

IN THE COURT OF APPEALS OF IOWA

No. 0-584 / 10-0236
Filed December 8, 2010

**KONNIE JO OLSON f/k/a
KONNIE JO ELSBERND,**
Plaintiff-Appellee,

vs.

GLADYS ELSBERND,
Defendant-Appellant.

Appeal from the Iowa District Court for Winneshiek County, Margaret L. Lingreen, Judge.

Gladys Elsbernd appeals from the district court order finding in favor of Konnie Elsbernd on her fraudulent conveyance claim. **AFFIRMED AND REMANDED WITH DIRECTIONS.**

David Strand, Decorah, and Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellant.

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C., Decorah, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.,

This fraudulent conveyance case finds its origin in the property division of the dissolution action of Michael and Konnie Elsbernd.¹ Gladys Elsbernd, Michael's mother, appeals the district court's conclusion that she participated in a fraud with her son. The district court determined that Gladys accepted the transfer of hog confinement buildings and equipment, Michael's principal asset, without providing adequate consideration and with the intent to place the property beyond the reach of Konnie, who had a \$100,000 judgment against Michael. Finding no merit in Gladys's claims that consideration was adequate and Konnie suffered no prejudice from the transfer, we affirm the district court.

Gladys also contests the common law attorney fees ordered by the district court. Because Gladys's ongoing collusion with her son was oppressive to Konnie's rights as a creditor, we also affirm on the attorney fee issue.

I. Background Facts and Procedures

In the spring of 2007, Michael and Konnie Elsbernd divorced. In the dissolution decree, the district court ordered Michael to pay Konnie a lump sum of \$75,000 as an equalization payment and also ordered Michael to pay \$25,000 for Konnie's attorney and expert witness fees. This decree upon entry became a lien on Michael's real property. See *Haden & Co. v. Goppinger*, 24 N.W. 743 (Iowa 1885).

Michael earns his living finishing hogs in the confinement facilities he built on his parent's land in 2000 while the parties were still married. Michael financed

¹ The plaintiff is now known as Konnie Olson.

the confinement with a loan of \$250,000 from the Luana Savings Bank. By 2006, the loan principal had been reduced to \$106,000. During the dissolution proceedings, Michael stopped making payments on the hog facilities to force the bank to foreclose and thereby to reduce Konnie's property award. Konnie learned of the pending foreclosure and intervened in the action, which preserved the asset for purposes of the court's property distribution.

In the course of the dissolution proceedings, the court determined that Michael was not credible in his claim that he was indebted to his parents or in his argument that the hog confinement had little or no value. In May 2008, our court affirmed the district court's valuation of the confinement at \$450,000 and the district court's distribution of property, stating: "Rather than proving Michael has no assets, his testimony supports the conclusion that he has been engaged in a financial shell game, using his family as shells to hide the pea." *In re Marriage of Elsbernd*, No. 08-0015 (Iowa Ct. App. Sept.17, 2008).

After the dissolution decree had been entered, Konnie pursued a contempt action against Michael for failure to pay child support. The district court dismissed the action, but on appeal our court found a willful violation of the decree. Our September 2008 decision chronicled the Elsbernd family's history of deception:

Michael's history of engaging in dishonest behavior, joined in by his family, began in 1997 when civil fraud penalties were assessed against Michael, his father, and his brother for hiding income. This behavior continued when Michael planned to intentionally default on the hog confinement loan payments. Only because Konnie learned of the pending foreclosure and intervened was the \$450,000 asset preserved for the dissolution property distribution. The dishonest behavior also continued when Michael and his

parents joined together during the dissolution trial to claim Michael had no ownership interest in the hog confinement, despite financial records to the contrary.

Additionally, by ignoring the assets Michael was awarded four months before he stopped fully paying his child support obligation, the contempt court allowed Michael to accomplish what the dissolution court refused to allow: Michael and his family conspiring to dispose of Michael's property and hide his income.

Our court was specifically critical of Gladys's role in the efforts to manipulate Michael's financial status and shield his assets:

[T]he contempt court failed to recognize Michael is still engaged in wrongful conduct and has no credibility concerning financial issues. The dissolution court specifically ruled Michael's claim for back rent to his parents was a sham debt developed after separation and not a legitimate debt. The parent's eviction based on this meritless debt allowed Michael to continue to manage the same hog operation in the same confinement for the same company. However, now the \$88,000 multi-year Holden Farm payments run through Michael's mother, who chooses to pay him \$26,880 per year for exactly the same work which yielded a \$50,000 per year income in the past.

In re Marriage of Elsbernd, 08-0015 (Iowa Ct. App. Sept. 17, 2008).

Still owing the \$100,000 judgment to Konnie, on June 30, 2008, Michael signed a bill of sale, transferring "all right, title and interest" in the hog finishing houses and associated equipment to his mother. The consideration for the transfer was \$143,464.29 in the form of debt forgiveness.

On November 12, 2008, Konnie filed a request for execution, identifying the amount owed to her from the dissolution decree, as well as interest on the judgments, as \$114,220.40. The clerk of court in Winneshiek County directed the sheriff to levy the writ of general execution against Michael's hog confinement facilities and equipment. The dictation was dated November 19, 2008. No execution apparently occurred. The district court found that because Michael

conveyed his interests in the finishing houses to Gladys, Konnie's judgment has not been satisfied.

On December 26, 2008, Konnie filed a petition in equity alleging Michael and his mother Gladys Elsbernd carried out a fraudulent conveyance. Specifically, she alleged that Michael transferred his hog finishing houses and associated equipment to his mother for \$143,464.29 when the facilities were determined in the dissolution action to have a fair market value of \$450,000. Konnie noted that she had received issuance of a general execution and Michael and Gladys were "attempting to interpose the fraudulent conveyance" of the property to defeat her claim.

The court held a hearing on September 30 and October 1, 2009. Both Michael and Gladys testified. Gladys admitted knowledge of the district court's valuation of the property in her son's dissolution case and expressed her view that it was "very unfair." The district court took note of Gladys's conflicting testimony concerning the amount of debt forgiveness: at one point alleging she accepted the property in forgiveness of Michael's debts well in excess of \$143,464.29 and at another point asserting the only debt forgiveness was the amount of consideration recited in the bill of sale.

Konnie moved for sanctions against Michael and Gladys pursuant to Iowa Rule of Civil Procedure 1.413. Konnie also filed an affidavit requesting attorney fees.

On December 9, 2009, the district court entered a decree finding Michael's conveyance of the hog confinement facilities to his mother was fraudulent and

setting aside the June 30, 2008 transfer. The court also awarded common law attorney fees in the amount of \$6,692.37. Gladys appeals from both aspects of the decree. Michael—who appeared pro se at the trial—did not appeal.

II. Standards of Review and Burdens of Proof

We review de novo an equitable action alleging a fraudulent conveyance. Iowa R. App. P. 6.907; see *Hartford-Carlisle Sav. Bank v. Shivers*, 552 N.W.2d 909, 911 (Iowa Ct. App. 1996). The party asserting fraud bears the burden of proving its existence by clear, satisfactory, and convincing evidence. *Benson v. Richardson*, 537 N.W.2d 748, 756 (Iowa 1995).

The award of common law attorney fees also rests in the district court's equitable powers. Accordingly, our review of the fee award is de novo as well. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993). To be entitled to common law attorney fees, the plaintiff must prove "the culpability of the defendant's conduct exceeds the 'willful and wanton disregard for the rights of another'; such conduct must rise to the level of oppression or connivance to harass or injure another." *Id.* at 159-60.

III. Analysis

A. Fraudulent conveyance

A fraudulent conveyance is a transaction by which the owner of real or personal property places the land or goods beyond the reach of the owner's creditors, to the prejudice of the creditor's legal or equitable rights. *Ralfs v. Mowry*, 586 N.W.2d 369, 372 (Iowa 1998). Essentially, the debtor's property is a fund from which his or her obligations should be paid and the debtor may not

hinder the creditor's right to proceed against that fund. *Id.* If the debtor disposes of the property with the intent to delay or defraud the creditors, the transaction is inequitable and subject to being set aside. *Id.* at 372-73.

Courts deciding whether a conveyance is fraudulent will look for certain badges or indices of fraud, including: (1) inadequacy of consideration; (2) insolvency of the transferor; (3) pendency or threat of third-party creditor litigation; (4) secrecy or concealment; and (5) departure from usual business practices. *Benson*, 537 N.W.2d at 756. Courts also will examine the relationship between the grantor and grantee. *Rouse v. Rouse*, 174 N.W.2d 660, 667 (Iowa 1970). Although a blood relationship is not a per se indicia of fraud, it does require "a critical examination of the attending circumstances." *Id.*

The district court decided that Konnie satisfied her burden to show a fraudulent conveyance. The court found that the transfer was without adequate consideration because the hog confinement was worth, at a minimum, \$222,842, but was transferred to Gladys for only \$143,464.29—more than \$79,000 less than the value. The court also found that Gladys gave inconsistent testimony at the fraud trial and "generally lacked credibility." The district court made a factual finding that "[w]ith Elsbernd having conveyed his interest in the hog finishing houses and associated equipment to his mother," Konnie's judgment had not been satisfied.

Gladys argues on appeal that Konnie failed to show that her rights as a creditor against Michael were prejudiced by the June 30, 2008 transfer of the hog confinement facilities. Gladys relies on *C. Mac Chambers Co. v. Iowa Tae Kwon*

Do Academy, 412 N.W.2d 593, 596 (Iowa 1987) for the proposition that a conveyance will not be set aside as a fraud on creditors unless the creditors can show they were prejudiced, even where the record reveals an actual fraudulent intent. Gladys notes that under Iowa Code section 624.23 (2009) judgments in the district court “are liens upon real estate owned by the defendant at the time of such rendition.” She argues that the hog confinement buildings constituted real estate and Konnie’s judgment lien was not affected by the bill of sale. She observes that the district court did not make a specific finding concerning why the execution was not carried out.

In short, Gladys contends she was “merely protecting her financial security interest” when she took ownership of the hog confinement buildings.

We first turn to the question whether Konnie’s rights as a creditor were prejudiced by Michael’s June 30, 2008 conveyance of property to his mother. Our courts have interpreted prejudice or injury in this context to mean “the creditors must be able to show they would have received something which has become lost to them by reason of the conveyance.” *C. Mac Chambers Co.*, 412 N.W.2d at 596. In *C. Mac Chambers*, the complaining unsecured creditors could not show prejudice because a secured creditor not involved in the transfer had a superior interest in the transferred assets that exceeded the value of the assets. *Id.* at 597. Thus, even if the conveyance was set aside as fraudulent, the disputed assets were not available to the complaining creditors. *Id.*

Konnie is not in the same position as the unsecured creditors in *C. Mac Chambers*. If the transfer had not occurred, the sheriff could have levied on the

farm confinement buildings and the related equipment by general writ of execution pursuant to Iowa Code chapter 626, since they were owned by Michael. Once the transfer occurred, Konnie still had a lien on the real property, see *Haden & Co. v. Goppinger*, 24 N.W. 743 (Iowa 1885) but Konnie would have to commence some kind of judicial proceeding to enforce that lien. The prospect of going forward with enforcement of a lien against the new owner under that provision would be more arduous, costly, and less certain for Konnie. Furthermore, Gladys's argument disregards the personal property (e.g., equipment) that was conveyed by Michael to her under the bill of sale. Konnie did not have a lien on the personal property, so Michael's transfer of it to Gladys placed it entirely beyond Konnie's reach. We conclude that the record supports a finding that Konnie suffered prejudice by Michael's conveyance.²

We next turn to the question of the adequacy of the consideration for the transfer. Konnie contends the district court should have used the dissolution court's valuation of \$450,000 for the hog confinement in determining the consideration was inadequate. She argues that under the doctrine of res judicata, Gladys was in privity with her son and should be bound by the earlier judicial determination of the value of the hog confinement.

² Our dissenting colleague argues the Konnie was not prejudiced for a different reason. He contends that on a sheriff's sale the facilities, including the personal property, would have brought less than \$143,464.29. Thus, he maintains that even a sheriff's sale would have netted nothing for Konnie, because Gladys's lien, which covered all the assets, had priority. We note that the \$222,000 value the district court assigned to the hog buildings and improvements was the number provided by Gladys's expert, not the number provided by Konnie's expert. (He found a much higher value of \$450,000.) In any event, we do not believe that Gladys raised this particular "no prejudice" argument either in the district court or in this appeal.

The district court did not err in accepting the new appraisal amount of \$227,230 offered in the fraudulent conveyance case. The doctrine of res judicata did not bind the district court in the fraudulent conveyance case to the \$450,000 valuation for the hog buildings determined in the dissolution case. First, Gladys was not a party to the dissolution proceedings. See *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006) (requiring parties in first and second action to be the same). Second, the issue is not identical to that determined in the prior action. See *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 572 (Iowa 2006). The value of the buildings and equipment was subject to change between the first appraisal in March 2007 and the second appraisal in June 2008.

But as the district court determined, the discrepancy between the new appraisal of \$227,230 and the \$143,464.29 in debt forgiveness still points to inadequate consideration for the transaction. We share the district court's concern over Gladys's contradictory testimony concerning the amount of debt forgiveness she extended to her son Michael. The discrepancy in the defendants' evidence at trial supports the finding of inadequate consideration and sheds light on the willingness of this mother and son to manipulate their financial dealings to place Michael's assets out of Konnie's reach.

The record contains clear and convincing evidence supporting the district court's finding of a fraudulent conveyance.

B. Common law attorney fees

In general, a party may not claim attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award.

Williams v. Van Sickel, 659 N.W.2d 572, 579 (Iowa 2003). The rare exception is a situation where common law attorney fees would be available. *Hockenberg Equipment Co.*, 510 N.W.2d at 158. The standard for awarding common law attorney fees is “a showing of something beyond ‘legal malice,’ namely, ‘connivance’ or ‘oppression.’” *Id.* at 159.

“Oppressive” conduct is “difficult to bear, harsh, tyrannical, or cruel.” *Van Sickel*, 659 N.W.2d at 579. “Connivance” is defined as “voluntary blindness or an intentional failure to discover or prevent the wrong.” *Id.* The terms envision intentional conduct likely to be aggravated by “cruel and tyrannical motives.” *Id.* The conduct must be far more egregious than “a mere lack of care” or “disregard of the rights of another.” *Id.*

The district court awarded Konnie \$6692.37 in attorney fees. The court concluded that these common law attorney fees were justified for the following reasons:

[T]he court finds Defendant Michael Elsbernd’s conduct in transferring the hog facilities to Defendant Gladys Elsbernd and Ms. Elsbernd’s acceptance of same, for insufficient consideration and with knowledge of Olson’s judgment lien on the facilities, was intentional and oppressive. It was designed to harass and prevent Olson from satisfying a money judgment awarded to her.

Gladys argues on appeal that her conduct in taking the bill of sale from her son for the hog confinement buildings did not rise to a level that would justify an award of common law attorney fees. She claims her motive was “to protect her investment and security in the property.”

Konnie believes the attorney fees were justified because Gladys “knowingly and willfully helped Michael conceal his assets.” Konnie notes that

Gladys never asked for rent or threatened to foreclose on Michael's property before his finances were at issue in litigation. Konnie likens Gladys's conduct to that of county treasurer Williams in the *Van Sickel* case. Our supreme court upheld the award of common law attorney fees against Williams because:

It is hard to imagine behavior that would be more oppressive or conniving than a public official creating documents which benefit herself to the detriment of those she is elected to represent. Equally oppressive and conniving was her attempt to defraud the district court in her scheme to protect herself from liability.

Id. at 581.

We see a similar level of oppressive and conniving conduct by Gladys. Gladys is obviously not a public official and did not hold the same position of trust as Williams. But Gladys did participate in her family's ongoing efforts to obfuscate Michael's financial holdings for the purpose of defrauding her former daughter-in-law and was not reluctant to advance incredible positions in court to accomplish this end. We are not convinced that Gladys's only motivation was to protect her security interest in the property. Gladys joined with her husband and son during the dissolution trial to claim that Michael had no ownership interest in the hog confinement, despite financial records showing otherwise. Gladys then claimed Michael owed her back rent, despite the court's conclusion that such debt was a sham developed after Michael's separation from Konnie. Now Gladys purports to forgive Michael's debt of \$143,464.29 in return for transfer of his primary asset—an asset Konnie sought to levy against for her judgment (a judgment Gladys believed was "very unfair" to her son). Michael continued to rely on this asset for his income after the transfer to his mother. Gladys's pattern

of dishonest dealings and her less than credible testimony in the fraudulent conveyance case justifies the district court's grant of common law attorney fees.

We also find Konnie is entitled to appellate attorney fees because she had to defend against Gladys's continued attempt to excuse her oppressive actions on appeal. *See Van Sickle*, 659 N.W.2d at 581. Konnie's attorney filed an affidavit seeking \$3532.10 in appellate attorney fees. We remand to the district court to determine the amount of appellate attorney fees Konnie is entitled to recover.

AFFIRMED AND REMANDED WITH DIRECTIONS.

Mansfield, P.J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent.

Although I agree Gladys and Michael had fraudulent intent, Konnie failed to show by clear and convincing evidence that she was prejudiced or suffered an injury entitling her to a judgment in her favor. As the majority has aptly recited, to establish prejudice or injury in a fraudulent conveyance claim, a creditor “must be able to show it would have received something which has become lost by reason of the conveyance.” *C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad.*, 412 N.W.2d 593, 596 (Iowa 1987). Here, Gladys held a valid security interest in the hog confinement buildings and equipment to the extent of \$143,464.29. To establish that Konnie lost something, she was required to show the property had a value in excess of Gladys’s superior lien. *Id.* at 597.

Appraiser Merlin L. Studt opined that the buildings and equipment had a value of \$222,000. However, Studt’s appraisal assumed that the owner of the hog confinement buildings would be entitled to egress to the buildings; the right to lease the land upon which the buildings and equipment lie; and the right to use water available at or near the site. Inasmuch as the land and water source are owned and controlled by the Roger F. Elsbernd Revocable Trust, the likelihood that the buildings and equipment could be sold in excess of Gladys’s superior lien is remote. Konnie’s own expert, Ronald Juve, acknowledged that without the land and a well, the buildings have only salvage value.

Although the majority believes this issue was not preserved, clearly the district court concluded that the hog facilities had a value greater than the lien

and that conclusion was necessary to establish inadequacy of consideration and a resultant injury to Konnie. I disagree with the value placed upon the hog facilities for the reasons stated, and regardless of the fraudulent nature of the transaction, the conveyance did not injure Konnie as a creditor. *Hagge v Gonder*, 222 Iowa 954, 270 N.W. 371, 373 (1936) (dismissing a fraudulent conveyance claim where the amount of mortgage exceeded the value of nonexempt property and thus, conveyance did not injure or hinder the creditors).