THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 21 2018
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-in-Equity

Docket No.: 2014-CP-23-04097

First Citizens Bank and Trust Company, Inc., ... Respondent,

v.

Ronald D. Taylor and Ted D. Smith, ... Defendants,

Ex Parte: Smith Family, LLC, WHS Properties, LLC, and Wanda H. Smith, Appellants.

FINAL BRIEF OF RESPONDENT

Joey R. Floyd, Bar No. 68491
Chelsea J. Clark, Bar No. 102211
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities........ 3

Statement of the Issue on Appeal........ 5

Statement of the Case........ 5

Statement of Facts........ 9

Standard of Review........ 14

Arguments........ 15

I. THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT THE FUNDS AT ISSUE BELONGED TO TED SMITH AND SHOULD BE APPLIED TOWARDS THE JUDGMENT AGAINST HIM, PURSUANT TO S.C. CODE § 15-39-410........ 15

II. THE MASTER-IN-EQUITY CORRECTLY APPLIED THE FUNDS TO THE JUDGMENT UNDER THE STATUTE OF ELIZABETH........ 19

III. APPELLANTS HAVE ABANDONED ARGUMENT ONE AND FOUR IN THE BRIEF OF APPELLANT........ 22

IV. THE ISSUE OF EXEMPTIONS IS NOT RIPE FOR REVIEW........ 22

V. APPELLANT WERE NOT DENIED DUE PROCESS OR AN OPPORTUNITY TO PRESENT EVIDENCE AND TESTIMONY........ 23

VI. THE MASTER-IN-EQUITY HAS SUBJECT-MATTER JURISDICTION OVER THIS TYPE OF CASE........ 24

Conclusion........ 25

TABLE OF AUTHORITIES

Cases

A Fast Photo Express, Inc. v. First Nat'l Bank of Chi., 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006) 14

Ag-Chem Equip. Co. v. Daggerhart, 281 S.C. 380, 315 S.E.2d 379 (Ct. App. 1984) 14

Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978) 24

Bank of Babylon v. Quirk, 192 Conn. 447, 472 A.2d 21 (Conn. 1984) 24

Crawford v. Cent. Mortg. Co., 404 S.C. 39, 744 S.E.2d 538 (2013) 22

Deer Island Lumber Co. v. Va.-Carolina Chem. Co., 111 S.C. 299, 97 S.E. 833 (1919) 16

Dewey v. W. Fairmont Gas Coal Co., 123 U.S. 329, 8 S. Ct. 148 (1887) 20

Dove v. Gold Kist, 314 S.C. 235, 442 S.E.2d 598 (1994) 24

Epperson v. Entm't Express, Inc., 242 F.3d 100 (2d. Cir. 2001) 20

Exch. Nat'l Bank v. Washington, 30 N.Y.S.2d 43 (Sup. Ct. 1941). 20

Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995) 14

HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010) 22

In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) ... 22

Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000) 14

Johnson v. Serv. Mgmt., 319 S.C. 165, 458 S.E.2d 900 (1995) 15, 16, 21

Linson v. Polymer Engineering, Inc. Health Care Ben. Plan for Employees, 1991 U.S. Dist. LEXIS 16773, 1991 WL 243313 (N.D. Ind. 1991) 20

Lynn v. International Brotherhood of Fireman & Oilers, 228 S.C. 357, 90 S.E.2d 204 (1955). 15, 21

McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933) 16

Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013) 16

Nat'l Mar. Servs. v. Straub, 776 F.3d 783 (11th Cir. 2015) 20

Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 459 (2012) 24

Palmetto Bank & Trust Co. et al. v. McCown-Clark Co. et al., 143 S.C. 98, 141 S.E. 155 (1928) 19

Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001) 14

R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000) 22
Rutherford v. Kessel, 560 F.3d 874 (8th Cir. 2009) 20, 24
S.C. DSS ex rel. Tex. v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995) 23
S.C.N.B. v. Central Carolina Livestock Market, 289 S.C. 309, 345 S.E.2d 485 (1986) 23
Snow v. Smith ex rel. Stoudenmire, 416 S.C. 72, 784 S.E.2d 242 (Ct. App. 2016) 14
Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974) 22
Spivey v. Carolina Crawler, 367 S.C. 154, 624 S.E.2d 435 (Ct. App. 2005) 23
State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) 22
Thomas, Head & Greisen Emples. Trust v. Buster, 95 F.3d 1449 (9th Cir. 1996) 20
Wannamaker v. Bryant, 165 S.C. 107, 162 S.E. 779 (1932) 19, 25

Statutes

S.C. Code Ann. § 15-39-310 15
S.C. Code Ann. § 15-39-410 15
S.C. Code Ann. § 27-23-10 15

Rules

Rule 69, SCRCP 24, 25

STATEMENT OF THE ISSUE ON APPEAL

I. WHETHER THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT FIRST CITIZENS IS ENTITLED TO EXECUTE ON FUNDS WHICH THE JUDGMENT DEBTOR ADMITTED, UNDER OATH, BELONGED TO HIM, INDIVIDUALLY, BUT WERE DEPOSITED INTO A BANK ACCOUNT UNDER THE NAME OF A LIMITED LIABILITY COMPANY ALLEGEDLY OWNED BY THE JUDGMENT DEBTOR'S WIFE.

STATEMENT OF THE CASE

This case has a long and fulsome history. Respondent, First Citizens Bank and Trust Company, Inc. (Respondent or First Citizens) filed suit against Ronald D. Taylor (Taylor) and Ted D. Smith (Ted Smith) on July 28, 2014 alleging a single cause of action, breach of contract. (R. p. 5). First Citizens alleged that Taylor and Ted Smith failed to make payments towards a Commercial Note. Taylor and Ted Smith did not dispute that they failed to pay the balance due under the Commercial Note. Rather, they contended that First Citizens failed to bring the action within the applicable statute of limitations. (R. p. 12). On October 6, 2015, Judge Robin Stilwell entered an Order of Judgment in favor of First Citizens in the amount of $74,843.23. (R. p. 19). The court found the Commercial Note was a contract in writing secured by a mortgage of real property. (R. pp. 17–18). Thus, the twenty-year statute of limitations in S.C. Code Ann. § 15-3-520 applied and First Citizens' claim was brought within the applicable statute of limitations. (R. p. 18). Taylor and Ted Smith appealed. This Court affirmed the judgement in favor of First Citizens in an unpublished decision. *See First Citizens Bank and Trust Company, Inc. v. Ronald Taylor and Ted D. Smith*, Op. No. 2016-UP-471 (S.C. Ct. App. Filed Nov. 9, 2016).

The matter was referred to the Honorable Charles B. Simmons, Master-in-Equity for Greenville County, by way of an Order of Reference filed on November 10, 2016. Thereafter, First Citizens initiated supplemental proceedings. (R. pp. 26–28). A supplemental proceedings hearing was held on January 23, 2017 during which Taylor and Ted Smith provided testimony

regarding their assets. (R. pp. 35–50). At the conclusion of the hearing, counsel for First Citizens requested that the supplemental proceedings remain open to allow for additional discovery. (R. p. 50, lines 20–25).

Following the January 2017 hearing, First Citizens Counsel for First Citizens issued various subpoenas for documents as well as subpoenas commanding Ted Smith and his wife Wanda Smith to appear for depositions. Counsel for Respondent filed two motions to compel, one filed February 16, 2017 and one filed March 2, 2017, in order to obtain compliance with the subpoenas. (R. pp. 53–83, 84–94). Judge Simmons filed two orders of production, one filed March 15, 2017 and one filed March 17, 2017. (R. pp. 95–97, 98–100). On May 2, 2017, Counsel for Ted Smith, on behalf of Appellants, filed a motion to quash relating to a subpoena issued by Counsel for First Citizens to United Community Bank (UCB), the bank at which WHS Properties, LLC, Smith Family, LLC and Wanda Smith hold accounts.[1] (R. pp. 101–02). Following a hearing on May 18, 2017, the court entered an Order denying the motions to quash. (R. pp.113–15). On May 24, 2017, Ted Smith and Wanda Smith each appeared for his/her deposition and provided testimony. (R. pp. 116–266, 267–346).

On June 1, 2017, the court entered a Consent Order prohibiting Smith Family, LLC from selling, disposing, or transferring gold and silver being held by Smith Family, LLC. (R. p. 348–50). Counsel for First Citizens discovered the purchases of gold and silver during the May 24, 2017 depositions. (R. p. 236, line 21–p. 238, line 7). Also on June 1, 2017, First Citizens moved to add Smith Family, LLC, WHS Properties, LLC, and Wanda Smith as parties to the ongoing supplemental proceedings, based upon the deposition testimony of Ted Smith and Wanda Smith. (R. pp. 351–58). In addition, First Citizens filed a motion to execute wherein it sought to execute

[1] WHS Properties, LLC and Smith Family, LLC are limited liability companies allegedly owned by Wanda Smith.

on funds belonging to Smith but being held in bank accounts of Smith Family, LLC, WHS Properties, LLC, and/or Wanda Smith. (R. pp. 359–67). First Citizens filed a memorandum in support of its motion outlining the relevant facts and applicable law. (R. pp. 403–19). In addition, First Citizens attached numerous exhibits, including Ted Smith's and Wanda Smith's entire deposition testimony and bank records evidencing certain transactions and deposits. (R. pp. 420–550).

A hearing on First Citizens' motions was held on June 23, 2017. (R. pp. 368–402). On July 5, 2017, the Master-in-Equity entered an order joining WHS Properties, LLC, Smith Family, LLC, and Wanda Smith as parties. (R. p. 562). The Order also required that Smith Family, LLC pay First Citizens $81,026.76 on, or before, July 14, 2017. (*Id.*). Counsel for Ted Smith and Appellants filed a motion to alter and/or amend the Order pursuant to Rule 59(e), SCRCP on July 7, 2017. (R. p. 564–65). While the motion was pending, on July 15, 2017, counsel for First Citizens filed a motion to compel the payment ordered in the July 5, 2017 Order. (R. pp. 566–67). Following a telephone conference, the court issued an Order on August 7, 2017 wherein it denied Ted Smith's and Appellants' motion to alter or amend. (R. p. 569). The court also ruled that it would hold First Citizen's motion in abeyance until August 9, 2017 to allow the parties an opportunity to reach a mutually agreeable compromise regarding the payment of the $81,026.76. (R. p. 571). Notably, the Master-in-Equity advised the parties that he would address any applicable Section 15-41-30 exceptions at a later date. (R. p. 569, n.3).

On August 9, 2017, Ted Smith and Appellants filed a motion for supersedeas pursuant to Rule 241, SCACR. (R. p. 574). Thereafter, on August 16, 2017, Appellants filed the subject Notice of Appeal. (R. p. 575). On September 6, 2017, the Master in Equity issued an Order Regarding Supersedeas wherein the court allowed gold owned by Ted Smith and/or Smith Family, LLC to serve as security for the supersedeas. (R. p. 578–82). Due to the volatility of gold, the

Master-in-Equity ordered that Smith Family, LLC deliver $125,000.00 worth of gold to First Citizens to be held during the pendency of this appeal. (R. p. 579). On October 5, 2017, First Citizens filed another motion to compel, alleging that Smith Family, LLC failed to comply with the Master-in-Equity's Order Regarding Supersedeas. (R. pp. 583–96). On October 20, 2017, the Master-in-Equity issued an Order Regarding Modification of Supersedeas directing that the gold previously delivered by Smith Family, LLC to First Citizens be returned to Smith Family, LLC, immediately liquidated into cash, and then paid to the court, in the amount of $81,026.76, to be held in trust during the pendency of this appeal. (R. pp. 597–600). Ted Smith and Smith Family, LLC have complied with the Order Regarding Modification of Supersedeas and paid $81,026.76 to the Greenville County Clerk of Court for safekeeping.

STATEMENT OF FACTS

All facts relevant to this case concern Ted Smith's attempts to hide his assets by using his wife. On October 6, 2015, an Order of Judgment was entered against Taylor and Ted Smith in the amount of $74,843.23. (R. p. 19). Ted Smith appealed the Order of Judgement; however, this Court affirmed the lower court's decision on November 9, 2016. *See First Citizens Bank and Trust Company, Inc. v. Ronald Taylor and Ted D. Smith*, Op. No. 2016-UP-471 (S.C. Ct. App. Filed Nov. 9, 2016). Thereafter, First Citizens initiated supplemental proceedings to collect the amount owed. (R. pp. 26–28). An initial hearing was held on January 23, 2017 at which Ted Smith provided testimony. Ted Smith testified, under oath, that:

- He was retired. (R. p. 35, line 11).
- He had no bank account. (*Id.*, line 22).
- He did not have any other sources of income. (*Id.*, lines 17–18).
- His wife banked at Branch Banking and Trust Company (BB&T). (R. p. 36, lines 8–9).
- His wife "has a little LLC that has an account with UCB." (*Id.*, lines 11–12).
- His wife had one bank account at UCB. (R. p. 41, lines 14–15).
- He deposited his social security checks into the UCB account. (*Id.*, lines 18–20).
- He affirmed that there were no other accounts that had not been talked about during the January 23, 2017 supplemental proceedings hearing. (R. p. 45, lines 2–4).

Following the January 23, 2017, Counsel for First Citizens issued subpoenas to UCB. The subpoena response revealed that there were actually four bank accounts at UCB for which Ted Smith was an authorized user and which he appeared to be actively using. (*See* R. pp. 359–63, 403–19). The accounts were in the name of Wanda Smith, Smith Family, LLC and WHS Properties, LLC. The subpoena response also revealed four (4) deposits, totaling $81,026.76, which are the subject of this appeal. Each deposit consisted of funds belonging to Ted Smith, individually, which he deposited into the Smith Family, LLC bank account at UCB. The four deposits are as follows:

1. March 23, 2016, $15,789.27: Final distribution of $15,664.27 from Ted Smith's mother's estate and a $125.00 payment from the personal representative of Ted Smith's mother's estate. (R. p. 545).
2. July 14, 2016, $16,800.00: Commission payment to Smith as a Broker/Broker in Charge. (R. p. 544).
3. August 17, 2016, $20,250.00: Commission payment to Smith as Broker/Broker in Charge. (R. p. 543).
4. October 27, 2016, $28,187.49: Payment to Smith for construction management fees. (R. p. 542).

On May 24, 2017, Ted Smith and Wanda Smith appeared for depositions and provided testimony. Notably, during her deposition, Wanda Smith testified as follows:

- She had one bank account with BB&T. (R. p. 277, lines 2–4).
- She was not aware of her name being on any other bank accounts and did not know if she was a signatory on any other bank accounts besides her BB&T account. (*Id.*, lines 5–22).
- She purports to own Smith Family, LLC. (R. p. 278, lines 4–8).
- She does not know where Smith Family, LLC banks. (*Id.*, lines 17–21).
- She does not know what assets Smith Family, LLC owns. (*Id.*, lines 22–24).
- She does not know if Smith Family, LLC owns property. (R. p. 278, line 25–p. 279, line 2).
- Ted Smith makes all the financial decisions and has complete control of all bank accounts of Smith Family, LLC. (R. p. 280, line 19–p. 281, line 1).
- She has no idea how much money Smith Family, LLC has in the bank and has never seen a bank statement for Smith Family, LLC. (R. p. 281, lines 2–10).
- She does not know if she invested any money into, put any capital into or how much money she put in Smith Family, LLC. (R. p. 281, line 14–p. 282, line 17).
- She does not know the intent or purpose of the business besides "manage my money." (R. p. 284, line 18–p. 285, line 4).
- She does not know what Smith Family, LLC has in terms of reserves or expenses. (R. p. 288, lines 17–21).
- She does not know who receives compensation from Smith Family, LLC because she

doesn't know anything about the financials of the company. (R. 290, lines 3–9).

- She has never had any dealings with Smith Family, LLC. (*Id.*, lines 23–25).

As is relevant to this appeal, Ted Smith testified as follows:

- He does not know where the $1000.00 capital for Smith Family, LLC came from. (R. p. 145, lines 14–25).
- He admits that he used the bank accounts at UCB as his personal bank accounts and paid his personal bills out of the accounts. (R. p. 164, lines 10–16).
- He admits that he could do anything with the bank accounts that his wife could do. (R. p. 170, line 14–p. 171, line 7).
- He does not derive any income from Smith Family, LLC or WHS Properties, LLC but they pay for expenses and keeps a roof over his head. (R. p. 180, line 22–p. 181, line 2).
- The wire transfer from Smith Family, LLC checking account to International Co. in the amount of $135,374 is for the purchase of silver that he contends his wife purchased. (R p. 199, line 23–p. 200, line 6).
- Smith Family, LLC pays for his son's apartment. His son brings him cash and Smith Family, LLC writes the check. Ted Smith keeps the cash. (R. p. 201, line 18–p. 202, line 11).
- Smith Family, LLC pays for air conditioning work at his home. (R. p. 202, lines 12–21).
- He was a project manager and hired people to do whatever needed to be done in connection with a project known as the "Easley Building" and he received a check for $28,187.49 on, or about, October 21, 2016. The money was deposited into Smith Family, LLC bank account. (R. p. 209, line 18–p. 210, line 15).
- He is the broker-in-charge for two real estate companies. (R. p. 211, line 23–p. 212, line 7).
- He received a commission of $20,250 from a real estate sale on, or about August 17, 2016 and deposited it into Smith Family, LLC's bank account. (R. p. 217, lines 1–15, p. 543).
- He received a commission of $16,800 from a real estate sale on, or about July 11, 2016 and deposited it into Smith Family, LLC's bank account. (R. p. 218, lines 5–12).

- He did not have a personal bank account after "everything went to pot."[2] (*Id.*, lines 17–20).
- He received $15,664.27 on, or about, March 17, 2016 as a final distribution from his mother's estate and he deposited that money into the Smith Family, LLC bank account. (R. p. 220, line 13–p. 221, line 9).
- He moved money as necessary from Smith Family, LLC to WHS Properties in the UCB accounts as necessary to pay bills. (R. p. 228, lines 10–24).
- He is now moving everything to Smith Family, LLC to "make it less complicated" to pay the bills. (R. p. 236, lines 10–13).
- He has purchased over $300,000 in gold and silver and still has possession of same. (R. p. 240, line 21–p. 241, line 9).

Smith Family, LLC is the only active LLC of the Smiths' at this point in time. (R. p. 244, lines 13–14). Smith Family, LLC had $380,000.00 in the account at the time of Ted Smith's deposition on May 24, 2017. (R. p. 171, lines 16–18, p. 225, lines 3–5). Notably, when asked about the four deposits set forth above, Smith unequivocally admitted that he deposited his own money into the Smith Family, LLC account. (R. p. 211, lines 9–17, p. 217, lines 13–15, p. 218, lines 1–4, p. 221, line 5–7). Importantly, Wanda Smith made no claim to the money stemming from the four deposits. In fact, she was wholly unware of the bank account in which the money was deposited. (R. p. 278, lines 17–21).

On June 1, 2017, based on the deposition testimony of the Smiths, as well as the bank records from UCB, First Citizens filed a motion and supporting memorandum seeking to execute on the $81,026.76 of Smith's personal money which was deposited into the Smith Family, LLC bank account. First Citizens' motion was brought pursuant to the Statute of Elizabeth and well as S.C. Code § 15-39-410. (R. p. 414 ("First Citizens maintains that the transfers outlined herein should be set aside pursuant to the Statute of Elizabeth, S.C. Code Ann. § 27-23-10(A) (2007),

[2] Ted Smith experienced financial hardship with his business in the first quarter of 2008.

S.C. Code § 15-39-410, along with the basic principles of equity given the prior sworn testimony of this Defendant, the misleading testimony, the continued acts of the debtor to delay, hinder, defraud his creditors, and such other applicable law.")). First Citizens attached the entire deposition transcripts of the Smiths to its memorandum in support of its motion, along with bank records evidencing the four deposits. (R. pp. 420–550). First Citizens also filed a separate motion seeking to join Wanda Smith, Smith Family, LLC, and WHS Properties, LLC as parties to the ongoing supplemental proceedings on June 1, 2017. A hearing on the two motions was held on June 23, 2017. Although present, Ted Smith and Wanda Smith chose not to testify. (*See* R. pp. 368–402). Moreover, neither Ted Smith, nor Appellants introduced evidence or submitted memoranda in opposition to First Citizens' motions.

On July 5, 2017, the lower court entered an Order ordering Smith Family, LLC to tender a check to First Citizens in the amount of $81,026.76 on, or before, July 14, 2017. The court's ruling was based upon the Statute of Elizabeth as well as S.C. Code § 15-39-410. (R. p. 556, 558–62). Based on the uncontradicted deposition testimony of Ted Smith and Wanda Smith, the lower court ruled that Ted Smith impermissibly deposited his own money into the Smith Family, LLC bank account. (R. p. 557). As such, the lower court ordered that those funds be paid to First Citizens and be applied towards the judgment against Ted Smith. (*Id.*). The relief granted was limited to the amount of the four deposits set forth above and did not extend to the assets of the LLC generally. The Master-in-Equity noted that his decision was based upon the deposition testimony wherein Smith admitted that he deposited fund belong to him, individually, into the Smith Family, LLC account. Following additional motions and the liquidation of the gold into cash, the funds are currently held by the court for the duration of this appeal. The Master-in-Equity has yet to rule on any applicable exemptions and specifically noted in his August 7, 2017 order that the exemptions would be addressed at a later time. (R. p. 569, n.3).

STANDARD OF REVIEW

"Supplementary proceedings are equitable in nature." *A Fast Photo Express, Inc. v. First Nat'l Bank of Chi.*, 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 a Master-in-Equity case like this one, the appellate court may determine the facts "in accordance with its own view of the preponderance of the evidence." *Id.* (citing *Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n*, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995)).

However, the appellate court is not required to ignore the facts found by the master, who saw and heard the witnesses, and was in a better position to evaluate their credibility. *Snow v. Smith ex rel. Stoudenmire*, 416 S.C. 72, 84, 784 S.E.2d 242, 249 (Ct. App. 2016) (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)). Furthermore, the appellant is not relieved of the burden of convincing the appellate court that the master committed error in its findings. *Id.* (citing *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001)).

ARGUMENT

I. THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT THE FUNDS AT ISSUE BELONGED TO TED SMITH AND SHOULD BE APPLIED TOWARDS THE JUDGMENT AGAINST HIM, PURSUANT TO S.C. CODE § 15-39-410.

The Master-in-Equity based his rulings on two statutes: S.C. Code Ann. § 15-39-410 (hereinafter "the civil remedies statute") and S.C. Code Ann. § 27-23-10(A) (hereinafter "the Statute of Elizabeth"). Both statutes provide a basis for recovery. Appellants argue only the application of the Statute of Elizabeth, stating that the statute may not be applied in a supplemental proceeding, but only in a new and separate action. While Respondent disagrees with Appellants, it is unnecessary for the Court to reach the issue raised by Appellants because the civil remedies statute in Title 15 provides a separate basis to affirm the lower court.

Under South Carolina law, if a judgment is unsatisfied, a judgment creditor may initiate supplementary proceedings to discover assets of the judgment debtor. *Johnson v. Serv. Mgmt.*, 319 S.C. 165, 167, 458 S.E.2d 900, 902 (1995) (citing S.C. Code Ann. § 15-39-310). "[S]upplementary proceedings 'furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution . . . .'" *Id.* (quoting *Lynn v. International Brotherhood of Fireman & Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955)). To that end, the civil remedies statute provides:

> The judge may order 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); *see also Johnson*, 319 S.C. at 168, 459 S.E.2d at 902 (citation omitted).

It has long been held that a court may reach funds in the hands of a third party to satisfy a judgment. In a 1919 case, the South Carolina Supreme Court posed the following question. Can

the funds of a corporation, in the name of said corporation, be taken in proceedings to which that corporation is not a party, upon the claim that the funds are the funds of an individual (the defendant)? *Deer Island Lumber Co. v. Va.-Carolina Chem. Co.*, 111 S.C. 299, 302–03, 97 S.E. 833, 833 (1919). The answer was yes: "a judgment creditor may by the plain words of the statute arrest a fund in the hands of a third party" if they are alleged to belong to the judgment debtor. *Id.*, 111 S.C. at 303–04, 97 S.E. at 834. Indeed, in the more recent *Johnson* case, this Court held that funds held by a third party and now the property of the third party—the judgment debtor's bank—could only be reached through supplemental proceedings. *Johnson*, 319 S.C. at 168, 459 S.E.2d at 902 (citing *McManus v. Bank of Greenwood*, 171 S.C. 84, 88, 171 S.E. 473, 474 (1933)); *see Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344, 745 S.E.2d 90, 93 (2013) ("We note *Johnson* refers to the need for supplemental proceedings, which were held in the current matter with all necessary parties present . . .").

Under the civil remedies statute, the Master-in-Equity had the authority to apply towards the satisfaction of Ted Smith's debt money that belonged to Ted Smith but was held by Appellants. Specifically, the $81,026.76 ordered to be applied towards the judgment consists of four deposits made by Ted Smith into the Smith Family, LLC bank account. Each of the four deposits occurred after the First Citizens judgment was entered against Smith.

During his May 2017 deposition, Smith provided testimony specifically addressing each of the four deposits. For each deposit at issue, Smith admitted the funds deposited belonged to him, individually. The registered agent of Smith Family, LLC, Wanda Smith, was examined about the funds and made a party to the proceedings. She denied any knowledge about the banking or assets of Smith Family, LLC, despite being its sole member. The Master-in-Equity reviewed the full depositions of Ted Smith and Wanda Smith in reaching his decision.

The first deposit was for $15,789.27 and was made on March 23, 2016. These funds represent inheritance money paid to Ted Smith from his mother's estate. Ted Smith gave the following testimony:

> Q. . . . And this appears to be identified as a final distribution to you personally?
> A. Yes.
> Q. And so this was money that you received personally, right?
> A. Yes.
> Q. And it's $15,664.27, right?
> A. Yes.
> Q. It should have been deposited into a personal bank account, right?
> A. It was deposited in the only bank account I could deposit it in because I did not have a personal bank account at that time.

(R. p. 221, lines 1–14).

The second deposit was for $16,800.00 and was made on July 11, 2016. These funds were a real estate commission payment to Ted Smith. Ted Smith testified as follows:

> Q. Flip the page, United Community Bank page 71. On July 11, 2016, you took what appears to be $16,800, endorsed it for Cross Creek Realty by Ted Smith —do you see that—
> A. I do.
> Q. —as broker-in-charge, and you deposited it into Smith Family, LLC, right?
> A. I did.
> Q. Why didn't you put it in your personal account at that time?
> A. I didn't have a personal account at that time.

(R. p. 218, lines 5–16).

The third deposit was for $20,250.00 and was made on August 17, 2016. These funds were an additional real estate commission payment. Ted Smith testified as follows:

> Q. And then you took that money, you endorsed it as Ted D. Smith, and you deposited it into Smith Family, LLC, right?
> A. That's correct.
> Q. This was your personal money, right—
> A. Yes.

(R. p. 217, lines 9–15).

The final deposit at issue was for $28,187.19 and was made on October 27, 2016. These funds were paid to Ted Smith for his work as a construction manager. Ted Smith testified as follows:

> Q. Okay. So, in October 2016 you put in $28,187.49 from Mr. Groves' company, 5208 Calhoun [into the Smith Family, LLC bank account]?
> A. Yes, that's correct.
> Q. That's correct.
> Q. That was your personal money?
> A. Yes.

(R. p. 217, lines 20–25).

The evidence reviewed by the Master-in-Equity included the full deposition transcript of both Ted Smith and Wanda Smith, as well as bank records of the deposits. This uncontroverted evidence was submitted to the lower court as exhibits to Respondent's memorandum in support of its motion to execute. This uncontroverted evidence demonstrates that the funds applied to satisfy the judgment against Ted Smith belonged to Ted Smith.[3] Thus, the Master-in-Equity properly applied these funds to the judgment under the authority of Section 15-39-410. Because the Master-in-Equity properly applied the funds with the civil remedies statute, it is not necessary for this Court to reach the issue of the Statute of Elizabeth.

---

[3] There is no evidence or testimony which contradicts Ted Smith's deposition testimony stating that the funds at issue were his own. At no point in this case has Wanda Smith ever claimed an ownership interest in the $81,026.76 at issue. Counsel for Appellants, through his own argument, is the only person who contends there is a dispute over ownership. However, it has long been held that factual statements of counsel, whether made during oral argument or in written briefs or memoranda should not be considered as evidence by the court. *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) (citing *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) and *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003)) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."). Therefore, no evidence or testimony exists to contradict the findings of the Master-in-Equity, who correctly determined that the funds in question belong to Ted Smith.

II. THE MASTER-IN-EQUITY CORRECTLY APPLIED THE FUNDS TO THE JUDGMENT UNDER THE STATUTE OF ELIZABETH.

The case cited by Appellants, *Wannamaker v. Bryant*, 165 S.C. 107, 109, 162 S.E. 779, 780 (1932), is distinguishable from the case at bar. In this case, the issue is cash, not real estate. In this case, Appellants were made a party to the supplementary proceedings. In this case, testimony of Appellants, in the form of the deposition of Wanda Smith, was entered into the record. In this case, the court acted upon the cash in question as Ted Smith's—because it is— not "as if" it is Ted Smith's. *Id.* 165 S.C. at 109, 162 S.E. at 780. There is no question of ownership or control, merely one of technicality.

In *Wannamaker*, the court quoted, "'No provision appears that either expressly or by implication gives authority to the Court to summarily dispose of the issue of ownership, or to order property claimed by another to be applied towards the satisfaction of an execution against the judgment debtor.'" *Id.* at 165 S.C. at 110, 162 S.E. at 780 (quoting *Palmetto Bank & Trust Co. et al. v. McCown-Clark Co. et al.*, 143 S.C. 98, 141 S.E. 155 (1928)). The distinction in this case is that Appellants have not claimed ownership of the funds belonging to Ted Smith. Appellants had an opportunity to contradict the evidence emanating from their own mouth, but did not do so. Indeed, nowhere in Appellant's brief is there an affirmative assertion of Appellants' ownership. Ultimately, Appellants arguments are only procedural and not substantive.

Several other courts, including the United States Supreme Court, have for that very reason determined that no additional proceedings are necessary. To any extent the Court of Appeals may find that additional proceedings have been required by South Carolina case law in the past, Respondent asserts that the Court should overrule that precedent in favor of more recent and persuasive case law.

For instance, in *Rutherford v. Kessel*, 560 F.3d 874 (8th Cir. 2009), the plaintiff brought suit against the defendant for injuries occurring when defendant assaulted the plaintiff. *Id.* at 875. During the litigation, the defendant transferred three condominiums that he owned to his sister. *Id.* The case went to trial and the plaintiff obtained a judgment against the defendant. *Id.* Following the trial, the plaintiff brought a post-trial motion seeking to set aside the transfer of the condominiums from the defendant to his sister. *Id.* The trial court granted the plaintiff's motion even though the sister was not a party to the litigation. *Id.* Thereafter, the sister appealed arguing that a separate action was required to set aside the alleged fraudulent conveyance. *Id.* at 878. The Eighth Circuit rejected the sister's contention that fraudulent conveyance should have been addressed in a separate suit. *Id.* at 879. The court quoted, among others, a New York case which states, "creditors may now assail fraudulent conveyances without first obtaining a judgment, and may assail them in the same suit in which they seek to establish their debt . . . ." *Exch. Nat'l Bank v. Washington*, 30 N.Y.S.2d 43, 45 (Sup. Ct. 1941).

Several other courts have also ruled that asserting a fraudulent conveyance claim in supplementary proceedings or other existing proceeding is proper and a separate action is not required. *See Dewey v. W. Fairmont Gas Coal Co.*, 123 U.S. 329, 8 S. Ct. 148 (1887); *Nat'l Mar. Servs. v. Straub*, 776 F.3d 783 (11th Cir. 2015) (finding the District Court did not err in allowing the plaintiff to bring fraudulent conveyance claims in supplementary proceedings rather than requiring a separate action); *Epperson v. Entm't Express, Inc.*, 242 F.3d 100 (2d. Cir. 2001); *Thomas, Head & Greisen Emples. Trust v. Buster*, 95 F.3d 1449 (9th Cir. 1996) (finding the district court had jurisdiction to set aside the alleged fraudulent conveyances in supplementary proceedings); *Linson v. Polymer Engineering, Inc. Health Care Ben. Plan for Employees,* 1991 U.S. Dist. LEXIS 16773, 1991 WL 243313 (N.D. Ind. 1991) (holding that the court has jurisdiction to set aside a fraudulent conveyance in the context of proceedings supplemental to execution.).

These cases are consistent with the dictates of public policy and the purpose of the Statute of Elizabeth. If South Carolina law requires a creditor to bring a separate action to set aside an allegedly fraudulent transfer, creditors would be forced to continually chase debtors without remedy. For example, assume a creditor obtained a judgment against a husband. Husband's wife had no involvement in the underlying case; however, while the case was pending, husband transferred a large sum of money to his wife. The transfer was not discovered until after a judgment was entered against the husband. Rather than allowing the creditor to make a motion to set aside the transfer in supplementary proceedings, the court required the creditor to bring a separate action. The subsequent action went to all the way to trial and it was determined that the transfer was in fact fraudulent. Two days after trial, wife transferred all of the money she received from her husband to her daughter. This process could go on without end. If the creditor was forced to bring another action against the daughter, she could then transfer the money to her brother. Each time a transfer was deemed to be fraudulent, the transferee could then transfer the money to another person thereby requiring the creditor to bring a separate action. The unfairness to the creditor that would result is clearly apparent. The purpose of supplemental proceedings is to aid in discovery and "furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution . . . ." *Johnson,* 319 S.C. at 167, 458 S.E.2d at 902 (1995) (*quoting Lynn,* 228 S.C. at 362, 90 S.E.2d at 206).

Historic procedural vagaries should not control this case. All actions taken by the Master-in-Equity were those in equity. This case is distinguishable from historic state precedent and in line with modern precedent from many other courts. Ownership of the funds in this case is indisputable. The right result is clear; the only question is how it may be reached.

III. APPELLANTS HAVE ABANDONED ARGUMENTS ONE AND FOUR IN THE BRIEF OF APPELLANT.

Appellants' brief contains five enumerated arguments. However, arguments one (I) and four (IV) consist of only bolded headings. These headings are short, conclusory statements and include no citations to authority. Therefore, under the principles of appellate procedure, the Court may deem them abandoned. *See, e.g., Crawford v. Cent. Mortg. Co.*, 404 S.C. 39, 44 n.2, 744 S.E.2d 538, 541 n.2 (2013) (citing *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001)) and *Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635–36, 699 S.E.2d 699, 706 (Ct. App. 2010) (citing *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) and *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998).

IV. THE ISSUE OF EXEMPTIONS IS NOT RIPE FOR REVIEW.

Appellants raise the issue of exemptions in their brief. This issue is not ripe for review at this time. Additionally, the issue is unpreserved.[4]

Appellants filed two orders of the lower court with their Notice of Appeal. In this second order, electronically signed on 2017-08-04, Judge Simmons writes, in note three on page two, "Issues relative to 15-41-30 exemptions that Smith may be entitled to, if any, will be addressed at a later date." Issues that have not been ruled on are not ripe for review. *See Spivey v. Carolina*

[4] The issue has not been preserved because it has not been ruled on.

> The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citations omitted). The lower court has not had an opportunity to rule on the issue of exemptions; therefore, the issue is not preserved and there is no ruling for the appellate court to affirm or reverse.

Crawler, 367 S.C. 154, 160, 624 S.E.2d 435, 438 (Ct. App. 2005) ("[I]ssues that are not ripe are not proper subjects of review."). Appellants' appeal of the issue is premature.

Because the issue of exemptions has not been ruled on, it should not be before the Court of Appeals at this time. Respondent requests that the Court dismiss this claim until this matter has been remitted to the lower court, the lower court has ruled on the issue, and the issue is ripe for review.

V. APPELLANTS WERE NOT DENIED DUE PROCESS OR AN OPPORTUNITY TO PRESENT EVIDENCE AND TESTIMONY.

Appellants argue that the "Master-in-Equity erred in adjudicating facts without the opportunity for the Appellants to present any evidence or testimony." Respondent avers that this argument has been abandoned for lack of authority since all text located below the heading concern an error of law argument, which has been addressed above, and not the issue of the opportunity to be heard in the hearings having already occurred in this case. See Respondent's Argument III, *supra*.

However, to the extent that Appellants have preserved the issue of due process, Respondent argues that it was nôt denied. Due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *S.C. DSS ex rel. Tex. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995) (quoting *S.C.N.B. v. Central Carolina Livestock Market*, 289 S.C. 309, 345 S.E.2d 485 (1986)). "Due process does not mandate any particular form of procedure[;] [i]nstead, due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." *Id.*

In this case, there is no question that all persons concerned had an opportunity to voice their concerns and were aware of the hearings on the issue.[5] Appellants counsel argued against the motions of Respondent that were granted and led to this appeal. Appellants could have presented rebuttal evidence. Although Appellants contend that the proper procedure was not followed in this matter, there is no reason to believe that Appellants did not receive due process.

VI. THE MASTER-IN-EQUITY HAS SUBJECT-MATTER JURISDICTION OVER THIS TYPE OF CASE.

Appellants argue that the "Master-in-Equity lacked subject matter jurisdiction to add parties . . . ." Subject-matter jurisdiction does not relate to jurisdiction over parties. Subject-matter jurisdiction concerns the type of case at bar. Specifically, subject-matter jurisdiction is "'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (citing *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (Conn. 1984) and *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978)).

There is no question that the Master-in-Equity had subject-matter jurisdiction over the type of case before him. All the matters contained in this appeal are matters of equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012) (citations omitted) (stating that action to set aside a conveyance under the Statute of Elizabeth, and even an action to pierce the corporate veil under an alter-ego theory, is in equity). The lower court was within the scope of Rule 69, SCRCP, which provides for "proceedings supplementary to and in aid of a judgment" and "proceedings on and in aid of execution." Rule 69, SCRCP. "In the aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person,

[5] In the above-cited *Rutherford* case, the court quoted the district judge. The district court judge noted that the person to whom the fraudulent transfer had been made was present and listened to testimony about the ownership of the property. *Rutherford*, 560 F.3d at 880 (citation omitted). In the district court's opinion, if that person disagreed, they had an obligation to set the record straight, rather than allow the conveyor to testify falsely. *Id.*

including the judgment debtor, in the manner provided in these rules for obtaining discovery." Rule 69, SCRCP.

To the extent that Appellants may argue that Section 15-39-460 applies, it is the position of Respondent that no claim by Appellants has been made to the funds belonging to Ted Smith. The uncontroverted evidence indicates no claim of ownership by the registered agent of Smith Family, LLC to the funds in the account. Therefore, no additional proceedings could have been required. The funds were payable to Ted Smith, deposited by Ted Smith, and fully within the control of Ted Smith. There is no evidence to the contrary and for this reason there can be no colorable claim to ownership of the funds by Appellants. Ted Smith is seeking to evade justice and a valid judgment debt against him by fraudulently holding the money under the names of other persons. Those other persons deny all knowledge of the funds belonging to Ted Smith or any of the transactions related to the funds. It is simply unacceptable for Ted Smith to evade the law and successfully secrete tens of thousands of dollars away for his personal use without a reasonable remedy available to those he has taken money from and not repaid. The record reflects that Ted Smith still has full power and control over his money. Therefore, that money should be applied to the judgment against him.

CONCLUSION

The Master-in-Equity correctly applied funds belonging to Ted Smith to a judgment against Ted Smith. For this reason and those set out above, Respondent respectfully requests that this matter be affirmed. If, however, the Court finds some error in the actions of the lower court, Respondent requests that the matter be remanded for additional proceedings or reversed without prejudice so that Respondent may continue its efforts to reclaim the funds owed to it. *See Wannamaker*, 165 S.C. at 111, 162 S.E. at 780 ("The judgment of this Court is that the order appealed from be, and the same is hereby, reversed, without prejudice to the right of the respondent

to proceed with his action to set aside the deed, or to bring such new action thereabout as he may be advised.").

BRUNER, POWELL, WALL & MULLINS, LLC

Joey R. Floyd, Bar No. 68491
Chelsea J. Clark, Bar No. 102211
Post Office Box 61110 (29260)
1735 St. Julian Place, Suite 200 (29204)
Columbia, South Carolina
(803) 252-7693
Attorneys for the Respondent

March 21, 2018
Columbia, South Carolina

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, the undersigned certifies that this final brief complies with Rule 211(b), SCACR.

BRUNER, POWELL, WALL & MULLINS, LLC

Joey R. Floyd, Bar No. 68491
Chelsea J. Clark, Bar No. 102211
Post Office Box 61110 (29260)
1735 St. Julian Place, Suite 200 (29204)
Columbia, South Carolina
(803) 252-7693
Attorneys for the Respondent

March 21, 2018
Columbia, South Carolina

RECEIVED
MAR 21 2018
SC Court of Appeals