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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY

The Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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Case No. 2014-CP-04-2419
Supreme Court Case No.: 2021-000722

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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 Petitioner

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# RESPONDENT'S RETURN TO PETITIONER MARY THOMAS' PETITION FOR WRIT OF CERTIORARI

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2. DID THE COURT OF APPEALS PROPERLY AFFIRM THE TRIAL COURT PROPERLY FINDING THAT APPELLANT UNJUSTLY BENEFITTED FROM THE TRANSFER OF A JOINTLY HELD ASSET WITH HER HUSBAND SOLEY TO HERSELF WITHOUT ANY CONSIDERATION UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE?

## STATEMENT OF THE CASE

This case is about whether the recipient and beneficiary of fraudulent conveyance can avoid liability when the transaction at issue is a judgment debtor's spouse conveying his one-half interest in a limited liability corporation to his spouse (the Petitioner) for no consideration.

The timing of the transaction at issue is key, which are poignantly set forth by the trial court in its order and judgment [R.pp. 49-51]. These factual findings are directly supported from the evidence at trial.

In October 30, 2008, Respondent loaned Debtor Husband $125,000.00. Respondent testified Debtor Husband needed the funds for the quick flip of a property in Florida. [R.pp. 103-104; R.p. 177] On March 9, 2010, Respondent and Debtor Husband met to execute a promissory note, which Debtor Husband freely and voluntarily signed. [R.pp. 107-108] The terms of the note acknowledged the 2008 loan and stated the amount owed was $181,250.00. [R.p. 108; R.pp. 178-179] The promissory note called for Debtor Husband to start making monthly payments in the amount of $34,294.71, beginning April 1, 2010. [R.p. 178]

The first payment became due, but no payment was made. [R.p. 157] When the second payment (May 1, 2010) had become due and was not made, Respondent contacted Debtor Husband. [R.p. 158] It was at that time that Debtor Husband told the Respondent that he was not going to pay anything. [*Id.*] Knowing that he was already behind on payments, Debtor Husband looked for a way to divest himself of his major asset at the time, his interest in Prodigal Enterprises, LLC, a limited liability corporation, that he shared with his wife. [R.pp. 127-128]

The sole asset of Prodigal Enterprises, LLC was land it owned at Highway 81 North, Piedmont, SC 29673 [hereinafter "Brushy Creek Bar-B-Q property"]. [R.p. 123] The land and the commercial building located on it was where Appellant operated the family business of Brushy Creek Bar-B-Q, Inc. [*Id*.]

By 2005, the members of Prodigal Enterprises, LLC other than Defendants Appellant and Debtor Husband, had been repaid for their interests. [R.pp. 123-124] Although none of the paperwork had been executed. [*Id*.] By 2010, Appellant and Debtor Husband were the only *de facto* members of Prodigal Enterprises. Debtor Husband was the managing member of Prodigal Enterprises, LLC. [R.p. 157] At the time of transfer to Appellant, the land and building were owned free and clear of any mortgage or liability to any other third party. [R.p. 125]

In September of 2009, Defendants Debtor Husband and Appellant consulted with Attorney Bill Hood to explore the possibility of transferring the title of the property to Appellant in connection with her opening a bail bond business. [R.p. 160] According to the promissory note signed by Debtor Husband in March 2010, September 2009 would have been just a few weeks after the $181,250.00 was due the Respondent on July 30, 2009.

[R.p. 178] **Mr. Hood testified that, while the Thomases did meet with him in September 2009, the file sat idle for several months with no activity.** [R.p. 163-164**] Indeed, it was not until late May and early June of 2010 that the Thomases had an urgent need to get the work completed.** [*Id.*]

In June 2010, the other members of Prodigal Enterprises LLC all executed satisfactions of their mortgages relating to the Brushy Creek Bar-B-Q property. [R.pp. 123-124] Debtor Husband testified that these other parties were repaid their loans/investment years before, but they had not gotten around to do the paperwork until June 2010. [R.p. 123]

With the monthly payments on the promissory note past due and continuing to be missed, on July 7, 2010, Defendants Debtor Husband and Appellant executed a series of documents that did the following:

1) For nominal consideration, transfer the title of the Brushy Creek Bar-B-Q property from Prodigal Enterprises, LLC to Petitioner. [R.p. 216] [R.pp. 124-125];
2) Petitioner filed with the Anderson Clerk of Court pledging the property as collateral for a bond company, Bail Pros; [R.p.220; R.p.124]; and
3) Dissolved Prodigal Enterprises, LLC. [R.p. 225; R.p. 124]

At the time of transfer, the property was worth $203,535. [R.p. 220; p. 124]. Debtor Husband admitted that, as a 50% owner of Prodigal Enterprises, LLC, the value of his interest in the property was worth more than $100,000.00, which he transferred to Appellant for $10.00. [R.p.125]

Debtor Husband testified on cross-examination that at the time of this transfer, his interest in Prodigal Enterprises, LLC (with its unencumbered ownership of the Brushy Creek Bar-B-Q property) was the single largest asset he owned at that time. [R.pp. 127-128] He also admitted this transfer was made to his wife without any consideration. [R.p. 125] Further, he admitted that following this transfer, he did not have any assets to satisfy the amounts owed to the Respondent. [R.pp. 127-128]

The Respondent ultimately retained a lawyer to bring an action against Debtor Husband for collection of the promissory note. [R.p. 111] A judgment was entered in Respondent's favor against Debtor Husband in the amount of $378,108.08 on March 6, 2013. [R.pp. 228-231] Respondent's attempt to collect on that judgment to date have been unsuccessful. [R.p. 232] The judgment was placed in the hands of the Sheriff for collection and returned *nulla bona.* [R.p. 232] Respondent testified that he has never received a dime from the defendant for the original $125,000.00 loan to Debtor Husband. [R.p. 111]

## LEGAL ARGUMENT

1. THE COURT OF APPEALS COURT PROPERLY AFFIRMED THE TRIAL COURT'S FINDING APPELLANT LIABLE FOR THE FRAUDULENT CONVEYANCE OF PROPERTY TO HER UNDER THE FACTS AND CIRCUSTANCES OF THIS CASE.

When a party denies any fraudulent intent in transferring an asset outside the reach of a creditor, fraudulent intent is inferred if one or more of the following "badges of fraud" exist(s):

> [T]he insolvency or indebtedness of the transferor, [a] lack of consideration for the conveyance, [a] relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, [a] 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.

First Citizens Bank & Trust Co. v. Park at Durbin Creek, LLC, 419 S.C. 333, 797 S.E.2d 409 (S.C. App., 2017), quoting, Coleman v. Daniel , 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). It is generally recognized that, although the identification of one badge of fraud does not create a presumption of fraud, "whe[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted." Coleman, at 209–10, 199 S.E.2d at 79–80 (*quoting*, 37 AM. JUR. 2D Fraudulent Conveyances §10 (1968). "A badge of fraud creates a rebuttable presumption of intent to defraud." First Citizens Bank & Trust Co. v. Park at Durbin Creek, LLC, 419 S.C. 333, 797 S.E.2d 409 (S.C. App., 2017) (*quoting*, Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999)).

Petitioner argues the Statute of Elizabeth does not apply because the grantor (Prodigal Enterprises) was an LLC, not a direct debtor to the Respondent. The following facts are not disputed:

- Husband was a debtor to the Respondent. [R.p. 49]
- Husband's only asset at the time the debt to Respondent was coming due was his one-half interest in Prodigal, to which his wife [Petitioner] owned the other half-interest. [R.p. 50]
- The original members of Prodigal Enterprises other than Debtor Husband and Appellant had been paid in full for their interests in Prodigal Enterprises in 1998, but no paperwork confirming this was generated until May/June 2010 [R.p. 50]

- At the time of transfer to his wife [Petitioner], Debtor-Husband was the managing member of Prodigal. [R.p. 50]
- Prodigal's sole asset was its unincumbered interest in a commercial property. [R.p. 51]
- Prodigal's transfer of its sole asset to Petitioner was for no consideration. [*Id.*]
- By transferring its sole asset to Petitioner, Husband divested the Respondent of the opportunity to collect the debt from Husband's interest in the LLC. [*Id.*]
- At the time of transfer to Petitioner, Debtor-Husband's one-half interest in Prodigal was his only asset not subject to a homestead exemption [*Id.*]
- Following the transfer to his wife, Debtor Husband was judicially insolvent [*Id.*]; and
- Immediately following the transfer, Debtor Husband simultaneously dissolved Prodigal Enterprises so that deeding back the property was no longer feasible. [R.p. 225]
- Petitioner did not incorporate her bonding business until five (5) months later in December 2010. [R.p. 226]

The Court of Appeals correctly observed the legal fallacy of this position:

> But for the fraudulent conveyance resulting in the immediate dissolution of Prodigal, [Respondent] would have been afforded the opportunity to charge [Debtor-Husband]'s distributional interest in Prodigal. *See*, S.C. Code Ann. §33-44-504(a) (2006) ("On application by a judgment creditor of a member of a limited liability

> company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment.")
>
> [R.p. 2.]

Petitioner attempts to shield herself from the benefit of the fraudulent conveyance by arguing the debt/judgment was against her husband individually, and not against the actual LLC which conveyed the asset. As this court observed in Lebovitz v. Mudd, 293 S.C. 49, 52, 358 S.E.2d 698, 700 (1987), "[the Statute of Elizabeth] does not limit its application to judgment creditors…. its protection extends to other types of parties defrauded in connection with the conveyance of the property." Here, as the trial court noted, but for the fraudulent transfer, Respondent would have been able to seize Husband-debtor's one-half interest in the LLC. Cloaking the fraudulent transfer through a conveyance of an LLC which only the husband and wife owned flies in the face the purpose and intent of protecting creditors under the Statute of Elizabeth.

The fraudulent conveyance statute envisions a money judgement as part of the equitable relief because it authorizes the Court to invalidate "any lease, rent, commons or other profit or charge out of the same …" S.C. Code of Laws §27-23-10 (1976 Ann.) The finding of a monetary award against the Petitioner is justified because by the Husband and Wife conspiring to divest their LLC of its only asset and immediately dissolving the LLC, undoing the transaction was no longer legally feasible.

The focal issue is that at the time the Debtor Husband and Petitioner knew Respondent's note was coming due and that his debt would be reduced to a judgment. To thwart Respondent from collecting against Debtor Husband's singularly largest

unencumbered asset, held by a closely held corporation where they were the sole members, Debtor Husband and Appellant Wife transferred their LLC's lone asset solely in her name only. The transaction was designed to lay the ground work for the very arguments raised in this case by liquidating the sole asset held by Debtor Husband at that time, namely, his one-half interest in Defendant Prodigal Enterprises, LLC.[1] Then Debtor Husband and Appellant Wife immediately closed Prodigal Enterprises down, knowing, if successful, that Respondent's claim against Debtor Husband would leave him empty-handed. See, e.g., Lebovitz v. Mudd, 293 S.C. 49, 358 S.E.2d 698 (1987) (Allegations that defendants' conveyances rendered partnership insolvent and were made with knowledge of Respondents' tort claims against partnership and with actual intention to defraud Respondents stated causes of action against defendants for fraudulent conveyances.)

These are the very reasons why the equitable powers of the Court are so broad. Not every fraudulent transfer fits neatly into a box. And this is why the Court's decision to enter a money judgment against Appellant in the amount of $125,000.00 is the more just and appropriate available remedy under the unique circumstances of this case. She was the one has directly benefited from the transfer of title for the property in her name only.

The trial court saw through Appellant and Debtor Husband's attempt to divest Debtor Husband of his sole asset at the time which was subject to being sold to satisfy any collection attempts by Respondent. Because Appellant and Debtor Husband immediately dissolved their LLC after the transfer, simply rescinding the fraudulent conveyance was no

[1] Appellant argues the transfer serves a legitimate purpose for serving as collateral for her newly operating bail bond business. [R.p. 14-15]. The fact that Appellant did not incorporate her business for another five (5) months after the fraudulent transfer further underscores the timing of the transfer was related to Respondent's demand for money and not her newly found interest in opening a bail bond business. [R.p. 226.]

longer an option. Exercising its equitable powers authorized by long-standing South Carolina law, the trial court forged the only result that could do justice to the parties in this case. There is no dispute that Appellant was the beneficiary of a one-half interest in a commercial property for which she paid no consideration. Having witnessed the testimony of the witnesses and reviewed the corresponding documentation, the trial court's order and judgment simply divests Appellant of the benefit she received from this fraudulent conveyance.

Thus, the Court's award of $125,000.00 against the Appellant disgorges her of the profit she received from the fraudulent conveyance. The finding and ruling by the Court of Appeals that the Petitioner is liable under S.C. Code of Laws §27-23-10 are supported by the ample findings of fact by the trial court and the application of principles and holdings of South Carolina case law. For this reason, its decision should be affirmed.

2. THE COURT OF APPEALS CORRECTLY AFFIRMED THE FINDING UNJUST ENRICHMENT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Because of the unique sequence of the events, some equitable maxims forged from South Carolina law are applicable. "Equity will not suffer a wrong to be without a remedy." Lane v. N.Y. Life Ins. Co, 147 S.C. 333, 145 S.E. 196, 207 (S.C., 1928). Equity abhors a wrong without a remedy. State *ex Rel.* Daniel v. Strong, 185 S.C. 27, 192 S.E. 671 (S.C., 1937). Equitable power of court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all circumstances, to deny it would permit one party to suffer gross wrong at hands

of other. Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 687 S.E.2d 29 (S.C. 2009).

Another long-standing equitable maxim is "Equity regards substance rather than form." After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). The notion that equity looks to substance rather than form evolved out of judicial regard for that which ought to be done; this maxim applies by dispensing with pure formalities which would otherwise defeat the equity. *Id.*

In its order and judgment, upon finding the transfer was a fraudulent conveyance, the trial court recognized that voiding the transaction was neither feasible nor practical by the time of trial. For example, Debtor Husband and Appellant immediately dissolved their LLC following the transfer of its only asset to Appellant. As such, the transaction could not simply be "undone" because the Court did not have the power to resurrect the dissolved LLC. [R.p. 54] Additionally, Appellant argued at trial that because the land currently serves as collateral for her bonding business, transferring title would dramatically disrupt her bail bond business. [R.p. 148]

Cognizant of these realities, the Court found that awarding damages to the Respondent was the only feasible remedy equitably available; namely, a monetary award against the Appellant. [R. pp. 54-55] "Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff." Regions Bank v. Wingard Properties, Inc., 394 S.C. at 256-57, 715 S.E.2d at 356. "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., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1998). "A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." Dema v. Tenet Physician Servs.–Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009).

Although unjust enrichment is often associated with claims of *quantum meruit*, quasi-contract, or implied by law contract (s*ee*, e.g., Bank v. Wingard Properties Inc., 394 S.C. 241, 715 S.E.2d 348 (S.C. App., 2011), it is not limited to those circumstances. Here, the Petitioner certainly received a substantial benefit from the fraudulent conveyance, which "in justice and equity" belongs to Respondent. It is not disputed that if Respondent was a judgment creditor in 2010, he would have been able to seize Debtor Husband's one-half interest in the LLC, which was a one-half interest in the commercial property the LLC owned. Appellant benefited from the gift of this solely because she and her Debtor Husband consummated the transaction before Respondent could reduce husband's debt to a judgment.

As the Court of Appeal noted, the preponderance of the evidence supports the trial court's finding that Petitioner was unjustly enriched when she received the property for nominal consideration and used the property to secure bonds for her bail bonds business.

Under the facts and circumstances of this case, it would be inequitable and unjust to permit Appellant to retain this benefit. For this reason, the trial court's award and the Court of Appeals holding her liable for unjust enrichment is proper. The order of the Court of Appeals should be AFFIRMED.

## CONCLUSION

The unique facts and circumstances of this case underscore the importance of allowing South Carolina courts to enjoy broad equitable powers. In this case, when assessing the veracity of witnesses at trial and reviewing the totality of the evidence, the trial court found by clear and convincing evidence that Appellant and her Debtor Husband acted in concert to divest husband of the one significant asset which was subject to creditor collections: namely, his one-half interest in the LLC which he jointly owned with Appellant. Confronted with the difficulties of unwinding the deed transfer, the trial court found that awarding damages against Appellant was the best available equitable remedy under the circumstances. This decision is supported under either fraudulent conveyance or unjust enrichment.

For these reasons, the Court of Appeals correctly upheld the trial court's findings. Accordingly, the order of the Court of Appeals should be affirmed.

Respectfully Submitted,

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