THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT

William P. Keesley, Chief Administrative Judge

Appellate Case No. 2015-000348

Wilma Spikes ..... Respondent,

Roy Steven Cunningham and Roy Chester Cunningham ..... Appellants.

BRIEF OF RESPONDENT

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Attorney for the Respondent

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STATEMENT OF THE CASE:

Appellant, Roy Steven Cunningham (Steven) agreed on behalf of his company, Calypso Pools, Inc. (Calypso), to install a pool on property owned by Respondent, Wilma Spikes (Spikes). Calypso failed to complete the job. Spikes corrected faulty work and completed the job, then sued both Calypso and Steven in September 2010. She received judgments against each of them. The judgment against Steven was $92,713.39. When Steven did not pay, Spikes instituted supplemental proceedings against him. She was unsuccessful in collecting anything in the supplemental proceeding. However, in that supplemental proceeding, Steven confirmed that he had transferred property to his father, Roy Chester Cunningham (Roy) after Spikes had served him with her lawsuit.

Spikes filed the instant suit on April 4, 2013 to set aside the conveyance of the property to Roy. A bench trial was held on September 29, 2014 before Judge William P.

Keesley. At the bench trial, Steven testified that he "gave the property back" to Roy because of a secret agreement between Roy and his children not to let the property go out of the family and that the children must give their property to Roy if they moved off the land. Judge Keesley ruled in favor of Spikes and issued his order dated January 29, 2015. This appeal ensued.

STATEMENT OF FACTS

Spikes served Steven with the summons and complaint in the underlying *Spikes v. Calypso Pools, Inc. and Steven Cunningham,* Civil Action No. 2010-CP-32-3985 against both Steven and Calypso on September 20, 2010. (R p. 87.) Both defendants were held in default. (R pp. 16-17.) The damages hearing resulted to a judgment in the amount of $92,713.39 against Steven. (R pp. 16-17). Steven never paid the judgment. (Spikes testimony, R p. 31, lines 8-12). A Rule to Show Cause hearing was held by The Honorable James O. Spence on June 13, 2012. (R pp. 93). In that hearing, Steven testified that he gave the property at issue to Roy because "when my mother got pancreatic cancer, I knew he was going to have to have it, so I gave it back to my dad last year . . . because I knew he was probably going to have to sell it to pay the hospital bills." (R p. 98, lines 19-24). However, in front of Judge Keesley he testified that he gave the property back because he moved off the land. (R p. 59, lines 9-18.) He testified that Roy gave parcels of land to each of his three children with the understanding that they would give it back to him if they moved off the land. (R p. 58, lines 19-24). He testified that he moved off the land in 2007 (R p. 59, lines 9-10), but that he did not give the property back to his father until 2010 (R p. 60, lines 20-22). In fact, the deed was not signed until

December 25, 2010. (R p. 88.) Interestingly, he was off the land for at least a year before he traded Lot D for Lot F with his sister. (R p. 58, lines 10-15.)

Roy testified that he had three children. (R p. 43, lines 14-17). He testified that he gave each of his children approximately equal property (R p. 44, lines 9-13). He testified that the other two children still live on the land. (R p. 44, lines 9-18.) He also testified that it was "family property" and that he expected to have it returned if one of the children moved off the property (R p. 46, lines 3-10). However, he did not know when Steven moved off the land, and he did not know how long it was between the time Steven moved and the time he received the quit claim deed to the property at issue in this appeal. (R p. 53, lines 3-24; R p. 54, lines 20-25).

I

THE TRIAL COURT PROPERLY HELD THAT THE TRANSFER WAS MADE WITHOUT VALUABLE CONSIDERATION.

The Cunninghams argue that the Trial Court used the wrong standard in analyzing the facts and the law. They appear to equate "grossly inadequate consideration" with "nominal consideration." The two are not the same.

In Jeffords v. Berry, 247 S.C. 347, 147 S.E.2d 415 (1966), a property with a market value of $36,000 was transferred for a consideration of $1,000. The court held that this was "inadequate consideration," and construed inadequate consideration as being enough to set aside the transfer under the Statute of Elizabeth. The South Carolina Supreme Court, however, has this to say:

> While the consideration here has been found by the circuit judge to be inadequate, it has not been found to be grossly inadequate, even assuming that the rather scanty evidence bearing on the value of the equity purchased by the appellants would warrant and support such a finding. Under our decisions, had a finding been made that the consideration was

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> While the consideration here has been found by the circuit judge to be inadequate, it has not been found to be grossly inadequate, even assuming that the rather scanty evidence bearing on the value of the equity purchased by the appellants would warrant and support such a finding. Under our decisions, had a finding been made that the consideration was

> grossly inadequate and such finding supported by the evidence, such would have constituted a badge of fraud which, under the circumstances, may very well have warranted the court in finding an actual fraudulent intent, a prerequisite to setting aside the deed. Rather than finding a grossly inadequate consideration and a fraudulent intent, the circuit judge has found the consideration to be merely 'inadequate', made no finding as to the intent of the grantor and exonerated the grantees of any fraudulent intent. . . . We are convinced that the circuit judge was in error in setting aside the deed under these circumstances.

Id. at 352, 53, 418.

Thus, Jeffords stands for the proposition that the court must find "grossly inadequate" consideration, and if it does so find, then the grossly inadequate consideration is a "badge of fraud."

Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 524 S.E.2d 621 (1999) examined a certified question from the South Carolina Bankruptcy Court. The questions was: Is gross inadequacy of consideration a sufficient ground to set aside a conveyance under S.C. Code Ann. 27-23-10? The court found:

> In answering the certified question now before us, we are asked to consider whether a grossly inadequate consideration (here less than 20% of the property's value) is sufficient to set aside the conveyance as fraudulent. As noted above, grossly inadequate consideration is treated as a "badge of fraud" under this Court's precedent. *See also McGhee v. Wells,* 57 S.C. 280, 35 S.E. 529, 531 (1900) (defining grossly inadequate consideration as "a consideration so far short of the value of the property as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust."). A badge of fraud creates a rebuttable presumption of intent to defraud.

Id. at 596, 623. Thus, we again see the "badge of fraud" attends "grossly inadequate" consideration, if it is indeed found to be grossly inadequate.

The quit claim deed at issue here recites that the consideration is $1.00. In Judy v. Judy, 403 S.C. 203, 742 S.E.2d 672 (Ct. App. 2013), the two deeds in question each cited consideration of "$5.00, love and affection." Id. at 207, 674. The Judy court held

that both deeds were "voluntary." Id. at 209, 210, 675. The Judy court set aside the deeds based upon their voluntary character, not because they were grossly inadequate. In fact, the Judy court applied the standard, set forth below as the second condition, instead of looking for badges of fraud, holding that:

> Even if we concluded clear and convincing evidence of actual moral fraud had not been adduced at the summary judgment stage, because the Remote and Recent Conveyances were to family members and voluntary, the burden shifted from the Jimmy, Bobby, and Kevin to the grantees to establish the bona fides of the transfers.

Id. at 210, 676 (emphasis added). In other words, voluntary is not the same as "grossly inadequate." If $5.00 plus love plus affection is voluntary, certainly a naked consideration of $1.00 is voluntary. In the instant case, the deed was to a family member and was voluntary.

The Trial Court found the consideration to be "nominal." (R p. 4, Conclusion of Law No. 3.) "A conveyance made upon a mere nominal consideration or without consideration is "voluntary." First State Savings and Loan Association v. Nodine, 291 S.C. 445, 354 S.E.2d 51 (Ct.App. 1987)(Cert. denied 1987); Durham v. Blackard, 313 S.C. 432, 438 S.E.2d 259 (Ct.App. 1993). The Appellants agree that the consideration was nominal. (Appellants' Brief at p. 7.)

II

THE TRIAL COURT USED THE PROPER STANDARD TO ANALYZE THE TRANSACTION.

Having established that the consideration was "nominal" or "voluntary", the next issue is: under what condition should this transaction be analyzed? In Windsor Properties Inc. v. Dolphin Head Const. Co., Inc., 331 S.C. 466, 498 S.E.2d 858 (1998), the South Carolina Supreme Court stated:

> We have held that under this statute, conveyances shall be set aside under two conditions: First, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration.

Id. at 470, 860; Albertson v. Robinson, 371 S.C. 311, 316, 638 S.E.2d 81, 83 (Ct.App. 2006).

Under the facts of this case, it does not matter under which condition the transaction is analyzed, the result is the same.

A. Condition 1: the transfer was made by the grantor with the actual intent of defrauding his creditors.

While the Trial Court did not use this condition to analyze the transfer, use of it leads to the same conclusion reached by the Trial Court – the deed is void.

> 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.
>
> *Gardner v. Kirven,* 184 S.C. 37, 41, 191 S.E. 814, 816 (1937); *see also Coleman v. Daniel, II,* 261 S.C. 198, 199 S.E.2d 74 (1973); *Matthews v. Matthews,* 207 S.C. 170, 35 S.E.2d 157 (1945); *Matthews v. Montgomery,* 193 S.C. 118, 7 S.E.2d 841 (1940); *First Union Nat. Bank v. Smith,* 314 S.C. 459, 445 S.E.2d 457 (Ct.App.1994).

Windsor Properties, 331 S.C. 466, 498 S.E.2d 858 at 471, 860, 61.

Thus, the burden of proof shifted to Roy to prove both a valuable consideration and the bona fide transfer by clear and convincing evidence. He cannot prove the bona fides of the transaction; in fact, he never tried to. The timing of the transaction, coming as it does more than three months after Steven was served with the first summons and complaint and after he was in default, combined with Steven's prior testimony when

compared to his trial testimony, lead to the conclusion that this was a fraudulent transfer. That intent is imputable to Roy.

Roy never provided any documentary proof of the "family character" of the property; indeed, there is none. He did not introduce any deeds setting forth the required re-transfer upon the grantees moving off the land, and the two deeds that were introduced do not mention that requirement. (R p. 88 and R p. 91.) He did not call either of his other children, who he testified still live on the land and are therefore presumably available to testify. Instead, he testified that, while Steven moved off the land, he did not know when that was or how long it took for the property to come back to him. His only corroborating evidence was Steven's testimony, and we know that Steven gave a completely different account of the transfer previously and under oath. There is no "clear and convincing" evidence here, and the Trial Court was not convinced.

Additionally, Roy never produced any evidence whatsoever that there was valuable consideration for the transfer, never mind by clear and convincing evidence.

Thus, under the first condition, Roy and Steven have failed to provide the clear and convincing proof required of them, and the Trial Court reached the correct legal conclusion.

B. Condition 2: the transfer was "voluntary."

There was no valuable consideration paid for the property Steven transferred to Roy. Thus, it does not matter what Steven's intent was. "If the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors needs be proven." Windsor Properties Inc., 331 S.C. 466, 498 S.E.2d 858 at 471, 860.

The Trial Judge was correct in his analysis, stating:

4. "Where a transfer is made without valuable consideration being exchanged, the transfer will be set aside only when the creditor establishes the following: (1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness to the creditor in full, not merely at the time of transfer, but in the final analysis when the creditor seeks to collect the debt." Albertson at 317, 638 S.E.2d at 84.
5. "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." Albertson 317-318, 638 S.E.2d at 84.

(R p. 4, Conclusion of Law Nos. 4, 5)

The Trial Court followed that analysis by finding that the transfer was voluntary, that a debt was owed to Spikes before the transfer was made, and that Steven failed to retain sufficient assets to pay the debt when Spikes sought to collect the debt. Thus, under the second condition, the Trial Court used the correct standard and reached the correct conclusion – the deed is void.

III

SPIKES WAS NOT REQUIRED TO ESTABLISH THAT ROY STEVEN CUNNINGHAM TRANSFERRED THE PROPERTY TO PROTECT IT FROM HIS CREDITORS.

The Cunninghams argue that Spikes must show that the grantee participated in the fraudulent act, citing Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 459 (2012) and McDaniel v. Allen, 265 S.C. 237, 217 S.E.2d 773 (1975). These cases do not stand for that principal. In both Oskin (Id. at 398, 464) and McDaniel (Id. at 242, 775), there is undisputed valuable consideration. McDaniel instructs us that

> The deed in question was not without consideration; it does not fall within the second classification above mentioned and may not be set aside as

> fraudulent without an actual intent on the part of the grantor imputable to the grantee to delay, hinder, or defraud creditors of the grantor.

Id. at 243, 776.

Here, there is no valuable consideration. Thus, neither of these cases are controlling, nor are they relevant to this appeal. The requirement that the plaintiff establish that the grantee participated in the fraudulent act only occurs when there is "valuable consideration."

IV

SPIKES PROVED THAT ROY STEVEN CUNNINGHAM COULD NOT PAY THE JUDGMENT.

The analysis set forth above shows that the Trial Court properly held that the purpose of the transfer was to defraud Steven's creditors. However, the Appellants argue that there is one more issue to consider. They argue that there is no evidence that Steven could not pay his creditor. However, they overlook the evidence that was introduced. While Spikes was not required to prove any such thing, (McDaniel, 265 S.C. 237, 217 S.E.2d 773 at 242, 775), Spikes will show that Steven had no other assets.

One requirement of supplemental proceedings is that there must be a nulla bona return from a writ of execution. (S.C. Code Ann. 15-39-310.) The Trial Court took notice of the transcript of the supplemental hearing held on June 13, 2012. (R p. 44, lines 1-7, R p. 93.) Because a nulla bona return to a writ of execution is a necessary predicate to holding a supplemental proceeding, it is clear that at least the Sheriff did not find any assets. Additionally, as Spikes testified, no money had been paid as of September 29, 2014. Steven testified that he had numerous creditors, mentioning that the list could be found "across the street," evidently referring to the Register of Deeds office (R p. 104,

line 21 through R p. 105, line 11), and that "[m]y business is completely gone." (R p. 101, line 2.) Therefore, Steven had no assets with which to pay his creditor. As the Trial Judge pointed out, Steven did not contradict Spikes' testimony. (R p. 5, Conclusion of Law No. 8.)

V

THE TRIAL COURT PROPERLY HELD THAT THE TRANSFER WAS MADE TO DEFRAUD ROY STEVEN CUNNINGHAM'S CREDITORS.

In its Order, the Trial Court held that, as a matter of fact, Steven's changing story led to the finding of fact that he transferred the property to Roy to defraud this creditors. (R p. 3, Finding of Fact.) While the Trial Court's order voiding the transfer does not depend upon the finding that the transfer was indeed to defraud the creditors, the Trial Court heard the testimony and observed the witnesses and was in the best position to judge their credibility. "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence. However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." U.S. Bank Trust Nat'l Assoc. v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct.App. 2009).

Here, there appears no other explanation for the shifting reasons given by Steven for his transferring the property to Roy at such a propitious time other than that he was seeking to put his one asset beyond the reach of his creditors.

CONCLUSION

An appellant court can affirm for any reason appearing in the record. In this matter, there is adequate reason to affirm the Trial Court. Additionally, there is sufficient

facts and law to affirm on the basis that the transfer was entered into to defraud Steven's creditors, and that that intent is imputable to Roy. This judgment should be affirmed.

Respectfully submitted,

July 13, 2015.

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RESPONDENT'S BRIEF CERTIFICATION

The undersigned certified that this Final Brief conforms to the requirements of Rule 211(b) of the Appellate Court Rules, **EXCEPT that I have added a reference to the trial transcript on Page 9 identifying the Court's Exhibit 1 because there is no identification on the Court's Exhibit 1 in the Record on Appeal other than in the Table of Contents.**

July 13, 2015

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PROOF OF SERVICE

I certify that I have served the final Respondent's Brief on Roy Steven Cunningham and Roy Chester Cunningham by depositing copy thereof in the United States Mail, postage prepaid, on July 14, 2015, addressed to their attorney of record, S. Jahue Moore, Esquire, Moore, Taylor & Thomas, P.A., P.O. Box 5709, W. Columbia, SC 29191.

July 14, 2015

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July 14, 2015

The Honorable Jenny Abbott Kitchings
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RE: ***Wilma Spikes v. Roy Cunningham***
Appellate Case No. 2015-000348
Our File No. 2-2160.1

Dear Ms. Kitchings:

Enclosed for filing please find the original and 20 bound copies of the ***Brief of Respondent*** and ***Proof of Service***, evidencing service of same upon Appellant's counsel. Please return five clocked copies via our courier..

With my kindest regards, I am,

Sincerely,

Brian P. Robinson

Brian P. Robinson
S.C. Bar No. 8814

BPR/jf
Enclosures
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Ms. Wilma Spikes