such a finding?

## STATEMENT OF THE CASE

This is an appeal from supplemental proceedings, in which Palmetto Residential Builders, LLC ("Palmetto") is attempting to set aside voluntary, post-judgment transfers made by Respondent Michael Cox to his International Paper Salaried Savings Plan Account ("Retirement Account"), which he has used to evade Palmetto's collection efforts throughout these proceedings. All of the funds at issue in this appeal were voluntary, post-judgment transfers Mr. Cox elected to direct-deposit from his paychecks into the Retirement Account. Had Mr. Cox not made these voluntary contributions, the cash would have been deposited into a bank account and subject to execution.

Palmetto filed this lawsuit on June 29, 2006 to collect payment for a new home it constructed for Michael Cox and Elizabeth Cox, (collectively, "Respondents"). (R. pp. 49-50.) The complaint asserted claims for breach of contract, quantum meruit and foreclosure on a mechanic's lien. (R. pp. 50-52.) On January 30, 2008, the jury returned

a general verdict for Palmetto in the amount of $83,956.66. (R. p. 48.) After awarding attorney's fees, costs and interest, the Trial Court entered judgment in the amount of $119,430.93. (R. p. 46-47.)

Palmetto then commenced these supplemental proceedings to collect on the judgment. During the first hearing, Palmetto discovered that five days after the jury verdict Mr. Cox had liquidated $44,487.89 worth of stock and transferred the proceeds his Retirement Account to repay a loan he had taken from that account. (R. p. 43.) After allowing the parties to brief the issue, the Master-in-Equity held Mr. Cox was "essentially using his retirement account as his own 'offshore bank account'" and granted Palmetto's motion to set aside the deposit as a fraudulent transfer. (R. p. 39.) Although the Respondents argued that the anti-alienation provision in the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code precluded Palmetto's request to set aside the transfers, the Master-in-Equity held,

> The Defendant's assertion is misplaced. In the case of In re Goldschein, 241 B.R. 370 (Bkrtcy. D.Md. 1999), a debtor and a 'Benefit Plan' made a similar argument, where non-exempt assets were transferred to a 'Benefit Plan' that was supposedly exempt. "The Benefit Plan's inalienability argument is grounded in a faulty premise...The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers."

Id. (emphasis in original). Neither party appealed the October 1, 2008 Order.

On October 24, 2008, the Master-in-Equity held a second hearing. Mr. Cox testified at the hearing that on January 31, 2008, the day after the jury verdict, he had transferred an additional $7,000 from a savings account at Bronco Federal Credit Union to his Retirement Account. (R. p. 26.) Palmetto moved to set aside the $7,000, as well, and the Master-in-Equity granted that motion. Again, the Master-in-Equity held, "Michael Cox is essentially using his retirement account as his own 'offshore bank

account' to borrow money and repay himself with non-exempt assets to keep the non-exempt assets out of reach from a Judgment creditor." (R. p. 31.) And again, the Master-in-Equity rejected the Respondents' argument that federal law precluded Palmetto's attempt to avoid the fraudulent transfer. (R. pp. 33-34.) Neither party appealed that order.

On January 22, 2009, the Master-in-Equity held a third hearing, after which he ordered that the plan administrator pay the fraudulently transferred funds directly to Palmetto. (R. pp. 22-23.) Palmetto ultimately received payment, and the supplemental proceedings lay dormant until 2013, when Palmetto resumed its collection efforts. (R. pp. 19-21.)

After an August 27, 2013 hearing, the Master-in-Equity noted in his Order that Mr. Cox had recently purchased a new car and ordered that Mr. Cox produce all statements for his retirement account for the previous four years. (R. p. 17.) Palmetto continued to pursue discovery with little cooperation from the Respondents. (R. pp. 187-88.)

On May 20, 2014, Palmetto moved to set aside additional transfers, which are the subject of this appeal. (R. pp. 132-145.) The Respondents filed a Return to the Motion on June 25, 2014, immediately prior to the hearing. (R. pp. 197-205.) At the June 25th hearing, the Master-in-Equity took no testimony; he only heard and considered the arguments of counsel and their filings.

Ultimately, the Master-in-Equity granted Palmetto's motion in part (R. pp. 8-15), and denied it in part. (R. pp. 3-7.) The Master-in-Equity granted Palmetto a charging order and held Mr. Cox in contempt of court because he "willfully and intentionally violated this Court's orders and show[ed] flagrant disregard for the truth in these

proceedings." (R. p. 13.) The Master-in-Equity found "troubling" the fact that "[i]n complete disregard for this Court's orders, Mr. Cox has continued to buy and sell vehicles without restraint and spend the proceeds, which should have been applied toward satisfaction of [Palmetto's] judgment." (R. p. 9.) In a separate order, however, the Master-in-Equity denied Palmetto's motion to set aside the post-judgment contributions Mr. Cox made to his Retirement Account, reasoning that the anti-alienation provision of ERISA and the Internal Revenue Code precluded attachment of funds in the Retirement Account and that "the voluntary contributions made by Mr. Cox to his retirement account [were] made with and for valuable consideration and were not made with any intent to defraud [Palmetto]." (R. pp. 6-7.)

On September 29, 2014, Palmetto made a motion for the Master-in-Equity to reconsider its order denying the motion to set aside the fraudulent transfers to the Retirement Account. (R. pp. 104-08.) The Master-in-Equity denied that motion. (R. pp. 1-2.) Palmetto then commenced this appeal seeking review of the Master-in-Equity's Order denying its motion to set aside the fraudulent conveyances.

## STATEMENT OF THE FACTS

The retirement account at issue in this case is Michael Cox's International Paper Salaried Savings Plan Account ("Retirement Account"). (See R. pp. 161-75.) The record before the Master-in-Equity contained no description or terms of the plan.

As soon as the jury returned its verdict, Mr. Cox began making a series of fraudulent transfers to the Retirement Account. In addition to the two transfers of $44,487.89 and $7,000 immediately following the verdict, Mr. Cox diverted approximately $56,917.81 in funds to the Retirement Account from January 1, 2010 to June 30, 2013. Id. Each transfers was a direct deposits from Mr. Cox's paycheck that

would have been deposited into his checking account had he not diverted the funds to the Retirement Account. (See R. pp. 192-95.) It is undisputed that all of the transfers were voluntary contributions. (R. pp. 3 ("This Order concerns only...voluntary contributions....") and 197.) Moreover, it is undisputed that all of these transfers occurred while the Respondents owed a substantial amount of money on Palmetto's judgment. As of the date of this filing, after taking into account all payments received and interest owed on Palmetto's judgment, the Respondents owe Palmetto $119,611.79, exclusive of any attorney's fees and costs incurred in supplemental proceedings.

## ARGUMENT

As a matter of law, a judgment debtor should be required to pay his judgment creditor before he transfers non-exempt cash to his retirement account. In this case, the Respondents have diverted at least $56,917.81 in funds to Mr. Cox's International Paper Salaried Savings Plan Account ("Retirement Account") that otherwise would have been applied toward Palmetto's judgment. The Master-in-Equity condoned the fraudulent transfers, holding that the anti-alienation provision in the Employee Retirement Income Security Act (ERISA), 28 U.S.C. §§ 1001, et seq., and the Internal Revenue Code precluded Palmetto from attaching its judgment to any funds in the Retirement Account and that the transfers were not fraudulent because they were made for consideration and there was no evidence of actual fraud. (R. pp. 6-7.)

As set forth herein, Palmetto seeks a reversal of the Master-in-Equity's Order because (i) judgment debtors in South Carolina do not have a right to make voluntary contributions to a retirement account in preference of a judgment creditor, (ii) under the law of the case doctrine, the anti-alienation provision in ERISA and the Internal Revenue Code does not prevent attachment of fraudulently transferred funds, (iii) the fraudulent

transfers were not made for consideration and, therefore, no evidence of actual fraud was necessary, and (iv) the record before the Master-in-Equity contained no evidence to support Respondents' contention that Mr. Cox did not increase his retirement account contributions after Palmetto's judgment.

"Supplementary proceedings are equitable in nature." A Fast Photo Exp., Inc. v. First Nat. Bank of Chicago, 369 S.C. 80, 84, 630 S.E.2d 285, 287 (Ct. App. 2006) (quoting Ag-Chem Equip. Co. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984)). "In an equitable matter referred to a master for final judgment with direct appeal to the supreme court, the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence." Id. (quoting Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995)). "The appellate court is not required, however, to disregard the findings of the master." Id.

## I. A JUDGMENT DEBTOR HAS NO RIGHT TO VOLUNTARILY TRANSFER NON-EXEMPT FUNDS TO A RETIREMENT ACCOUNT IN PREFERENCE OF A JUDGMENT CREDITOR AND THEN CLAIM THE FUNDS ARE EXEMPT FROM ATTACHMENT.

It is against both public policy and the statutory exemption scheme for a judgment debtor to make a voluntary, post-judgment transfer of non-exempt funds into a retirement account and then show empty pockets to his judgment creditor. While the General Assembly has enacted some protections for judgment debtors in S.C. Code Ann. § 15-41-30, nothing in South Carolina law gives a judgment debtor a right to use his retirement account to hide non-exempt assets from a judgment creditor.

Under South Carolina law, a judgment creditor is entitled to execute on "any property of the judgment debtor, not exempt from execution, in the hands either of

himself or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services cannot be so applied." S.C. Code Ann. § 15-39-410 (2005). Limited exceptions are found in S.C. Code Ann. § 15-41-30. With respect to individual retirement accounts, S.C. Code Ann. § 15-41-30(A)(13) (Supp. 2014) exempts from attachment and levy,

> The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. **A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan**.

(emphasis added). The prior version of this exemption, which applies to contributions the Respondents made before May 14, 2012, contained the same exception for fraudulent transfers. S.C. Code Ann. § 15-41-30(A)(12) (Supp. 2008); see also Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 106, 713 S.E.2d 650, 654 (Ct. App. 2011) (a statute is to be construed prospectively unless it is remedial or procedural in nature).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 147, 694 S.E.2d 525, 529 (2010). The Master-in-Equity held S.C. Code Ann. § 15-41-30(A)(13) precluded attachment of all funds in the Retirement Account, including the Respondents' post-judgment transfers. (R. p. 5, ¶ 7.) However, nothing in the statutory exemption scheme evidences the General Assembly's intent to allow a judgment debtor to make contributions to a retirement account like the Respondents have made in this case. To allow such contributions would invite manipulation of the statute and reward a

judgment debtor for fraudulent activity. In fact, the clear and unambiguous language of section 15-41-30(A)(13) shows the General Assembly's intent to preclude judgment debtors from using the exemption to keep fraudulent transfers beyond the grasp of a judgment creditor. S.C. Code Ann. § 15-41-30(A)(13) (Supp. 2014). Therefore, it cannot be the public policy of this State that a judgment debtor has a right to make voluntary, post-judgment contributions to a retirement account in preference of paying his judgment creditor and show his judgment creditor empty pockets.

Similarly, nothing in federal law precludes a judgment creditor from avoiding fraudulent transfers a judgment debtor makes to his retirement account. Respondents argued to the Master-in-Equity that the anti-alienation provision in ERISA and the Internal Revenue Code prevents a creditor from attaching the voluntary, post-judgment contributions Mr. Cox made to his Retirement Account. However, Respondents never entered the plan description into evidence, so the Master-in-Equity had no evidence on which to find the International Paper plan "was clearly an employee pension plan under ERISA." (R. p. 5.) Had Respondents entered the plan into evidence and proven it qualified under ERISA, it would not make a difference. While no South Carolina court has reported an opinion on this issue, other courts have held that "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." In re Goldschein, 241 B.R. 370, 379 (Bkry. D.Md. 1999). See also Gilchinsky v. National Westminster Bank N.J., 159 N.J. 463, 732 A.2d 482 (1999). The reasoning is simple: the non-exempt funds should never have been in the retirement account to begin with. This reasoning is in harmony with the language the General Assembly included in S.C. Code Ann. § 15-41-30(A)(13), and it is the reasoning the Master-in-Equity adopted in his two orders setting aside other fraudulent transfers Mr.

Cox made to the Retirement Account. Since neither of those orders was appealed, as discussed below, it is also the law of this case that the anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers. See Section II, infra.

The question then is whether the post-judgment contributions are fraudulent transfers under South Carolina law. The Statute of Elizabeth, which applies to fraudulent transfers, provides:

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

S.C. Code Ann. § 27-23-10(A) (2007).

It is well-established in South Carolina that under the Statute of Elizabeth, 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.**

Mathis v. Burton, 319 S.C. 261, 264-65, 460 S.E.2d 406, 408 (Ct. App. 1995) (quoting Durham v. Blackard, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993)).

Respondents have argued that the voluntary, post-judgment contributions Mr. Cox made to his Retirement Account were not fraudulent transfers because they were made for valuable consideration. They contend the consideration was the matching contributions International Paper made to the account. However, Respondents failed to present any evidence to the Master-in-Equity supporting that argument. See Sulton v. Healthsouth Corp., 400 S.C. 412, 420, 734 S.E.2d 641, 645-56 (2012) (arguments of counsel are not evidence). They presented no statements or plan description, nor did they present evidence that matching contributions had been made. Even if those matching contributions were made, they fail to qualify as valuable consideration because they were not paid to the Respondents. Rather, the matching contributions were made to the Retirement Account. Therefore, when the judgment debtor (Mr. Cox) transferred the money into the Retirement Account, he *received* no valuable consideration. No one paid the Respondents anything for the assets they fraudulently transferred to the Retirement Account. The matching contributions were an employment benefit, not valuable consideration as required by the Statute of Elizabeth. Mr. Cox simply moved non-exempt cash from one account to another, claimed an exemption, and then showed his judgment creditor empty pockets.

It is undisputed that the Respondents were indebted to Palmetto when they made the transfers; it is undisputed that each of the transfers was voluntary; and it is undisputed

that the Respondents have failed to retain sufficient assets to pay Palmetto's judgment. Had Mr. Cox not diverted portions of his paychecks to the Retirement Account, the funds would have been deposited into his Mid Carolina Credit Union checking account and would have been subject to execution.

The Master-in-Equity, therefore, erred when he held that federal law precluded avoidance of the fraudulent transfers and that the post-judgment contributions to the Retirement Account were exempt. While the law encourages this State's citizens to save for retirement, it should not encourage judgment debtors to contribute non-exempt cash to a retirement account to avoid paying their judgment creditors, and it should not allow exemptions to be subject to manipulation. To do otherwise would create two classes of judgment debtors: those with retirement accounts and those without. It cannot be the public policy of South Carolina to invite manipulation, reward fraud and create two classes of judgment debtors. However, that is the result of the Master-in-Equity's order.

For these reasons, the Master-in-Equity's order should be reversed.

## II. THE MASTER-IN-EQUITY ERRED WHEN HE HELD FEDERAL LAW BARRED AVOIDANCE OF THE FRAUDULENT TRANSFERS BECAUSE THE LAW OF THE CASE IS THAT THE ANTI-ALIENATION PROVISION OF ERISA AND THE INTERNAL REVENUE CODE DOES NOT PRECLUDE AVOIDANCE OF FRAUDULENT TRANSFERS.

"An unappealed ruling is the law of the case and requires affirmance." Transportation Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). The law of the case doctrine applies here because twice the Respondents argued that the anti-alienation provision in ERISA and the Internal

Revenue Code precluded Palmetto from avoiding fraudulent transfers, and both times the Master-in-Equity rejected the Respondents' argument and ordered funds disgorged from the Retirement Account.

In its October 1, 2008 Order, the Master-in-Equity wrote,

> 6. The Defendant, Michael Cox, has asserted that the Anti-Alienability provisions of ERISA qualified retirement plans prevent this Court from attachment, garnishment, levy, execution and/or other legal or equitable process. The Defendant's assertion is misplaced. In the case of In re Goldschein, 241 B.R. 370 (Bkrtcy. D. Md. 1999), a debtor and a "Benefit Plan" made a similar argument, where non-exempt assets were transferred to a "Benefit Plan" that was supposedly exempt. "The Benefit Plan's inalienability argument is grounded in a faulty premise ... The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." 241 B.R. at 378-79.
>
> 7. The Defendant Michael Cox is essentially using his retirement account as his own "offshore bank account" to borrow money and repay himself with non-exempt assets to keep the non-exempt assets out of reach from a Judgment creditor. The South Carolina General Assembly did not intend to protect and condone such devious acts through the Homestead Exemption Act. Mr. Cox's actions have, in effect, removed the cash/stock from the "jaws of execution." The stock in the Smith Barney account was subject to execution and could have been applied towards the Plaintiffs Judgment had the Defendant, Michael Cox, abstained from liquidating the stock and placing it in his retirement account.

(R. pp. 39-40.) The Master-in-Equity then held Mr. Cox's transfer of $44,487.89 from his Smith Barney Account to the Retirement Account was a fraudulent transfer and ordered the funds paid to Palmetto. (R. pp. 39-41.)

In a subsequent Order addressing the $7,000 fraudulent transfer, the Master-in-Equity again held that "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." (R. p. 30-31) (quoting Goldschein, 241 B.R. at 378-79). And again, the Master-in-Equity noted Mr. Cox's attempts to frustrate Palmetto's collection efforts:

> The Defendant Michael Cox is essentially using his retirement account as his own "offshore bank account" to borrow money and repay himself with non-exempt assets to keep the non-exempt assets out of reach from a Judgment creditor. The South Carolina General Assembly did not intend to protect and condone such devious acts through the Homestead Exemption Act. Mr. Cox's actions have, in effect, removed the cash from the "jaws of execution." The cash in the Bronco Federal Credit Union account was subject to execution and could have been applied towards the Plaintiff's Judgment had the Defendant, Michael Cox, abstained from withdrawing the cash from the Bronco Federal credit union account and placing it in his retirement account.

(R. p. 31.)

In both orders, the Master-in-Equity considered the Respondents' arguments and concluded that even if ERISA applied, the anti-alienation provision did not prevent Palmetto's motion to set aside the fraudulent transfers. Neither side appealed those orders. Therefore, it is the law of the case that the anti-alienation provision in ERISA and the Internal Revenue Code does not prevent Palmetto from setting aside fraudulent transfers to the Retirement Account. Accordingly, the Master-in-Equity erred as a matter of law when he held federal law precluded Palmetto's attempt to avoid the fraudulent transfers.

## III. THE MASTER-IN-EQUITY ERRED WHEN HE HELD THE VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS WERE MADE FOR VALUABLE CONSIDERATION AND THERE WAS NO EVIDENCE OF ACTUAL INTENT TO DEFRAUD.

Under the Statute of Elizabeth, S.C. Code Ann. § 27-23-10(A), 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.

Mathis, 319 S.C. at 264-65, 460 S.E.2d at 408.

In this case, the Master-in-Equity held that the post-judgment contributions were made for valuable consideration. (R. p. 7, ¶ 14.) In truth, however, no valuable consideration was exchanged. In addition to the reasons discussed above, Mr. Cox was simply moving money from one of his pockets to another. He voluntarily diverted non-exempt cash from this checking account to his Retirement Account so he could claim the non-exempt funds were exempt. Meanwhile, Mr. Cox has maintained an interest in the money he diverted to the Retirement Account. Therefore, the Master-in-Equity erred when he held that the transfers were made for consideration.

The Respondents' argument that International Paper's matching contributions suffice for consideration falls short not only for the reasons discussed above but also because it invites debtors to manipulate the statute. If the Respondents are correct, then a debtor will be allowed to divert money to retirement accounts rather than pay his judgments, and then, as soon as the ten-year anniversary of the judgment passes, reap the benefits of his deceit by either taking disbursements or by taking out a loan against the retirement account. The law should not condone such conduct.

As for the factors set forth in Mathis, the record leaves no doubt (i) that Respondents were indebted to Palmetto at the time of each contribution, (ii) that all of the conveyances were voluntary, or (iii) that Respondents failed to retain sufficient assets to pay the remainder of Palmetto's judgment. (R. pp. 3-7, 16-18, 46-47.)

Even assuming, without conceding, that the transfers were made for consideration and, therefore, that Palmetto must show actual intent by Mr. Cox to defraud creditors, the Master-in-Equity erred in holding the transfers were made with no intent to defraud. The record is replete with evidence of Mr. Cox's attempts to obstruct, evade and defraud Palmetto. On two prior occasions, the Master-in-Equity held Mr. Cox made fraudulent transfers to the same Retirement Account. Each time, the Master-in-Equity noted that Mr. Cox was trying to use the Retirement Account as his own offshore bank account to keep non-exempt assets beyond the reach of Palmetto, and each time, the Respondents were ordered to pay the funds to Palmetto. (R. pp. 31, 39-40.) Notwithstanding those orders, Mr. Cox refused to pay Palmetto, forcing the Master-in-Equity to order the plan administrator to pay the money directly to Palmetto. (R. pp. 22-25.) Even after that order, Mr. Cox continued showing absolute disregard for the Court's orders and for these proceedings. (See R. pp. 10-14.) He continued selling cars and buying new ones, he lied under oath during a November 7, 2013 hearing, and he refused to cooperate even when his lie was exposed. (R. pp. 10-14; p. 82, line 9 – p. 87, line 24.) The Master-in-Equity held him in contempt of court because he "willfully and intentionally violated this Court's orders and show[ed] flagrant disregard for the truth in [those] proceedings." (R. p. 13.) The Master-in-Equity went so far as to hold Mr. Cox in contempt, award attorney's fees and costs as sanctions, and impose a suspended jail sentence of thirty days based on Mr. Cox's egregious conduct. (R. pp. 13-15.)

Ever since the jury returned its verdict, Mr. Cox has worked diligently to avoid paying Palmetto. His vehicle for evading and defrauding his judgment creditor has been his Retirement Account. His practice, however, did not prevent him from buying two brand new cars. (R. pp. 9-10.) During Palmetto's efforts to collect on the judgment, Mr.

Cox has been caught making a $44,487.89 fraudulent transfer to the Retirement Account (R. pp. 43-45); he has been caught making another $7,000 fraudulent transfer to the Retirement Account (R. pp. 26-35); he has been caught buying and selling vehicles in blatant violation of the Court's orders (R. pp. 9-10); and he has been caught lying under oath to the Master-in-Equity. (R. pp. 10-14.)

Rather than pay Palmetto's judgment, the Respondents continue to divert money into the Retirement Account and patiently wait until Palmetto's time to collect on the judgment expires. See S.C. Code Ann. § 15-39-30 (2005). Respondents have voluntarily transferred at least $56,917.81 to the Retirement Account, disguising those funds as exempt assets.

The Supreme Court of South Carolina has explained that a conveyance made without consideration is voluntary, or "gratuitous." Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 594-95, 524 S.E.2d 621, 622 (1999). It is undisputed in this case that all of the transfers Mr. Cox made to his Retirement Account were voluntary. These voluntary, or gratuitous, transfers are akin to gifts. The Supreme Court recognized long ago,

> No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. "The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud."

Penning v. Reid, 167 S.C. 263, 166 S.E. 139, 146 (1932) (quotations and citations

omitted). More recently, this Court held, "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). Under the facts of this case, the only just result is that the fraudulent transfers be set aside and the money be paid to Palmetto toward satisfaction of the judgment.

For these reasons, the Master-in-Equity's order should be reversed.

## IV. THE MASTER-IN-EQUITY ERRED WHEN HE FOUND THAT MR. COX DID NOT INCREASE THE AMOUNT OF CONTRIBUTIONS TO HIS RETIREMENT ACCOUNT AFTER THE JUDGMENT.

In denying Palmetto's motion to set aside the fraudulent conveyances, the Master-in-Equity found that Mr. Cox made "contributions to his ERISA covered retirement plan for twenty-nine (29) years, since 1985" and further that "Mr. Cox has been making contributions into the 401(k) plan long before the Petitioner's judgment and since the judgment, Mr. Cox has not increased the amount of his contributions into the 401(k) account which he is entitled to do." (R. p. 5.) While Respondents' counsel argued those points to the Master-in-Equity in the Return to Palmetto's motion, Respondents offered no testimony or document to substantiate their position. See Sulton, 400 S.C. at 420, 734 S.E.2d at 645-56 (arguments of counsel are not evidence). The record before the Master-in-Equity contained absolutely no evidence of the contributions Mr. Cox made to the Retirement Account prior to the judgment, let alone the contributions made since 1985. The only evidence before the Master-in-Equity showing contributions made were redacted quarterly statements from January 1, 2010 to June 30, 2013, which the Respondents produced. Accordingly, the Master-in-Equity erred when he held

Respondents' contributions to the Retirement Account did not increase after entry of the judgment.

## CONCLUSION

While South Carolina's Homestead Exemption Act, S.C. Code Ann. § 15-41-30, offers debtors protection in certain circumstances, the Act also protects judgment creditors when a judgment debtor takes cash that is subject to execution and deposits it into a retirement account to disguise the cash as being exempt. The law has never been intended to condone such conduct; to do so invites manipulation, rewards fraud and violates the public policy of this State. Therefore, as set forth above herein, this Court should reverse the Master-in-Equity's order denying Palmetto's motion to set aside the voluntary, post-judgment contributions to the Retirement Account.

Joey R. Floyd, Esquire
Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
*Attorneys for Appellant*

March 12, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM THE KERSHAW COUNTY
Court Of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

---

CIVIL ACTION NO.: 2006-CP-28-0433
APPELLATE CASE NO.: 2014-002455

---

Palmetto Residential Builders, LLC . . . . . .Appellant,

v.

Michael Cox and Elizabeth Cox. . . . . Respondents.

---

**CERTIFICATION OF COUNSEL**

---

The undersigned counsel for Appellant certifies that the Final Brief of Appellant filed in this matter complies with Rule 211(b), SCACR.

March 12, 2015

Joey R. Floyd, Esquire
Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
*Attorneys for Appellant*

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

---

APPEAL FROM THE KERSHAW COUNTY
Court Of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

---

CIVIL ACTION NO.: 2006-CP-28-0433
APPELLATE CASE NO. 2014-002455

---

Palmetto Residential Builders, LLC . . . . . .Appellant,

vs.

Michael Cox and Elizabeth Cox. . . . . Respondents.

---

**PROOF OF SERVICE**

---

I, Bridget S. Steele, a Legal Assistant of Bruner, Powell, Wall & Mullins, LLC, attorneys for Appellants, Palmetto Residential Builders, LLC do hereby certify that on the 13th day of March 2015, I served the *Final Brief of Appellant* upon opposing counsel by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

R. Charles Richards, Esq.
Richards Law Firm, LLC
1622 Sunset Boulevard
West Columbia, SC 29169
*Attorney for Respondents*

Bridget Steele

Bridget S. Steele
BRUNER, POWELL, WALL
& MULLINS, LLC
1735 St. Julian Place, Suite 200 (29204)
Post Office Box 61110
Columbia, South Carolina 29260
(803) 252-7693

Columbia, South Carolina