THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM THE KERSHAW COUNTY
Court of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

Appellate Case No.: 2017-000756 (S.C. Ct. App. filed Dec. 21, 2016)

Palmetto Residential Builders, LLC . . . . . Petitioner ~~Appellant~~,

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

April 28, 2017

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QUESTION PRESENTED

I. Whether a civil judgment creditor can attach and levy upon post-judgment contributions from an employee's wages conveyed into a 401(k) retirement account through his employer pursuant to and in compliance with the Employment Retirement Income Security Act of 1974 (hereinafter ERISA) and S.C. Ann. § 15-41-30 (A)(13) (Supp. 2015).

STATEMENT OF THE CASE

This is an appeal from a hearing in Supplemental Proceedings in which Appellant sought, *inter alia*, to set aside the voluntary, post-judgment, contributions, deducted from the paycheck of Respondent Michael Cox through his employer's ERISA covered 401(k) pension plan. 401(k) is the section in the Internal Revenue Code that allows for the employer-provided, pension plan.

Respondent Michael Cox worked for International Paper Company for over 30 years. International Paper Company set up the employee pension plan specifically to comply with ERISA.

Mr. Cox made contributions, deducted from his paycheck into his pension account, since 1985. Mr. Cox made contributions under the ERISA covered plan since it was available to International Paper employees on July 1, 1992. The plan is called the "International Paper Salaried Savings Plan" and is a "Qualified Employer Plan" under 26 U.S.C. § 401 (a).

Appellant won a jury trial judgment in the amount of $119,430.93 on February 13, 2008. (R. pp. A51- A52)[1] and commenced supplemental proceedings in September of 2008 in the Kershaw County Master-in Equity Court. Within one (1) week after the jury verdict, Mr. Cox sold $44,487.89 worth of stock and deposited it into his 401(k) retirement account along with $7,000.00 from a savings account.

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1 The citations to the record herein are to the documents I received from opposing counsel which are numbered A-1 through A-273. If more than one page of the record is cited herein, it is cited "R. pp. A1-A2" as opposed to "R. pp. A-1-A-2). A single page is cited "R. p. A-1."

In separate Orders, the Master-in-Equity set aside both conveyances. The $44,487.89 was ruled fraudulent by Order filed on September 29, 2008 (R. pp. A40- A46) and the $7,000.00 set aside by Order filed November 7, 2008. (R. pp. A122-A131). These conveyances were made from non-exempt assets and transferred into the pension fund. Accordingly, they were properly set aside.

At a hearing in January of 2009, the Master-in-Equity ordered the 401(k) plan administrator, J.P. Morgan Chase, to pay the improperly deposited funds directly to the Appellant. (R. pp. A132-A135). The case was dormant until June of 2013 when Appellants filed a Rule to Show Cause seeking to set aside all post-judgment contributions into the pension account.

Appellant wrongfully states in its Petition that Respondents argued that the fraudulent conveyances were protected by the anti-alienation provision of ERISA. At the time these conveyances were made and at the hearing on the issue, Respondents were not represented by counsel and were unaware of applicable law. The undersigned counsel was retained in September of 2013.

On May 20, 2014, Appellant moved to attach all post-judgment wage contributions from Mr. Cox's paycheck into to his employer-sponsored 401(k) plan, arguing that the contributions were fraudulent conveyances under South Carolina's Statute of Elizabeth, S.C. Code Ann. § 27-23-10 et seq. (R. pp. A136-A149). Moreover, they argued that the applicable homestead exemption, S.C. Code Ann. 15-41-30(A)(13) did not apply, nor did neither ERISA nor the Internal Revenue Code because the conveyances were fraudulent.

The hearing on Appellant's motion was on June 25, 2014. Appellant failed to procure a Court Reporter to make a transcript of the hearing. The hearing lasted over one (1) hour. Each

lawyer had ample time to argue their position and each were thoroughly questioned by Judge Tzerman.

By Order filed on September 15, 2014, the Master-in-Equity denied the Appellant's motion to set aside the post-judgment contributions. (R. pp. A7-A11). Judge Tzerman ruled the conveyances were not fraudulent, were not made with intent to defraud the creditor, were not "income" for tax purposes and were made for valuable consideration. The Judge ruled the contributions at issue were taken directly from Mr. Cox's paycheck, the plan was an employee pension plan under ERISA and the contributions were made in accordance with the plan; exempt from attachment or levy.

Appellants filed a Motion to Alter or Amend Judgment which was denied without a hearing by Order dated October 13, 2014. (R. pp. A5-A6). Appellants then appealed to the South Carolina Court of Appeals.

The Court of Appeals decided the case on the briefs without oral argument. The Court ruled, *per curium*, that S.C. Code Ann. § 15-41030 (A) exempted from attachment or levy any final court order or bankruptcy proceeding. Additionally, the Appeals Court ruled that Judge Tzerman did not err in finding that the contributions to the retirement were not increased post-judgment. (R. pp. A263-A264).

Appellants then filed a motion for rehearing. (R. pp. A265-A267). The Court of Appeals denied the motion ruling there was no basis for a rehearing by Order dated February 27, 2017. (R. p. A- 273). This Petition for Writ of Certiorari followed.

ARGUMENT

The Appellant conflates Respondent Michael Cox's improper, previous sale and/or

transfer of non-exempt assets into his pension account with transfers duly deducted from his wages into his pension account. The issue in this appeal is whether the wage-withholding contributions from the paycheck of Mr. Cox made in compliance with an ERISA covered 401(k) plan are fraudulent conveyances or are otherwise subject to attachment by a judgment creditor.

Appellant cites Oskin v Johnson, 400 S.C. 390, 735 S.E.2d 459 (2012), Mathis v. Burton, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995) (R. p. 254) and In re Goldschien, 241 B.R. 370, (Bkrtcy. D.Md. 1999) (R. p. A-217) to support their position that the anti-alienation provision of ERISA does not allow fraudulent conveyances to be made into an pension account. Stated differently, non-exempt funds may not be transferred into a 401(k) plan or any type of pension fund. Appellant also states that the law of the case is that the anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers. (R. pp. A227-A228).

Respondents agree. No fraudulent conveyance may be made into an otherwise exempt pension account; even a pension account covered by ERISA. Such voidable conveyances include selling or transferring non-exempt assets into the retirement account.

Appellants thoroughly document the past wrongful conveyances made by Mr. Cox into his pension account. Now, they ask this Court to rule that his wages; specifically wages deducted from Mr. Cox's paycheck in compliance with the pension plan are also fraudulent conveyances.

South Carolina's "Statute of Elizabeth," S.C. Code Ann. § 27-23-10 reads:

> 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 defraud creditors and other 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, conivous, or fraudulent devised and practices are, must or might be in the 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.

(emphasis added). The Statute of Elizabeth focuses on the intent of the debtor.

The state exemption under which the Respondents claim his 401(k) contributions are exempt from creditors is S.C. Code Ann. § 15-41-30(A)(13), which reads:

> The debtor's right to receive individual retirement accounts as described in **Sections 408(a)** and 408(A) 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, A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this term, "Internal Revenue Code" has meaning provided In Section 12-6-40(A) (emphasis added).

Section 408(a) of the Internal Revenue Code reads:

> For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:
>
> (1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(c), 403(a)(4), 403(b)(8) or 457(e)(16), no **contribution** will be accepted unless it is in cash and **contributions** will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section **219(b)(1)(a)** (emphasis added).
>
> (2) The trustee is a bank (as defined in subsection (n) or such other Person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirement of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account in non-forfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

Thus, Section 408(a), referenced in the applicable exemption, twice refers to contributions into the plan.

Section 219(b)(1)(a) reads:

(b) Maximum amount of deduction: (1) In general: The amount allowable as a deduction **under subsection (a)** to any individual for any taxable year shall not exceed the lesser of- (A) the deductible amount, or (B) an amount equal to the compensation includable in the individual's gross income for such taxable year. (emphasis added).

Subsection (a) reads: "In the case of an individual, there shall be allowed as a deduction an amount equal to the qualified retirement contributions of the individual for the taxable year."

The 401(k) plan Mr. Cox has is an individual retirement account under 408(a) of the Internal Revenue Code and it provides the required contractual "anti-alienation" provision.

An outline of the plan was presented at the motion hearing for the Master-in-Equity's review. No evidence was presented at the hearing that Mr. Cox made contributions in violation of the plan. Indeed, this appeal concerns setting aside the contributions Mr. Cox made in compliance with the plan.

The 2014 tax-year rules allowed Mr. Cox to contribute up to $23,000.00 into his 401(k)

under the applicable regulations of the Internal Revenue Service. All who contribute to 401(k) accounts are allowed to contribute up to $17,500.00 in 2014 pre-tax money into their retirement account. Mr. Cox, then age 59, was allowed an additional $5,500.00 pre-tax contribution into his pension plan pursuant to 26 U.S. Code § 219 (5)(B) which is called the "catch up" contribution. Only those who are 50 and over may take advantage of this provision.

Appellant wrongly classifies the contributions into the 401(k) as "non-exempt." (R. pp. A221-A226). Further, they argue that allowing these contributions into the pension plan is against "public policy" and that Mr. Cox is using the 401(k) to "hide non-exempt assets from the creditor." (R. pp. A221-A226).

Mr. Cox's previous conveyances of non-exempt assets into his pension account were properly voided and that money was paid to the judgment creditor. However, those conveyances are different in kind to the contributions at issue before this Court. Appellant now seeks to void all of the ERISA and state law protected pension contributions from the date of the judgment.

The wage-withholding contributions are not taxed because the I.R.S. does not consider them income. Further, as South Carolina's Wage Payment Act states, "Funds placed in pension plans or profit plans are not wages subject to this chapter." See S.C. Code Ann. § 41-10-10(2) (1986). Thus, Appellants ask this Court to order the attachment of non-wages and/or non-income.

Even if the contributions at issue were considered to be wages or income, they would not be subject to attachment by a judgment creditor because wages and income and are not subject to attachment by judgment creditors in South Carolina. First, these conveyances are exempt under S.C. § 15-41-30(A)(13). Second, the asset at issue is wages, which were deducted from Mr. Cox's

paycheck.

South Carolina disallows the garnishment of wages except under certain circumstances. Wages that may be garnished in this State are for the payment of overdue taxes, under a Chapter 13 Bankruptcy Plan or for the payment of child or spousal support. See Ashley P. Cuttino, Glenn M. Spitler, III: An Employer's Guide to Navigating the Payment of Wages and Garnishments, S.C. Law., March 2014, at 27-28. See also 15 U.S.C. § 1671 et seq. (1968). But wages may not be garnished in South Carolina to satisfy the judgment of an unsecured, non-priority creditor such as the Appellant and there is no authority stating so.

Title I of ERISA requires that benefits under the plan may not be assigned or alienated. For the anti-alienation clause to be effective, the underlying plan must constitute a "pension plan" under ERISA which is defined as "any plan, fund or program . . . which provides retirement income to employees." See ERISA § 3(2)(A).

Further, ERISA § 514 (a) provides that ERISA supersedes state laws to the extent that state laws relate to employee benefit plans, also known as the "preemption" provision". The anti-alienation and preemption provisions make state attachment and garnishment laws inapplicable or without force or effect with relation to ERISA covered plans. Although, as stated *supra*, South Carolina does not allow wage garnishment for the benefit of an unsecured, non-priority creditor; but if it did, it would be preempted by ERISA.

There are federal exceptions to the anti-alienation and preemption provisions which mirror South Carolina law. For example, Qualified Domestic Relations Orders (QDRO's) for child support may be attached by a spouse. I.R.C. § 401 (a)(13)(B); ERISA § 206(d)(3). In a marriage and subsequent divorce, a retirement plan is a marital asset subject to a Family Court's equitable

division authority. Federal tax judgments and levies are also exempt from state and federal law and may be attached and withdrawn from the pension account. See Treas. Reg. §1.401(a)-13(e). Criminal judgments may also be exempted and attached. See U.S. v. Novak, 476 F.3d 1041 (9th Cir. 2007).

The most applicable exception to the case at bar is that civil judgments may be offset by a pension-plan participant's fiduciary violation of the parameters of the plan itself. For example, if Mr. Cox would have contributed more than the allowed amount for any particular tax year, those funds would not be protected by ERISA and could be recovered by the judgement creditor.

None of the exceptions to the anti-alienation or preemption provisions are applicable in this case. No evidence was presented during any hearing demonstrating more was paid into the plan than was allowed.

Appellant notes that Respondents offered no testimony or entered documents into evidence to support claims that Mr. Cox has complied with the provisions of the plan. (R. pp. A225-A226). While that is true, there is also no evidence to rebut the claims. The moving party, the Appellants herein, had the burden of proof at the motion hearing. The hearing, of which no transcript was made, dealt almost entirely with whether ERISA covered payroll deductions deposited into a 401(k) pension account after a judgment has been rendered against the individual, is a fraudulent conveyance.

As Oskin v. Johnson holds, in referring to the Statute of Elizabeth; "In interpreting this statute, this Court has held conveyances shall be set aside under two conditions; First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable

consideration. 400 S.C. 390, 735 S.E.2d 459 (S.C. 2012).

The consideration Mr. Cox receives from his 401(k) contributions is that his contributions are matched by his employer and together these contributions will be paid out over time after Mr. Cox retires. Therefore, under Oskin, the only way this Court may set aside the contributions into the 401(k) are if they are found to be made with the actual intent of defrauding the creditor. As stated previously, Mr. Cox contributed to his 401(k) plan for decades prior to the judgment and he is contributing less than he is allowed by applicable law.

Selling non-exempt assets and depositing the proceeds therefrom into an otherwise exempt pension plan are fraudulent conveyances that should be set aside. Wage withholding contributions made in compliance with an ERISA covered pension plan and state law are exempt from levy and attachment.

Finally, ERISA and S.C. Code Ann. § 15-41-30(A)(13) are well settled areas of law. So long as an employee makes contributions to a pension plan in compliance with the law, it is exempt from attachment or levy except for unpaid taxes, criminal penalties or equitable division in a family court case.

The three (3) Court of Appeals Judges were unanimous in their ruling in this case. There is no conflict between the Court of Appeals and the Supreme Court on the issues presented. There are no constitutional issues involved. And there is no federal question presented in which the Court of Appeals conflicts with a decision of the United States Supreme Court.

CONCLUSION

Mr. Cox's prior conveyances of non-exempt property, post-judgment, into his pension account were properly set aside. However, those conveyances are irrelevant to the issue before

this Court. Petitioner seeks to set aside lawful contributions, which began long before the judgment, made in compliance with the pension plan provisions and protected by ERISA and state law.

Under ERISA and South Carolina's exemption laws, the contributions Mr. Cox made into his 401(k) pension plan post-judgment were not fraudulent conveyances. The contributions were made with the intent to provide for himself and his family after he retires. They were made for the valuable consideration of matching employer contributions and the protection from civil judgment creditors. Neither the wage contributions nor matching funds by the employer are taxed or considered income by the Internal Revenue Service.

Appellants present no evidence that Mr. Cox made contributions that exceed the plan's guidelines. The pension plan at issue may only be attached to pay taxes, criminal penalties or for equitable division in family court.

Finally, there is no special consideration in granting Appellant's Petition as circumscribed in Rule 242 (b) (1-5) SCRAC. Accordingly, Respondents respectfully request this Court deny Appellant's Petition for Writ of Certiorari.

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PROOF OF SERVICE

I, R. Charles Richards, attorney for Respondent, do hereby certify that I have served a copy of the Repondent's Return to Petition for Writ of Certiorari, by depositing a copy of the same in the U.S. Mail, with proper postage attached, on April 28, 2017 and addressed as follows:

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