

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

The Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2014-CP-04-2419

Dr. Marvin Anderson, Respondent.

v.

Mary Thomas; Forest Thomas; Prodigal Enterprises, LLC; ; Brushy Creek BBQ, Inc. ; and Bail Pros Bail Bonding, LLC, defendants

of whom, Mary Thomas is the Appellant,

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THE TRANSFER OF THE HWY. 81 PROPERTY TO APPELLANT WAS A FRAUDULENT CONVEYANCE
- 2.. DID THE TRIAL COURT ERR IN FINDING APPELLANT WAS UNJUSTLY ENRICHED BY A TRANSFER OF REAL ESTATE FROM A LIMITED LIABILITY COMPANY THAT WAS NOT RESPONDENT'S JUDGMENT DEBTOR?

STATEMENT OF THE CASE

Dr. Marvin Anderson (respondent) obtained a judgement against Forest Thomas (Thomas) for \$378,108.08 on March 6, 2013. Respondent filed an action against the appellant, Thomas and remaining defendants alleging (1) violation of S.C. Code Ann. § 27-23-10 and (2) unjust enrichment arising from a conveyance of real estate ("Hwy. 81 property") to appellant by the defendant Prodigal Sons LLC ("Prodigal").

The action was tried non-jury on February 21, 2017 before Circuit Court Judge J. Cordell Maddox, Jr. On May 19, 2017, Judge Maddox issued an Order finding that the respondent was entitled to a judgment against Mary Thomas in the amount of \$125,000.00 under either the unjust enrichment or fraudulent conveyance cause of action (Judgment, p. 8).

Appellant filed a motion to reconsider on May 26, 2017 (motion to reconsider). Following a hearing on the motion to reconsider, Judge Maddox issued an Order denying the motion and appellant filed this appeal.

FACTS

Prodigal Enterprises, LLC ("Prodigal") was formed on September 9, 1997 for the purpose of owning the Hwy. 81 property and leasing it to Brushy Creek BarBQ to operate a restaurant (transcript, p. 62). There were seven original owners of Prodigal including appellant and

Thomas (transcript, pp. 62-63). Appellant and Thomas (who are wife and husband) eventually bought out all of the other owners and became the only owners of Prodigal and Brushy Creek BarBQ by 2005 (transcript, p. 36).

The following sequence of events occurred:

- On April 5, 2007, appellant was issued a runner's license to work for Action Out Bail Bonding (transcript, p. 52).
- On October 30, 2008, the respondent loaned \$125,000.00 to Thomas (plaintiff's ex #1).
- On December 3, 2009 appellant passed the professional bondsman exam (transcript, p. 53).
- Thomas signed a promissory note at respondent's request on March 2, 2010 that acknowledged the 2008 loan, stated that the amount then due on the loan was \$181,250.00 and required monthly payments in the amount of \$34,294.71 beginning April 1, 2010 (transcript, p.15, plaintiff's ex.# 2).

Bail Pros Bail Bonding, LLC was formed on December 2, 2010 with appellant as the sole member (transcript, p. 52) Needing collateral to operate her new business , the appellant and Thomas decided to pledge the Hwy. 81 property held by Prodigal to the Anderson County Clerk of Court. They met with attorney Bill Hood September 2009 to draft the necessary documents to pledge the Hwy. 81 property (transcript, pp. 66-67). After the title search revealed that Prodigal owned the real estate, Mr. Hood informed them that appellant, as the professional bondsman, would have to own the Hwy. 81 property in order to pledge it as collateral for her bail bondsman business (transcript, p. 69). Up until that point, the appellant and Thomas believed the property

could be pledged by Prodigal (transcript, p. 38). The title exam also revealed several open mortgages on the Hwy 81 property. Mr. Hood drafted the mortgage satisfactions and the appellant and Thomas began tracking down the mortgage holders to execute the satisfactions (transcript, pp. 67-68). This process took several months to complete (transcript, p. 48). Once all the mortgages were satisfied, Prodigal conveyed the Hwy. 81 property to appellant for nominal consideration on July 7, 2010 (Plaintiff's exhibit # 14). On July 12, 2010, appellant pledged the Hwy. 81 property to Anderson County (plaintiff's exhibit # 15). Prodigal was subsequently dissolved.

No payment was ever made on the note and the respondent filed suit against Thomas.. A judgment was entered against Thomas in favor of respondent on March 6, 2013 in the amount of \$378,108.08 (plaintiff's exhibit # 18). When respondent discovered the above transfer of the Hwy. 81 property, he brought the underlying action against appellant, Thomas and other defendants.

The action was heard without a jury. In it's order, the trial court found that the purpose of the conveyance by Prodigal to appellant was to defraud the respondent (Order, p. 6). Finding it impossible to re-title the Hwy. 81 property to a dissolved corporation, the trial court found that the "most appropriate relief" (Order, p. 8) was to award a monetary judgment against appellant in the amount of \$125,000.00. The amount of the judgment was based upon what the court found to be the value and benefit appellant received from the transfer of the Hwy. 81 property to her.

ARGUMENT

Standard of Review

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998). In an appeal from an action in equity, the appellate has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995). 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. *Dorchester County Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 477 S.E.2d 476 (Ct.App.1996). Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. *Id.*

I. THE TRIAL COURT ERRED IN FINDING THE TRANSFER OF THE HWY. 81 PROPERTY TO APPELLANT WAS A FRAUDULENT CONVEYANCE

Respondent is a judgment creditor of Thomas. Respondent brought this action under S.C. Code § 27-23-10 claiming, *inter alia*, that he was a judgment creditor of the grantor which conveyed the Hwy. 81 property to the appellant. However, the grantor in that transaction was Prodigal, a limited liability company. Prior to the current action, respondent had never sued Prodigal and admitted he held no judgment against Prodigal (transcript, p.24).

Generally, “ a limited liability company is a legal entity distinct from its members.” S.C. Code Ann. § 33-44-201 (2006). “ A member is not a co-owner of, and has no

transferable interest in, property of a limited liability company.” S.C. Code Ann. §

33– 44– 501(a) (2006 & Supp.2012). *See also* Comment to S.C. Code Ann. § 33– 44– 501

(“ Members have no property interest in property owned by a limited liability company.”)

South Carolina’s fraudulent conveyance statute is codified under S.C. Code Ann. §27-23-

10(A):

Every gift, grant , alienation, bargain, transfer and conveyance of lands...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...must be deemed and taken...to be clearly and utterly void...

The order cites the two conditions under which conveyances will be set aside as a fraudulent conveyance:

When 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 v. Robinson, 371 S.C. 311, 317 (Ct. App. 2006), quoting *Mathis v. Burton*, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995).

Additionally,

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.

Windsor Properties v. Dolphin Head Const., 331 S.C. 466, 498 S.E.2d 858 (S.C., 1997),

citing *Gardner v. Kirven*, 184 S.C. 37, 41, 191 S.E. 814, 816 (1937). In *Windsor*, the property was transferred from the corporation, wholly-owned by husband, to the wife. Finding that the transfer was in reality an intra-family transfer, the court imposed the burden on the wife to establish by clear and convincing evidence that there was consideration and that the transaction was bona fide.

However, *Windsor* is distinguishable from the present case in an important way. In *Windsor*, the corporation that conveyed the property was the judgment debtor. Therefore, S.C. Code Ann. §27-23-10 and the case law that has developed from it could be readily applied. In the present case however, the limited liability company is not a judgment debtor. It is a separate legal entity, separate and distinct from both Thomas and the appellant.

Although the respondent included an allegation in his complaint that Prodigal was the alter-ego of Thomas, no evidence was produced at trial to support the allegation. Sheridan Alan Hill, the corporate attorney for the appellant and Thomas, testified that Prodigal was not the alter-ego of Thomas (transcript, p. 65). He testified that none of the transaction undertaken by Thomas were out of the ordinary. On the contrary, the transactions were customarily done by limited liability corporations (transcript, p. 65).

Additionally, there was clear and convincing evidence that this was a bone fide transfer. Appellant began working in the bail bond business in 2007 (transcript, p. 52) prior to the initial loan. She obtained took and passed the exam to be a professional bail bondsman in 2009 (transcript, p. 53) when the professional bail bondsman she was working for was arrested for breach of trust. It is clear from the evidence that appellant had been pursuing this line of work since before the loan was even made. The property was transferred to appellant for a legitimate

reason: she needed collateral to secure the bonds she would be writing (transcript, pp. 54-55).

The trial court concluded that the timing of the transactions cast doubt on appellant's motives. However, the parties contacted attorney Bill Hood who testified and corroborated the testimony of both appellant and Thomas as to why they sought the transaction (transcript, pp 67-72). Bill Hood's testimony also corroborated their testimony that explained why there was a delay between the time the appellant and Thomas first met with Bill Hood and the actual transfer of the property: there were outstanding mortgages that had to be satisfied (transcript, pp. 67-72). Finally, Mr. Hood corroborates the important testimony that the appellant and Thomas did not go to him asking to transfer the property from Prodigal to appellant, rather, they simply wanted to pledge the property as collateral for the bail bond business (transcript, pp. 68-69). It was Mr. Hood who brought to their attention that the property had to be in the bail bondsman's name (transcript, pp. 38, 68-69, 73).

Since Prodigal was not a judgment debtor of the respondent and, alternatively, there was no evidence that Prodigal was the alter-ego of Thomas, it was error for the court to find S.C. Code Ann. §27-23-10 applicable to the present case. Therefore, the fact that the transfer of Hwy. 81 to appellant was for nominal consideration is not relevant, as the transfer was not made by a judgment debtor and was made for a bona fide purpose.

II. THE TRIAL COURT ERRED IN FINDING THE TRANSFER OF THE HWY. 81 PROPERTY TO APPELLANT WAS A FRAUDULENT CONVEYANCE

Respondent's unjust enrichment action rests upon proof that appellant received a non-gratuitous gift *from the respondent* by virtue of the conveyance of the Hwy. 81 property from Prodigal, a limited liability company. Admittedly, the conveyance was made without valuable

consideration. However, the conveyance was made by Prodigal, not the respondent and not Thomas, individually. The order fails to apply the law regarding unjust enrichment to the evidence in the case. “ Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff. *Ellis v. Smith Grading and Paving, Inc.*, 366 S.E.2d 12, 294 S.C. 470 (S.C. App., 1988) citing *Barrett v. Miller*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct. App.1984).

“ This Court has recognized *quantum meruit* as an equitable doctrine to allow recovery for unjust enrichment.” *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 440 S.E.2d 129, 312 S.C. 259 (S.C., 1993); See also *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989).

“ Absent an express contract, recovery under *quantum meruit* is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.” *Id.* citing *Webb v. First Federal Savings and Loan Ass'n.*, 300 S.C. 507, 388 S.E.2d 823 (Ct. App.1989); *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 366 S.E.2d 12 (Ct. App.1988).

The fact that a limited liability company conveyed the Hwy. 81 property to appellant is central to this case.

Respondent's fraudulent conveyance action rests upon proof that he is the creditor of the grantor, which he admitted he was not. The order specifically finds (Order, p. 7) that Thomas was the grantor in the conveyance of the Hwy 81 property to appellant Mary Thomas when the only evidence submitted at trial was that the grantor was Prodigal. Thomas had no legal interest in the real estate.

Likewise, there is no evidence to support respondent's cause of action for unjust enrichment. There was no allegation of an express contract between the respondent and appellant, therefore, any recovery for unjust enrichment would fall under quasi-contract. However, the evidence fails to support a quasi-contract. The allegation in respondent's complaint is that the transfer of the Hwy 81 property to appellant constituted unjust enrichment. However, that transfer was not made by the respondent and respondent conferred nothing on appellant by virtue of that transfer. The conveyance was made by a limited liability company that was a legally distinct entity from both the appellant and Thomas. There was no judgment against Prodigal and no action pending against Prodigal. If the respondent believed the loan he made to Thomas unjustly enriched appellant, that is a cause of action that was not pled in this action and would have been barred by the statute of limitations had it been.

In order for a plaintiff to show that a non-gratuitous gift was bestowed upon a defendant, the plaintiff must show either of the two following situations:

1. That the benefit was conferred upon the defendant at the defendant's request; or,
2. That circumstances exist where the plaintiff may reasonably rely upon the defendant for payment and the defendant knows or has reason to know that the plaintiff is relying upon the defendant for payment; and
3. The defendant's conduct induced the plaintiff to confer the benefit on the defendant.

Niggel Assoc., Inc. V. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988).

It was error to apply unjust enrichment to this case because the respondent (who is the plaintiff) never (1) conferred a benefit upon appellant; nor are there (2) any circumstances where

the respondent could reasonably rely upon appellant for payment of the debt owed respondent by Thomas and that appellant knew or had reason to know that respondent was relying upon appellant for payment; and, (3) appellant's conduct did not induce the respondent to confer the benefit on appellant.

The application of unjust enrichment has been muddled by respondent and the trial court, because neither was consistent about identifying the benefit. Was the benefit the conveyance of the Hwy. 81 property to appellant by Prodigal or was it the \$125,000.00 loan from respondent to Thomas?

If the benefit was the \$125,000.00 loaned by respondent to Thomas, unjust enrichment cannot be applied against appellant. This scenario would require a showing that appellant either benefitted from the loan or that she was an active, known participant in the loan transaction itself.

There is no evidence that appellant benefitted from this loan in any way. Likewise there is no evidence to support the scenario that the appellant was an active participant in procuring this loan. There is no evidence that respondent was relying upon appellant to repay the loan, that appellant knew she was expected to repay the loan or that appellant did anything to induce respondent to make the loan. There is no evidence that appellant played any role in the loan from respondent to Thomas and the respondent did not attempt to offer any such evidence. Therefore, the court's use of unjust enrichment could not have been based upon the benefit being the \$125,000.00 loan.

If the benefit was the Hwy. 81 property as the order suggests ("the most appropriate relief...is to award a judgment to the plaintiff...for the value of the property ...she received from the fraudulent transfer.") (Order, p. 8), unjust enrichment cannot be applied against the appellant.

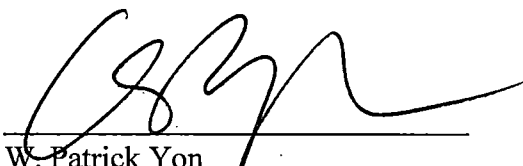
The benefit of the conveyance was conferred by Prodigal, not the respondent. Additionally, the respondent had no role to play in that transaction as it was between a limited liability corporation and the appellant. The respondent held no judgment against Prodigal. Therefore, the court's use of unjust enrichment to impose judgment against appellant, could not have been based upon the benefit being the transfer of the Hwy. 81 property.

The trial court seems to conflate the two transactions to find justification for its order. This was error. Appellant was aware of the Hwy. 81 transfer but not the loan. She benefitted from the Hwy. 81 transfer but not the loan. Respondent was not a party to the Hwy.81 transfer. There is no evidence that would support a finding of unjust enrichment against appellant under either transaction.

CONCLUSION

The trial court erred in finding a fraudulent transfer took place pursuant to S.C. Code Ann§ 27-23-10. The trail court also erred in finding the appellant had been unjustly enriched by the transfer. Therefore, this Court should reverse the trial court's judgment against the appellant.

Respectfully submitted,



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In The Court of Appeals

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J. Cordell Maddox, Jr., Circuit Court Judge

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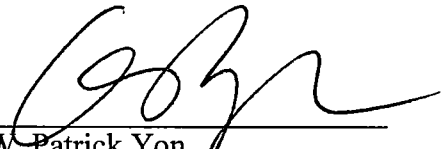
of whom, Mary Thomas is the Appellant,

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I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to Be Included on Appeal on Dr. Marvin Anderson by depositing a copy of the same in the United States Mail, postage prepaid, on October 8, 2018 addressed to his attorney of record, Rodney F. Pillsbury, Esq, 301 Rutherford St., Greenville, SC 29609.

October 8, 2018



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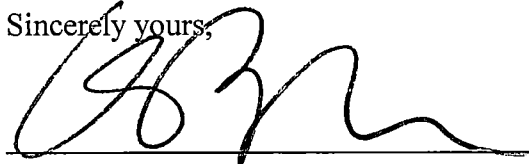
RE: Dr. Marvin Anderson v. Mary Thomas
Appellate Case No. 2018-000875

Dear Ms. Kitchings

Enclosed for filing are the following in the above case:

- (1) Appellant's Initial Brief;
- (2) Appellant's Designation of Matter to Be Included on Appeal;
- (3) Proof of Service on Respondent's attorney.

Sincerely yours,



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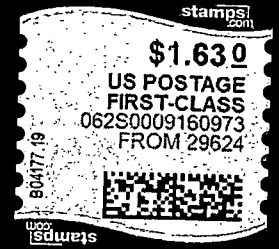
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