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S.C. SUPREME COURT

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

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

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

Appellate Case No. 2019-002091
Opinion No. 2019-UP-304 (S.C. Ct. App. filed Aug. 21, 2019)

China Construction America of South Carolina, Inc., Respondent,

v.

MS Production Solutions LLC a/k/a MSPS Steel Fabricators, Manfred Sprenger,
and Patricia Sprenger, Petitioners.

RESPONDENT’S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONERS FOR REVIEW¹

- I. Whether the Court of Appeals erred in finding that transfers from MSPS to Manfred Sprenger were made with the intent to defraud its creditors.
- II. Whether the Court of Appeals incorrectly overlooked evidence that MSPS made Manfred Sprenger's salary checks payable to Patricia Sprenger to allow her to endorse and deposit the checks.
- III. Whether the Court of Appeals erred in holding that a lack of evidence required the issue of security interest and execution be remanded.

STATEMENT OF THE CASE

This matter is before the Court following cross-appeals to the Court of Appeals from the Master-in-Equity for Greenville County, The Honorable Charles B. Simmons, Jr. This case originated with a Complaint filed by China Construction America of South Carolina, Inc. ("Respondent") against Petitioner MS Production Solutions, LLC, also known as MSPS Steel Fabricators ("MSPS"), on April 2, 2014. (R. p. 41.²) Respondent sued MSPS for numerous causes of action relating to MSPS' failure to perform its duties as a subcontractor and provide steel components for renovations of Irmo High School. (R. pp. 41–47.)

MSPS did not properly appear or answer after being served with the suit and an order for the entry of default ensued on July 31, 2014. (R. pp. 4–5.) Following a hearing for damages, The Honorable D. Garrison Hill entered an amended order of judgment against MSPS in the amount of \$657,137.30. (R. p. 39.) Respondent then initiated supplemental proceedings in aid of collection on the judgment and The Honorable Robin B. Stillwell issued an order of reference and rule to show cause on May 1, 2015. (R. p. 3.) The order and rule to show cause required MSPS

¹ Petitioners did not set out questions for review in their petition; therefore, these questions are derived from their argument headings.

² The Record on Appeal is contained in Appendices I and II, filed with the Petition for Writ of Certiorari, beginning at page 130. Respondent cites to the original Record pagination contained in the lower right-hand corner of the pages.

to appear on June 2, 2015 before the Greenville County Master-in-Equity to explain why the judgment had not been paid and to provide documents showing the financial status of the company. (R. pp. 1–3.)

On June 2, 2015, both parties appeared before the Master-in-Equity through counsel. (R. p. 161.) Petitioner Manfred Sprenger (“M. Sprenger”) testified as “Owner/President” of MSPS. (R. p. 162.) During the hearing, M. Sprenger testified that MSPS printed checks to his spouse for large sums of money, even though she has no position with the company. (R. p. 168, l. 12–p. 169, l. 18.) Respondent deposed M. Sprenger’s spouse, Petitioner Patricia Sprenger (“P. Sprenger”), on September 21, 2015. She testified that the Sprengers were holding in their bedroom approximately \$50,000 in cash that had originated from a check issued by MSPS in violation of the injunction in the rule to show cause previously issued by the circuit court. (R. p. 92, l. 20, p. 96, ll. 17–23; p. 2.) M. Sprenger interrupted the deposition in an attempt to stop his wife from testifying about the location of these funds. (R. p. 92, ll. 15–20.) Respondent moved to set aside the transfer of these funds from MSPS to P. Sprenger and funds from MSPS to M. Sprenger as fraudulent and to execute on the same. (R. p. 82.)

A hearing was held on Respondent’s motion on October 2, 2015. (R. p. 192.) On October 8, 2015, Judge Simmons signed an order directing MSPS to make efforts to recover the \$50,000 from P. Sprenger and noted that the Sprengers were not parties to the proceedings. (R. p. 8.) Shortly thereafter, Respondent moved to join the Sprengers as necessary parties, pursuant to Rule 19, SCRCF. (R. pp. 149–51.) Respondent also moved for an order of contempt on the basis that MSPS had failed to recover the funds in question and deposit them with its attorney to be held in trust. (R. pp. 136–37.) A hearing was held on these motions and MSPS’ motion to quash a subpoena on November 18, 2015. (R. p. 219–20.)

By order filed December 23, 2015, the Master-in-Equity joined the Sprengers to the case and ordered MSPS to place \$8,000.00 in its counsel's trust account, pending a ruling on the nature of the alleged fraudulent transfer. (R. pp. 13–16.) On March 2, 2016, a further and final hearing was held before Judge Simmons on the issue of fraudulent conveyances. (R. pp. 241; 244, ll. 5–19.) Judge Simmons concluded in his resulting order that MSPS had fraudulently conveyed up to \$221,593.94 in funds to Patricia Sprenger. (R. pp. 26–27.) The Master-in-Equity ordered, *inter alia*, that the previously set aside \$8,000.00 be paid to Respondent and that Respondent be allowed to conduct further discovery for the purpose of locating executable assets resulting from the improper transfers. (*Id.*) However, the court also ordered that Respondent could not reach the funds MSPS paid to M. Sprenger without proper documentation. (R. p. 26.)

Both Respondent and Petitioners filed motions to reconsider and both motions were denied. (R. p. 32.) Cross appeals to the Court of Appeals followed. After dual briefing, the Court of Appeals decided the case without oral argument in a lengthy *per curium* unpublished opinion. *See China Construction America of South Carolina, Inc. v. MS Production Solutions LLC a/k/a MSPS Steel Fabricators, Manfred Sprenger, and Patricia Sprenger*, 2019-UP-304 (S.C. Ct. App. filed Aug. 21, 2019).³

In addressing the issues appealed by Respondent, the Court of Appeals held that the lower court erred in not finding the transfers made to M. Sprenger fraudulent, that the lower court had not erred in choosing the date of the complaint as the start of a creditor/debtor relationship between the parties, and that the case should be remanded for further development of the record on the issue of security interests in MSPS deposit accounts. (Appx. I, pp. 7–11.) As to Petitioners' appeal, the Court of Appeals held that the lower court did not err by setting aside transfers from MSPS to

³ Hereinafter cited as contained in Appendix I to the Petition for Writ of Certiorari.

P. Sprenger. (Appx. I, pp. 11–12.) As a result, the Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. (Appx. I, p. 12.)

Petitioners filed a petition for rehearing dated October 7, 2019. (Appx. I, p. 13.) The petition was denied by order filed November 27, 2019. (Appx. I, p. 1.) Petitioners filed a petition for writ of certiorari with this Honorable Court dated January 6, 2020. This return follows.

ARGUMENT

The Supreme Court has discretionary review over cases heard by the Court of Appeals. Rule 242(a), SCACR. Rule 242, SCACR, governs petitions by parties for such review and sets out several factors the Court may consider. Rule 242(b), SCACR. The Court may consider whether there are novel questions of law, whether an appellate judge dissented in the prior ruling, whether the Court of Appeal’s ruling conflicts with existing precedent, and whether any substantial constitutional issues are implicated. *Id.* None of these factors are present in this case. The Court of Appeals applied longstanding law, such as the Statute of Elizabeth, to the facts of the case under a traditional equity standard of review. There are no novel or substantial legal issues to determine in this case. This is demonstrated by the petition for writ of certiorari, which propounds only factual disagreements with the Court of Appeals, rather than legal ones. The Court of Appeals’ unpublished rulings were supported by both the law and the record. Therefore, Respondent urges this Court to deny Petitioners’ request for a writ of certiorari.

I. THE COURT OF APPEALS CORRECTLY HELD THAT TRANSFERS FROM MSPS TO MANFRED SPRENGER WERE MADE WITH THE INTENT TO DEFRAUD ITS CREDITORS.

Petitioners argue that the Court of Appeals erred in setting aside transfers from Petitioner MSPS to M. Sprenger. This argument lacks context and is not supported by the facts of this case, which show that the transfers were made after the judgment was entered against MSPS and with the intent to defraud Respondent, a justly owed judgment creditor. Respondent incurred more than

half a million dollars in damages because of MSPS. (R. p. 39.) It has been six years since Respondent entered suit against MSPS and yet it has still not received even a fraction of the damages that are owed. Instead, during the intervening time, the Sprengers have been transferring tens of thousand of dollars to themselves, even after these transactions were repeatedly enjoined by the lower court. (R. pp. 29–30;⁴ p. 2; p. 7.) The Court of Appeals correctly held that payments to the Sprengers should be set aside.

The Statute of Elizabeth is a longstanding law allowing cheated creditors to seek a court’s affirmation that a fraudulent transfer of assets is void and of no effect. In pertinent part, the Statute of Elizabeth provides, “Every . . . transfer . . . , by writing or otherwise, . . . which may be had or made to . . . defraud creditors . . . must be deemed and taken . . . to be clearly and utterly void, frustrate and of no effect” S.C. Code Ann. § 27-23-10(A). The clear and convincing evidentiary standard applies to an action to set aside a transfer pursuant to the Statute of Elizabeth, which is reviewed under a *de novo* standard. *Judy v. Judy*, 403 S.C. 203, 207-08, 742 S.E.2d 672, 675 (Ct. App. 2013) (quoting *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012)). There are a few different scenarios where transfers can be set aside. *See Mathis v. Burton*, 319 S.C. 261, 264–65, 460 S.E.2d 406, 408 (Ct. App. 1995). The highest burden when setting aside a transfer is imposed when there is valuable consideration. *See id.* In this case, the Court of Appeals conducted its analysis using this higher standard, which requires actual intent. (Appx. I, p. 8.)

The Court of Appeals found that the transfers made to M. Sprenger were made in consideration of his work for the company as its owner. *Id.* Thus, the elements to be considered are: “(1) the transfer was made by the grantor with the actual intent of defrauding his creditors;

⁴ *See also* Appx. I, p. 61 (Brief of Appellant/Respondent setting out a table of events and transfers with record citations).

(2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee." *Mathis*, 319 S.C. at 264–65, 460 S.E.2d at 408 (quoting *Durham v. Blackard*, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993)). The Court of Appeals addressed each element, recognizing that MSPS had been on notice, not only of the suit and judgment, but of the lower court's repeated injunction against transfers at the time it issued checks to M. Sprenger. Additionally, the accounting records presented by Petitioners did not show any regular pattern of payments or documentation to support the "loans" alleged by M. Sprenger.

This lack of any corroborating documentation is important for several reasons. The Statute of Elizabeth provides that "feigned consideration" is to be ignored. S.C. Code Ann. § 27-23-10(A). Our courts have applied several "badges of fraud" for the purpose of ferreting out fraudulent transfers. This Court listed several badges in a 1973 case that has that has repeatedly been referenced in later jurisprudence. *See, e.g., First Citizens Bank & Tr. Co. v. Park at Durbin Creek*, 419 S.C. 333, 340–41, 797 S.E.2d 409, 413 (Ct. App. 2017); *First Citizens Bank & Tr. Co. v. Scofield*, 286 S.C. 520, 522, 335 S.E.2d 248, 249 (Ct. App. 1985) (both citing *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973)). The *Coleman* court noted that no one "could pretend to anticipate or catalog" all the indicia of fraud, but nevertheless stated that the generally recognized badges of fraud include "the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property." *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) (quoting 37 Am. Jur. (2d), *Fraudulent Conveyances*, § 10 (1968) (internal punctuation omitted)).

One or more badges of fraud may create a rebuttable presumption of fraud. *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999) (citations omitted). Indeed, when a “conveyance to a family member or close relative is attacked on account of its voluntary character, the law imposes a duty *on the transferee* to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence. *First State Sav. & Loan Asso. v. Nodine*, 291 S.C. 445, 450, 354 S.E.2d 51, 54 (Ct. App. 1987) (citing *Coleman*, 261 S.C. at 208, 199 S.E.2d at 79) (emphasis added). In this case, numerous badges of fraud apply.

For instance, at all times relevant MSPS did not have funds to pay the judgment against it and had significant debt, including a small business loan. (R. p. 174, ll. 4–5 (stating the amount owed on the loan as exceeding one million dollars)). Despite being in immense debt and under an injunction, MSPS chose to arbitrarily pay thousands of dollars to its sole owner and president for “loans” it has not been able to prove actually exist. Because M. Sprenger is the sole owner of the company, he has total control over MSPS’ assets and he *maintained* the same exact control when the funds were transferred to him, while *removing* the capabilities of his just creditors to access the funds. As the Court of Appeals noted, these payments did not maintain any regular pattern and thus are outside the usual method of business.

Petitioners failed to prove many things, including the existence of the alleged loans. However, even if the loans existed, which is denied, there is no evidence that they predated the debt owed to Respondent or had priority over that debt. This is exactly why injunctions like the one in this case are applied during supplemental proceedings—a debtor does not get to choose to pay its principal back before its other creditors. In decrying a scheme between a debtor and creditor to ensure that the instant creditor was paid before other duly owed creditors, this Court has said,

“whenever the court has been satisfied that the transfer of the insolvent debtor’s property was, in effect, an assignment for the benefit of certain creditors, to the exclusion of the other creditors, it has not hesitated to set it aside, no matter by what name it might be called.” *Meinhard v. Youngblood*, 41 S.C. 312, 327, 19 S.E. 675, 683 (1894). Even if the payments to M. Sprenger resulted from undocumented and unsecured loans, it is of no moment because Petitioners could not establish priority over the judgment lien of Respondent. MSPS cannot collude with its owner to ensure he is paid before other creditors.

Petitioners assert the Court of Appeals erred in finding no loans. Even if this were true, which is denied, it would not matter because there is no priority. However, the Court of Appeals’ findings were based on undisputed transactions in the record. Under the *de novo* standard of review, the Court of Appeals was entirely within its discretion to conclude that the transfers to M. Sprenger should be set aside because of actual intent to defraud creditors. Petitioners find fault with the inferences made by the Court of Appeals—yet they can cite to no document to show a loan, nor any legal error in the appellate court’s analysis. Thus, this Court should deny Petitioners’ request for a writ of certiorari upon this question.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE LOWER COURT’S RULING SETTING ASIDE THE FRAUDULENT TRANSFERS TO PATRICIA SPRENGER.

Petitioners next argue that both the Master-in-Equity and the Court of Appeals erred in setting aside MSPS transfers to P. Sprenger. It is undisputed that P. Sprenger was never an employee of MSPS or an owner of MSPS. P. Springer never paid taxes on the money. (R. p. 271, ll. 6–10.⁵) Her only connection to the company is her marriage to M. Sprenger. Yet tens of

⁵ Petitioners contend that M. Sprenger did pay taxes on that money, but point to the cited part of the record as evidence. The transcript here cited shows that Petitioners’ CPA was called to the stand by Petitioners’ counsel, yet counsel only asked about P. Sprengers’ tax liability and did not

thousands of dollars in checks have been issued to her. (See Appx. I, p. 61 (setting out list of transactions).) Because there is no valuable consideration provided by P. Sprenger for the funds transferred to her and she is a close family member of the sole owner of MSPS, the burden is placed on her to demonstrate the bona fide nature of the transfer. This she has failed to do.

Under South Carolina law, where there is no valuable consideration for a transfer, “no actual intent to hinder or delay creditors must be proven.” *Mathis*, 319 S.C. at 265, 460 S.E.2d at 408 (quoting *Durham*, 313 S.C. at 437, 438 S.E.2d at 262). “Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.” *Id.* Furthermore, the identification of one or more badges of fraud “creates a rebuttable presumption of intent to defraud.” *Royal Z Lanes*, 337 S.C. at 596, 524 S.E.2d at 623 (1999) (citations omitted); see also *Durbin Creek*, 419 S.C. at 341, 797 S.E.2d at 413 (quoting *Coleman*, 261 S.C. at 209–10, 199 S.E.2d at 79–80). Lastly, when a “conveyance to a family member or close relative is attacked on account of its voluntary character, the law imposes a duty on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence.” *Nodine*, 291 S.C. at 450, 354 S.E.2d at 54 (citation omitted).

MSPS was without dispute indebted to Respondent and others at the time of the transfers to P. Sprenger at issue in this case. Additionally, because P. Sprenger had no role with MSPS, the conveyances were voluntary. Lastly, MSPS failed to keep sufficient funds available to pay the

address or adduce an explanation as to any tax liability of M. Sprenger. (R. p. 270, l. 14–p. 271, l. 19.)

judgment of Respondent and its affirmation of that is represented by the need for this case. With these three factors established, Respondent, the judgment creditor, has met its burden and the Master-in-Equity and the Court of Appeals had clear and convincing evidence to find the transactions should be set aside.

However, even if the analysis is expanded to include a broader survey of the badges of fraud, the same result is reached. Several badges of fraud are implicated by these transfers, including deep indebtedness, a close family relationship with the transferee, one or more existing judgments,⁶ the retention by the transferee of control and the benefit of the funds, and secrecy. For instance, in the deposition of P. Sprenger, her husband attempted to stop her answering a question about the location of tens of thousands of dollars of cash from MSPS they were storing in their bedroom. (R. p. 92, ll. 16–17.) These facts together create a rebuttable presumption of fraud even with consideration and, together with the close family relationship, place the burden on Petitioners to prove the bona fides of the transactions in question.

P. Sprenger has failed to rebut this presumption or prove by clear and convincing evidence that the transactions were not fraudulent. Indeed, even if, as Petitioners contend, the payments were made in consideration of M. Sprenger's work, the same analysis used by the Court of Appeals in addressing the transfers to M. Sprenger would apply and the same result would be reached. Additionally, it should be noted that some of the payments to P. Sprenger were for amounts such as \$40,000.00, \$27,000.00, or \$70,000.00, which is hardly consistent with the "employment contract" M. Sprenger signed with himself. (R. p. 29–30 (list of transfers attached to lower court's order); Appx. I, p. 61 (list of transfers with Record citations), R. p. 854 (employment letter signed by M. Sprenger on behalf of MSPS and himself).)

⁶ (R. p. 205, ll.1–8 (referencing payment to the firm of Stewart and Crouch for a judgment)).

As this Court has long held, “[n]o rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous.” *Gardner v. Kirven*, 184 S.C. 37, 54, 191 S.E. 814, 821 (1937) (quoting *Penning v. Reid*, 167 S.C. 263, 289, 166 S.E. 139, 148 (1932)). In this case, MSPS caused more than half a million dollars in damage to Respondent. Instead of paying that judgment, the owner of MSPS has transferred thousands and thousands of dollars to himself and his spouse without maintaining adequate documentation to support their hazy claims of loans, paychecks, and bonuses. Petitioners’ briefs and petition have failed to cite documents in the record which are sufficient to meet their burden on this issue; thus, the Court of Appeals was correct to affirm the lower court’s ruling and set aside to transfers to P. Sprenger, as equity and justice demand.

III. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THAT THE ISSUE OF A SECURITY INTEREST SHOULD BE REMANDED.

The last issue raised by Petitioners is whether the Court of Appeals was correct to remand the issue of a perfected security interest in MSPS’ accounts that would prevent execution on the same. Respondent has maintained throughout this appeal that the Master-in-Equity erred in not finding a perfected security interest in these accounts. Nonetheless, Respondent recognizes that the Court of Appeals was fully within its discretion to remand the issue for further development of the record.

Our rules provide that the appellate court may “affirm, reverse, or modify the decision below or remand all or any issues for further proceedings.” Rule 220(a), SCACR. There is no doubt that the issue of priority in cases where there are multiple parties or multiple types of interests involved is always complex. As noted in Respondent’s brief before the Court of Appeal, the issue includes not only who has a security interest, but whether those interests are perfected. (See Appx. I, pp. 56–59.) Petitioners did not address this aspect in their Petition for Writ of

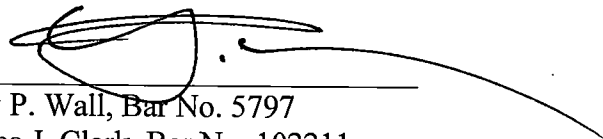
Certiorari. In this case, the Master-in-Equity failed to perform any analysis of the interests involved in the appealed orders, despite argument by counsel for Respondent and a motion for reconsideration. (R. pp. 19–33 (appealed orders); R. p. 277, l. 5–p. 278, l. 23 (argument by Mr. Osborne for Respondent); R. p. 155, ¶ 7 (Respondent’s motion).) For these reasons, the Court of Appeals did not err in determining that the issue should be remanded for further development of the record.

CONCLUSION

For the above reasons, Respondent requests that this Court deny the petition for writ of certiorari filed by Petitioners and allow this matter to be remitted to the Master-in-Equity.

Respectfully submitted,

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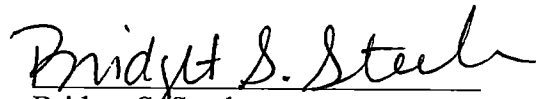
v.

MS Production Solutions LLC a/k/a MSPS Steel Fabricators, Manfred Sprenger,
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PROOF OF SERVICE

I, Bridget S. Steele, an employee of Bruner, Powell, Wall & Mullins, LLC, certify that I have served **Respondent's Return to Petition for Writ of Certiorari** on Petitioners by depositing a copy of it in the United States Mail, postage prepaid, on **February 25, 2020**, addressed to their attorney of record as follows:

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601


Bridget S. Steele

Columbia, South Carolina
February 25, 2020