1984

Dahnken, Inc. v. Harold Wilmarth : Brief of Plaintiff - Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

DAHNKEN INC., of Salt Lake City, a Utah corporation Plaintiff and Respondent, v. HAROLD WILMARTH Defendant and Appellant	Case No. 19406

BRIEF OF PLAINTIFF - RESPONDENT

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Response to Appeal from the Judgment of the Second Judicial District Court in and for Davis County, State of Utah
Honorable J. Duffin Palmer, Judge

* * * * * * *

WOODBURY, BETTILYON & KESLER
Verden E. Bettilyon
Jeffrey K. Woodbury
353 East 200 South
Salt Lake City, Utah 84111
Telephone: 364-4324
Attorneys for Plaintiff-Respondent

THORPE, NORTH & WESTERN
Vaughn W. North
Terry M. Crellin
9662 South State Street
Sandy, Utah 84070
Telephone: 566-6633
Attorneys for Defendant-Appellant

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Plaintiff and Respondent,	)	
v.	)	
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Vaughn W. North
Terry M. Crellin
9662 South State Street
Sandy, Utah 84070
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Attorneys for Defendant-Appellant

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NATURE OF CASE

This is an action commenced by Dahnken Inc. ("Dahnken") under the provision of 25-5-1, Utah Code Ann. 1953, to set aside a conveyance of real property from H. Carlton Davis ("Davis") to Harold Wilmarth ("Wilmarth")as being void under the Statute of Frauds, 25-1-1, et. seq. Utah Code Ann. 1953.

DISPOSITION IN LOWER COURT

The Second District Court, Davis County, State of Utah held that the assignment of a Uniform Real Estate Contract dated November 2, 1981 ("Assignment") covering property located in Bountiful, Utah ("Millbrook Property"), from Davis to Wilmarth was void and that the conveyance was to be set aside. The District Court further held that Davis was the owner of an agreement dated March 2, 1982 ("March 2 Agreement"), between Wilmarth and Davis and Clarus, a Utah corporation ("Clarus") and Sherman B. Hawkes ("Hawkes"), whereby Clarus and Hawkes agreed to convey certain lots or pay sums of money which was in part consideration of the sale of the Millbrook Property. Inasmuch as the Assignment from Davis to Wilmarth was found to be void, the District Court held that Wilmarth had no right, title or interest in the March 2 Agreement. The court further held that a prior garnishment by Dahnken on Clarus and Hawkes was a valid and first lien on the March 2 Agreement and that the March 2 Agreement should be sold by the Sheriff of Davis County. The judgment of the District Court was made and entered on the 19th day of July, 1983.

When reference is made to the record throughout the brief, the abbreviation CR (Court Record) shall apply to the first volume of the record on appeal and Tr (Trial Transcript) shall apply to the trial transcript in the second volume of the record on appeal.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to have the judgment sustained on appeal.

STATEMENT OF FACTS

The Statement of Facts set out in Appellant's brief is, in the main correct. However, Appellant has omitted or unclearly stated some of the pertinent facts, therefore a complete statement of facts are set out below.

1. Defendant Wilmarth is Davis' stepfather. (Tr 66). Wilmarth has no children of his own. (Tr 100). Davis has been his stepson for about 22 years. (CR 66). Dahnken made several attempts to locate Davis for service of process, however, Davis has left this jurisdiction with no forwarding address in an effort to avoid such service of process and actions of his creditors. (Tr 49). Plaintiff endeavored to take the deposition of Davis, however, two different dates were set, one in California and one in Salt Lake City, but Davis did not appear at either time. (CR 80, 84). Wilmarth claimed to be unsure of the present location of Davis. (Tr 105).

2. On March 2, 1981, Merrill W. Beck and Marcia D. Beck, his wife, sold the Millbrook Property under a Uniform Real Estate Contract

(Exhibit A) to Defendant Davis. Said Millbrook Property is located at 1414 Millbrook Way, Bountiful, Utah 84010.

3. On November 2, 1981, Defendant Davis executed an Assignment of the Uniform Real Estate Contract ("Assignment"), purporting to assign all of his right, title and interest in and to the Uniform Real Estate Contract to Defendant Wilmarth for a stated consideration of "$10.00 and other good and valuable consideration". (Exhibit C). Wilmarth testified that he did not sign this document, (Tr 91-92) although it was acknowledged and recorded. After signing this purported conveyance of the Millbrook Property to Wilmarth, Davis continued to deal with the property as if it were his own property. After the conveyance to Wilmarth, Davis used the Millbrook Property as security in securing a loan from Mr. Arnell Heaps ("Heaps") of over $50,000.00. This $50,000.00 obligation was incurred in a transaction in which Wilmarth had no interest. He also gave Heaps a verbal option to purchase the Millbrook Property. Davis represented to Heaps that he was in fact the owner of the Millbrook Property he used as security in their transaction. (Tr 34, 35, 36, 37, 38). Heaps never knew anything about the alleged interest of Mr. Wilmarth. (Tr 43). Davis remained in possession of the Millbrook Property from November 2, 1981 until March 2, 1982 when the Millbrook Property was sold to Clarus. Wilmarth never at any time took possession of the Millbrook Property nor did he receive any rent from Davis. (Tr 24, 104).

4. On February 5, 1982, Davis, as Seller, executed an Earnest Money Receipt and Offer to Purchase whereby Davis agreed to sell the

Millbrook Property to Hawkes as Buyer ("Exhibit E"). Davis did not consult with Wilmarth concerning the terms and conditions of the sale prior to signing the Earnest Money Agreement. (Tr 95-96).

5. The sale of the Millbrook Property was closed on March 2, 1982 with Wilmarth and Davis as purported sellers and Clarus and Hawkes as Buyers, (Clarus and Hawkes are sometimes hereafter referred to as "Buyers"). The purchase price was paid by Buyers paying $20,000.00 in cash and assuming the underlying contract obligation with Merrill Beck in the amount of $129,105.49 and the balance of $98,000.00 was represented by the March 2 Agreement whereby Clarus and Hawkes agreed to transfer certain lots or pay sums of money to Davis and Wilmarth, (Exhibit H). The Seller's closing statement (Exhibit G) shows a lien pay-off to Arnell Heaps to pay off the Davis obligation to Heaps and a cash payment of $15,862.50 in the form of a check made payable to Wilmarth (Exhibit Q). This check was endorsed "Pay to the order of Wendy F. Whitney" and endorsed by "Harold Wilmarth". The check is also endorsed by Wendy F. Whitney. Sid Davis, no relation, the Real Estate Broker who handled the sale of the Millbrook Property to Clarus, and who had been involved with Davis on other transactions, testified that Wendy Whitney was either the financee or wife of Davis at the time the check was endorsed. (Tr. 22). Wilmarth testified that the signature-endorsement on the check was not his, (Tr 90) and that he never saw the check before the trial. (Tr 95). It is clear that the cash proceeds from the Clarus sale never went to Wilmarth, but to Davis. Wilmarth also testified that he received a copy of the closing statement

(Exhibit G) but never inquired of Davis as to what happened to the cash proceeds. (Tr 97).

6. On May 17, 1982, Dahnken obtained a judgment against Davis and New Worlds in Fund Raising Inc. ("New Worlds") in the Third Judicial District Court for Salt Lake County, State of Utah, Civil Case No. C-82-33 ("Salt Lake County Judgment"). (CR 13). On August 4, 1982, Dahnken issued a Garnishment against Clarus and Hawkes attaching the March 2 Agreement.

7. On August 17, 1982, Dahnken commenced this action in the Second Judicial Court in Davis County, State of Utah against Wilmarth and Davis, seeking to have the Assignment from Davis to Wilmarth set aside on the grounds that it was a fraudulent conveyance under the provisions of 25-1-1 Utah Code Ann. (1953), and to have the Garnishment declared a valid first lien against the March 2 Agreement. (Exhibit H).

8. It is clear from the evidence that Wilmarth was insolvent when he signed the Assignment on November 2, 1981. Heaps testified that of the $100,000.00 owed to him by Davis, $50,000.00 was paid but $49,750.00 remained unpaid. (Tr 38).

Dahnken had attached personal property remaining in the store at 165 South State, Salt Lake City, Utah in August 1981 (CR 117).
Mr. Edward Arthur gave a full description of steps taken to try to collect from New Worlds and Davis involving attachment proceedings and other efforts by Commercial Security Bank ("CSB"). (Tr 38, 39). Mr. Arnell Heaps explained that his attorney had made great efforts to collect from Davis (Tr 38-39). Neither CSB or Mr. Heaps were able to

locate real property or any other assets owned by Davis. A full analysis of the facts relating to insolvency of Davis is given under Point I.

Wilmarth in his brief has not controverted the finding of the Court that Davis was insolvent after he made the Assignment to Wilmarth.

9. When the time came to sell the property alleged to have been conveyed to Wilmarth, it was Davis and not Wilmarth who controlled the transaction from the beginning to the end. Wilmarth admits that he had nothing to do with the negotiation of the terms or conditions of the sale. Wilmarth played no part in what those terms and conditions should be. (Tr 95-96). It was Davis who negotiated and signed all the documents. In fact, Davis signed the Earnest Money Agreement to sell the Millbrook Property as the owner (Exhibit E). Wilmarth only signed a Quit Claim Deed conveying whatever interest he had. Wilmarth stated that he never received any of the documents relating to the sale, such as the Earnest Money Agreement, or the closing statements and the March 2 Agreement until sometime after the sale was consummated. (Tr 95, 96, 97, 98).

10. Wilmarth gave Davis a Power of Attorney, but this document was not properly notarized or properly recorded and contained no legal description. A copy of such Power of Attorney was attached to another recordable document and was thus recorded. (Exhibit M). Judge Palmer noted particularly that this Power of Attorney was questionable. (Tr.-133).

11. The Assignment of Contract is an Assignment of Davis' full interest in the subject property. (Exhibit C). In fact the Real Estate

Agent that handled it explained that Davis insisted it was to be a full conveyance of his interest. (Tr.-26). However, at trial Wilmarth stated that he didn't have a full interest in the property, (Tr 104, 105). Upon the sale of property both Davis and Wilmarth signed the documents transferring title. (Tr 20, 21) (Exhibit H). The March 2 Agreement gives a 50% interest to Davis and 50% to Wilmarth. Thus Davis retained a secret interest in the property despite the full conveyance recorded in the recorder's office.

12. The record is clear that there was no "Fair Consideration" (25-1-3 Utah Code Ann. 1953) paid by Wilmarth for the Millbrook Property. The evidence introduced at the trial is briefly summarized below. (A full statement on these facts is made under Point I.)

The facts are not disputed that the "Antecedent Debt" which Defendant argues was the consideration for the Assignment of the Millbrook Property, [except for $9,100.00 (Exhibit 6)] were the debts and obligations of 3 corporations and they were not personally quaranteed by Davis. (Exhibits 2, 3, 4, 5, 7, and 8).[1] The notes (Exhibits 16 through 22) were obviously introduced into evidence to try to prove that Davis had a personal obligation to pay these corporate loans. An examination of these notes will indicate that they were all prepared at

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1. It appears that the corporation Econo Optic may have changed its name to Nutri Vite (Tr 103).

the same time, with the same paper and the same ink. They were never in the personal possession of Wilmarth but they were mysteriously sent to Vaughn North the attorney for Davis (one of the attorneys prosecuting this appeal) apparently after this lawsuit was filed. (Tr 108-109). (The effect of this evidence is fully discussed under Point I.)

STATEMENT OF POINTS

POINT ONE: THE EVIDENCE FULLY SUPPORTS THE FINDING BY THE TRIAL COURT THAT THE CONVEYANCE BY ASSIGNMENT OF CONTRACT OF NOVEMBER 2, 1981, FROM DAVIS TO WILMARTH WAS A FRAUDULENT CONVEYANCE PURSUANT TO SECTION 25-1-4 UTAH CODE ANNOTATED IN THAT IT WAS A CONVEYANCE BY AN INSOLVENT PARTY TO ANOTHER WITHOUT FAIR CONSIDERATION.

POINT TWO: TRIAL COURT WAS CORRECT IN REFUSING TO ADMIT PERSONAL CHECKS EXHIBITS 2, 3, 4, 5, 6 and 8, WRITTEN BY WILMARTH TO CORPORATIONS OTHER THAN DAVIS AS IRRELEVANT AND IMMATERIAL AND BECAUSE ON THEIR FACE THEY ARE NOT THE PERSONAL OBLIGATION OF DAVIS.

POINT THREE: EVIDENCE DOES SUPPORT A FINDING BY THE TRIAL THAT THE CONVEYANCE BY ASSIGNMENT OF CONTRACT OF NOVEMBER 2, 1981, FROM DAVIS TO WILMARTH WAS A FRAUDULENT CONVEYANCE PURSUANT TO SECTION 25-1-7 UTAH CODE ANNOTATED, 1953, BECAUSE SAID CONVEYANCE WAS MADE WITH ACTUAL INTENT TO HINDER, DELAY, AND DEFRAUD CREDITORS.

POINT ONE

POINT ONE: THE EVIDENCE FULLY SUPPORTS THE FINDING BY THE TRIAL COURT THAT THE CONVEYANCE BY ASSIGNMENT OF CONTRACT OF NOVEMBER 2, 1981, FROM DAVIS TO WILMARTH WAS A FRAUDULENT CONVEYANCE PURSUANT TO SECTION 25-1-4 UTAH CODE ANNOTATED IN THAT IT WAS A CONVEYANCE BY AN INSOLVENT PARTY TO ANOTHER WITHOUT FAIR CONSIDERATION.

The applicable sections of the Utah Fraudulent Conveyances Act are 25-1-4- and 25-1-7 U.C.A. 1953, Utah Code Ann. if Plaintiff has proved the essential elements under either of these sections, it must prevail in this appeal.

Mr. Justice Wolfe in Stanley v Stanley 97 Utah 520, 94 P.2d 465, 470, (1939), stated that the rule, with respect to the duty of the Supreme Court in review of an Equity case, was as follows:

> "Our duty is to make an independent examination of the record. If after that we find
>
> (1) The preponderance of the evidence supports the trial court's findings of fact, or
>
> (2) If there is doubt in our minds as to where the preponderance lies, or
>
> (3) We think the evidence as revealed by the record may slightly preponderate against its concludions but such preponderance may well be offset in favor of his conclusions by having seen the witnesses and been able to judge by their demeanor as to their credibility, then we will not reverse."

See also Boccalero v Bee, 102 Utah 12, 126 P.2d 1063, (1942).

We feel the court will find the evidence clearly preponderates in favor of the Plaintiff in this action.

In addition in a case under the Fraudulent Conveyances Act where only a nominal consideration (as in this case) is indicated in the conveyance, or the conveyance is to a near relative the Burden of Proof is on the grantee to prove sufficient consideration and good faith. The court stated in Lund v Howell, 92 Utah 232, 67 P.2d 215, 217, (1937), as follows:

> "...where a conveyance showing nominal consideration leaves a debtor unable to pay his debts, the burden is upon the grantee to show sufficient consideration and good faith; and where a conveyance is to a near relative, in a creditor's suit, the burden of showing good faith is on the grantee." Paxton v Paxton, 80 Utah 540, 15 P.2d 1051, (1932)

In Fraudulent Conveyance cases, the Utah Supreme Court has consistently stated that conveyances between close relatives are subject to a test of rigid scrutiny. See Paxton v. Paxton, 80 Utah 540, 15 P.2d 1051, (1932);

Lund v. Howell, 92 Utah 232, 67 P.2d 215, (1937); Givan v Lambeth 10 Utah 2d 287, 351 P. 2d 959, (1960); Ned J. Bowman Company v White, 13 Utah 173, 368 P.2d 962, (1962); Road Runner Inn, Inc. v Merrill, 605 P.2d 776, (Utah 1980). It should be noted that merely because a transaction is between close relatives, does not alone make a conveyance fraudulent. Each case must be determined on its own facts and circumstances, taking into consideration the purpose of the statute.

Section 25-1-4, U.C.A. 1953 states:

> "Conveyances by insolvent. Every conveyance made, and every obligation incurred, by a person which is, or will be thereby rendered, insolvent is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration."

Mr. Justice Ellett in construing this statute stated the three essential elements that must be proved:

> "Both the statute and case law interpreting the statute make it clear that subjective or actual intent to defraud are not elements of a fraudulent conveyance claim. Meyer is obligated to show only (1) that she was a creditor of GAC; (2) that GAC was insolvent at the time the conveyance was made to Terra; and (3) that the conveyance was not given for a "fair consideration". (Emphasis added). Meyer v General American Corp., 569 P.2d 1094, (Utah 1977).

(a) Creditor

That Dahnken was a creditor of Davis is indicated by the judgment entered in the Third Judicial District Court, Case No. C82-33, entered on May 17, 1982 in the amount of $65,000.00. (CR 6, Transcript of judgment filed with Exhibits, see also Tr 94).

(b) Insolvency

Defendant Wilmarth, in his brief, has not disputed that Davis was insolvent, therefore, this point is probably not at issue. But the facts are briefly stated below.

In rendering his decision, Judge Palmer stated:

"I find that there was an intent to hinder and defraud and delay creditors, and it's great financial embarrassment. The actual testimony of Mr. Arthur and more, at least substantiated by Mr. Cazier, is they were having problems with him. They had to, they consolidated the $100,000 to $250,000. The wanted more secured position. They demanded more payments and more security because it was late and his assets were found not to be enough to warrant the debt to the corporation, or to the individual." (Tr 134).

Judge Palmer made the following Findings of Fact:

"The Assignment of November 2, 1981 from Davis to Wilmarth was issued without a fair consideration; at the time Davis executed the Assignment, Davis was insolvent or became insolvent by reason of the conveyance; and the said Assignment was made with actual intent to hinder, delay and defraud creditors. (CR 127).

This finding is supported by ample evidence. 15-1-2 U.C.A. 1953

Defines insolvency as follows:

"A Person is insolvent when the present fair salable value of his assets is less than the amount that will be required to satisfy his probable liability on his existing debts as they become absolute and matured."

Judge Ellett in the Meyer case cited above stated: (page 1096):

"The level of insolvency necessary to meet the statute requirement is not insolvency in the bankruptcy sense but merely a showing that the party's assets are not sufficient to meet liabilities as they become due."

It is clear that Davis made the assignment (Exhibit C) at the time when his financial affairs were caving in and that he clearly knew that he would not have sufficient assets to meet his liabilities. Since none of his other creditors were able, after extensive search, to find other assets, the Millbrook Property represented the last physical asset Davis had. At the time the assignment was made he was clearly unable to meet his obligations as they came due.

The Assignment (Exhibit C) was executed at a time when several creditors were threatening law suits to enforce their debts against Davis which were outstanding and delinquent. For instance, it was in November of 1981 that New Worlds owed an amount of $250,000.00 or thereabouts, to CSB. (Tr 47,48). Davis was a personal guarantor to the loan for $100,000.00. CSB, in November, 1981, attached all of the property, primarily personal property, that it could find belonging to New Worlds in an effort to satisfy the outstanding obligation. (Tr 48, 49 and 50). In addition to this amount, Mr. Davis owed CSB an additional $20,000.00 (Tr 50) and he owed Dahnken over $69,878.00 (CR 6). Davis owed Mr. Arnell Heaps approximately $50,000.00 on one loan and approximately $49,750.00 on two other obligations which he had not paid. (Tr 34, 35, 37, 38, 39).

Mr. Edward Arthur, Vice President of CSB testified that a renewal loan was made to New Worlds which was guaranteed personally by Davis. The note was dated August 14, 1981 for $250,000.00 and became due November 15, 1981 (Tr 48). Mr. Arthur testified that CSB was very concerned about payment and the purpose of the renewal loan was to obtain additional security in the form of inventory and real property. Upon cross examination Mr. Arthur testified: (Tr 129,130, 131) as follows:

> "Q. Thank you. It's correct is it not Mr. Arthur, that if in any event in August of 1981 the bank was willing to make a $250,000.00 loan to Mr. Davis; is that correct?
> A. May I make this comment? Based on thirty-five years in lending money, when a lender has already put money out and is having difficulty collecting it, the options it has at that point are limited. When we renewed the $100,000.00 and the $150,000.00 notes into one note, our effort was to seek a liquidation program and some security.
> Q. May I ask you this, Mr. Arthur, is that disclosed by your records that that was the reason for making the $250,000.00 loan of credit in August?

A. Clearly.
Q. Do you have that with you, that would indicate that?
A. Yes, I do.
Q. Now you indicated that when, in the banking business that this is done because of collection difficulties did you say? Am I quoting you? You indicated that you make new loans available in order to, ahh, correct some collection difficulties or something to that effect. Do I have that correct?
A. I think you have stated it reasonably clear, counselor.

In the vernacular when you are casing (Casy) in the drink, you try to bail yourself out.

Q. Tell me now, what event took place prior to 1981 that told you that loan was not going to be paid back, or that the loans that had been made to that point were not going to be paid back?
A. Other than repayment of the letters of credit that, or the notes that underwrote the letters of credit, which Mr. Cazier testified to, and I emphasize possible existence of one or the other, Mr. Davis had been tardy in performance and his note was the, ahh, the $150,000.00 note was not past due [1] as was the $100,000.00 note. We were striving a way to get ours secured.

When the loan officer presented the request for the $250,000.00 renewal, the loan report form, which, the original of which I have in my hand, discloses that we were to have a filing on accounts receivable and inventory evidencing a security interest in those assets.

When the loan officer came to the loan committee, and I am a member of that loan committee, he was clearly instructed that we wanted to have additional security in the form of realty.

Q. But isn't it true too that there was an additional amount lent to Mr. Davis of some $100,000.00?
A. There was no additional money advanced when we renewed the notes. There were two notes in existence; one was a $100,000.00 note which was the residual of the Dahnken obligation. And there was another obligation for $150,000.00 to New Worlds in Fundraising. Those two notes were combined into the one note for $250,000.00

I never learned clearly why the loan officer was not able to get the real estate as security as he was instructed.

Q. But the loan committee felt comfortable with going ahead at any rate, is that not true?
A. I would have to say at this point that we felt very uncomfortable. That's why we sought additional collateral."

Sometime between November 1, 1981 and November 25, 1981 Mr. Arthur testified that Davis turned over the merchandise of the store to CSB. This

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1. The record states "not past due" but the context of the statement indicates he intended to say "was past due".

merchandise was sold, which left an obligation of $103,566.42 plus a $20,000.00 personal note (Tr 49) which were eventually written off. He also testified that all efforts to find other assets and real property of New Worlds or Davis were without success. (Tr 49).

It is interesting that CSB extended the New World - Davis loan on August 15, 1981 with the intent to obtain additional security in the form of accounts receivable, inventory and real property. For some reason the real property was never given as security but on November 2, 1981, Davis assigned all his right, title and interest in the Millbrook Property to his step father, Wilmarth. This occurred at about the same time that CSB foreclosed on the inventory, and Dahnken had previously commenced suit and attached the inventory remaining at 145 South State Street, Salt Lake City, Utah (Tr 117).

When a conveyance is made at a time when the grantor is heavily indebted, there is a presumption that the conveyance is fraudulent. In a recent Arizona case, Zellerback Paper Company v Valley National Bank, Arizona, Court of Appeals 477 P.2d 550, 554, (1970) the rule was stated as follows:

> "Having been in debt on September 7, 1965, under the circumstances shown, and obviously unable to retire its liabilities which, as reflected in the June statement, amounted to $112,473.40, the corporation can be presumed to have been insolvent when it undertook to guarantee and secure Ackerman's debts. Confronted with the same issue in Feist v Druckerman, 70 F.2d 33 (2d Cir. 1934), the court there stated: '...(A) Voluntary (emphasis theirs) conveyance made when the grantor is indebted is presumptively fraudulent. We think this means that, if one indebted makes such a transfer, it is presumed, (emphasis ours) in the absence of some proof to the contrary, that he was then insolvent...70 F.2d at 334'".
>
> Wilmarth did not overcome this presumption.

The only evidence offered by Defendant that Davis was solvent was by Mr. Stephen Cazier, who worked under the direction of Mr. Edward Arthur at CSB (he was not an employee of the bank at the time he testified). Mr. Cazier stated that he based his opinion on financial statements of Davis that were in the bank's files. (Tr 114). On redirect examination, Mr. Edward Arthur testified that the only financial statement of Mr. Davis in the bank's file was undated (with a pencil notation of September 30, 1980) and that such statement would not necessarily indicate the true financial picture of Mr. Davis a year and a half later. (Tr 126).

Respondents do not dispute the fact, that a transfer or mortgage of property made to a near relative in consideration of past due indebtedness, may constitute a non-fraudulent conveyance. However, it must be shown that the debt is genuine and the purpose of the mortgage debtor is honest, and that he was acting in good faith. Boccalero v. Bee, 102 Utah 12, 126 P.2d 1063, (1942; Paxton V Paxton, 80 Utah 540, 15 p.2d 1051, (1932). The Defendant did not show that there was in fact a good faith and fair consideration by clear and convincing evidence.

(c) Fair Consideration

Fair Consideration is defined by the statute as follows:

25-1-3, U.C.A., 1953, as amended:

"Fair consideration. - Fair consideration is given for property, or obligation:

(1) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or,

(2) When such property or obligation, is received in good faith to secure a present advance or antecedent debt in amount not dispro-

portionately small when compared with the value of the property or obligation obtained." (Emphasis added).

We are concerned here whether or not Wilmarth met the burden of proving that Davis was indebted to him. Clearly this burden was not met.

Wilmarth testified that he loaned money to Davis "and his businesses" over a long period of time. (Tr 66, 67). To substantiate these loans, a series of seven personal checks amounting to approximately $97,000.00 were offered into evidence. (Exhibits 2 through 8). Exhibit 2, 3, 4, and 5 were made payable to Econo Optic, a corporation. Three of these checks are endorsed by Econo Optic, by someone other than Davis, and one was endorsed by Econo Optic and by Davis, made payable to another company. Exhibit 6 was made payable to Davis. Exhibit 7 was made payable to "Mother's Food for Health" and endorsed by Mother's Food for Health. Exhibit 8 was made payable to Nutri Vite and endorsed by Nutri Vite.

Exhibit 6 was received into evidence but Exhibits 2, 3, 4, 5, 7 and 8 were not received into evidence. (Tr 78).

In an apparent attempt to establish that Davis had made a personal guaranty on these loans, a series of promissory notes, (Exhibit 16 through 22) were offered and received in evidence. An examination of these promissory notes will indicate that each note carefully corresponds to the date and amount of one of the checks, Exhibits 2 through 8. All appear to be on the same paper, the same ink, and the same typewriter. It appears obvious that all of the notes were prepared and executed at the same time. It also appears that a blank form note was first prepared and copied, and then the information from the corresponding check was filled in the blank spaces.

Wilmarth testified that he had never at any time had these promissory notes in his possession and that they had been delivered mysteriously, apparently after this suit was filed, to Mr. Vaughn North, the attorney who had represented Davis over a period of years and a member of the firm who is conducting this appeal. (Tr 108-109). He also testified that the notes were signed and prepared at a later date than the date indicated on the note. (Tr 81-82).

The court was also suspicious of these promissory notes. The court stated:

> "This (referring to the notes, Exhibits 16-22) is all hatched up and sent to...and I say hatched up, I don't know (when, where) these things were written but they are all identically the same which would be extremely unusual over the years." (Tr 133).

The notes (Exhibits 16 through 22) are in variance with the notes (Exhibits 10 through 13). Wilmarth testified that the latter notes were given for the obligations represented by the checks (Exhibits 2, 3, 4, and 5). The difference in the amount of the notes, as compared to the checks, apparently is interest which has been charged in advance and added to the face amount of the note. (Tr 75-76). The dates roughly correspond to the dates on the checks. Where the business is being conducted by mail it was highly unlikely that the dates on the notes would correspond exactly to the dates on the checks. These notes (Exhibits 10 through 13) together with the supporting testimony of Wilmarth establishes that the checks (Exhibits 2, 3, 4, and 5) were debts of the corporation and not personally guaranteed by Davis. This is further supported by the testimony of Wilmarth who carefully explained the business purpose of most of the loans. The

$18,000.00 loan to Nutri Vite (Exhibit 8) was to enable the vitamin company, which had made a large sale, to buy the vitamins to cover the sale. (Tr 72).

The loans to Econo Optic were for the purchase of furniture, fixtures and equipment to open new stores. (Tr 72-74). The promissory note (Exhibit 13) pledges certain furniture, equipment and fixtures as collateral. The purpose of the only check made out personally to Davis is also explained:

> "This (Exhibit 7) is a loan in March '77 for $9,100.00 that I wrote to him because he was blackballed, ahh, he was owing some money and he had to pay it." (Tr 73).

That these were business investments is further indicated by the promissory notes, (Exhibits 10, 11, and 12), which show an investment in the corporation Econo Optic with the right to convert the obligation to stock of the corporation. The testimony of Wilmarth that he went to California and worked in the vitamin store for a year without pay further indicates a business investment he was trying to protect.

Wilmarth testified:

> "Q. Were most of your business transactions confined to lending money to Mr. Davis?
> A. Business, yes. Ahh, except for one time in a vitamin company, I went to California, that's why I lived in California, ahh, trying to keep the business solvent and his partner out of his hair. They were 50 - 50 partners and couldn't make a decision and I eventually found out the partner was stealing from him and taking kickbacks when I took over his job there. Other than that, it's been, ahh, ahh, I haven't been with his business." (Tr 67).

Wilmarth testified that Davis had an obligation to pay back principal plus twelve percent interest. (Tr 72). However, the notes, Exhibits 16 through 22, provide for interest at 10% per annum.

Appellants argue it is only logical that the checks for loans to Davis be made out to the businesses because that was the purpose for which the loan was made. We think it more logical that the checks were made out to the person or entity which owed the debt. It seems clear that the original intent and understanding of Wilmarth and Davis was that the loans were corporation obligations only. It is apparent that Davis never considered the obligation to Wilmarth as his personal debt as he did not show it as an obligation on his personal Financial Statement which he delivered to the CSB (Tr 125, 128-129) and if Wilmarth really thought he was the owner of the Millbrook Property why didn't he show the proceeds of the sale in his 1981 income tax return, or why did he not make a demand for payment in over 20 years? (Tr 99). Also it does not seem logical that Wilmarth would make one check out to Davis (Exhibit 6) and the others to the corporations if in fact such checks were all loans to Davis and not the corporations.

The Appellant claims that the various companies were just an alter ego of Davis. But no evidence to support the "Alter Ego" theory was introduced at trial nor was this argument raised in the pleadings or in argument during the trial. Any claim that the corporations were in fact the alter ego of Davis would be directly inconsistent with Wilmarth's testimony.

In any event the documentation introduced into evidence shows only a debt of approximately $10,000.00 as an obligation owed by Davis to Wilmarth. (Exhibits 6 through 14). Exhibit 14 is not supported by a check. Certainly, an antecedent debt of $10,000.00 is not the fair equivalent or good faith equivalent for $100,000.00 in equity of real property. All other evidence of debt has not been shown to be good faith by clear and convincing evidence.

It has been held by many courts that the discharge of another's debt does not constitute fair consideration for a conveyance by one who is not legally responsible for payment of debt. Hansen v Cramer, 39 Cal.2d 321, 245 P.2d 1059, (1952); In the Hansen case, the Supreme Court of California set aside a conveyance as a fraudulent where a wife's separate property was conveyed in satisfaction of a husbands business debt. The Court stated (page 1060):

> "Fair consideration" is defined by section 3439.03 of the Civil Code as the exchange of property or the satisfaction of an antecedent debt which is the "fair equivalent" of the property conveyed. However, the antecedent debt alleged in support of the conveyance must be a legally enforceable obligation of the grantor, and the discharge of the debt of another does not within the meaning of the Fraudulent Conveyance Act, constitute a fair consideration for a conveyance by one who is not responsible therefor. (Neumeyer v Weinberger, 236 Wis 534, 295 N.W. 775, 776, (1941); 30 A.L.R. 2d 1209, and cases cited.)

The court also stated (page 1060):

> "What constitutes 'a fair equivalent' or 'a fair consideration' under the Fraudulent Conveyance Act must be determined from the standpoint of creditors. The debtor might be satisfied to give his assets to a stranger or to exchange them for some worthwhile chattel. But the law will not permit him to do so if he thereby renders himself uncollectible to the detriment of his creditors."

This matter has not been presented to this court previously, as far as we are able to determine but all courts which have ruled on the issue are unanimous. In an A.L.R. annotation on this subject it is stated:

> "No case within the scope of this annotation has been discovered wherein the court has upheld a transaction the consideration for which was the discharge of an antecedent debt owed by one other than the grantor, as based on 'fair consideration' under the Uniform Fraudulent Conveyance Act."

In the Zellerback Paper Company case, sited above, a 1970 Arizona Court of Appeals case, 477, P.2d 550, the court ruled that the personal debt of the corporation's sole stockholder was not to be considered in determining if fair consideration was given. The court said:

> "There was no 'present advance'. The corporation's only 'antecedent debt' to the bank was the $11,000. The $47,500 personal debt of Ackerman is not to be considered in deciding whether West-Coast received fair consideration. The $47,500 Ackerman debt is neither a 'present advance' nor an 'antecedent debt' of West Coast.

This Court also held that the $11,000 debt of West Coast to the bank was disproportionately small for the granting of a mortgage on property valued at $25,000. The mortgage was therefore declared to be fraudulent.

In our case, Davis' separate property can not be conveyed in satisfaction for the business debt of Econo-Optics, Mother's Food for Health, and Nutri Vite.

POINT TWO

POINT TWO: TRIAL COURT WAS CORRECT IN REFUSING TO ADMIT PERSONAL CHECKS EXHIBITS 2, 3, 4, 5, 6 and 8, WRITTEN BY WILMARTH TO CORPORATIONS OTHER THAN DAVIS AS IRRELEVANT AND IMMATERIAL AND BECAUSE ON THEIR FACE THEY ARE NOT THE PERSONAL OBLIGATION OF DAVIS.

The trial court refused to admit the checks of Wilmarth made payable to corporations other than Davis as evidence of Davis' indebtedness on the grounds that such checks are immaterial and irrelevant. (Tr 77). However, such checks were in fact admitted into evidence orally by the testimony of Wilmarth. (Tr 71 though 75). Wilmarth testified as to each check by reading the writing on the face of each check. He described to whom each check was made payable, the date and the amount of each check. Wilmarth

also testified at that time as to the terms and purpose of the loans for which each check was given. In addition Wilmarth testified that the payees upon the checks were companies which Davis allegedly owned. (Tr 71-75).

These checks, (Exhibits 2, 3, 4, 5, 7 and 8) are not material because they are made out to entities other than Davis. Testimony of Wilmarth that the checks represent the debt of someone other than the payee is self serving and hearsay and contradicts the great Weight of Evidence. The materiality of these checks is weakened further by the fact that the supporting promissory notes, admitted as evidence, (Exhibits 10, 11, 12, and 13) clearly indicate the corporate responsibility to pay the obligation rather than being the personal obligations of Davis.

If it were admitted for purposes of argument that it was error not to admit these checks, this error does not constitute reverseable error because the trial court had before it the evidence of these checks in full when it made its judgment. The introduction of the promissory notes (Exhibits 16 through 22) was a greater error since no foundation was laid for their introduction and they were clearly hearsy yet even with these notes in evidence the court could not find for the Defendant. The introduction of the physical documents would not have changed the trial courts opinion in light of the other evidence.

POINT THREE

POINT THREE: EVIDENCE DOES SUPPORT A FINDING BY THE TRIAL THAT THE CONVEYANCE BY ASSIGNMENT OF CONTRACT OF NOVEMBER 2, 1981, FROM DAVIS TO WILMARTH WAS A FRAUDULENT CONVEYANCE PURSUANT TO SECTION 25-1-7 UTAH CODE ANNOTATED, 1953, BECAUSE SAID CONVEYANCE WAS MADE WITH ACTUAL INTENT TO HINDER, DELAY, AND DEFRAUD CREDITORS.

Under Section 25-1-4 Utah Code Ann. 1953, discussed under Point I above, "subjective or actual intent" are not elements of a fraudulent conveyance claim. Section 25-1-7 U.C.A. (1953) reads as follows:

> "Conveyance to hinder, delay, defraud creditors. - Every conveyance made, and every obligation incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors."

Under 25-1-7 Utah Code Ann. (1953) "intent" of the parties is an element that must be proved before a fraudulent conveyance can be shown. Actual intent must be shown rather than mere intent presumed in law. In our case, there has been a plethora of fact indicating the fraudulent intent. The court stated:

> "The court has considerable difficulty finding that there was not a fraud. I think there was a fraud. I think it was an intentional fraud." (Tr 133).

In his brief, Wilmarth relies heavily on the following statement of Judge Palmer:

> "I think Wilmarth came into it sadly enough, maybe totally genuine."

The full statement made by Judge Palmer while rendering this decision is as follows:

> "I think Wilmarth came into it sadly enough, maybe totally genuine. I have some question. I think some handwriting experts could tell us a lot of things on this handwriting. I'm not one, but certainly the check signed by Mr. Wilmarth doesn't relate to any of these that he now says are his, including the Quit Claim Deed. So there is some real question here." (Emphasis added, Tr 135).

In a Fraud case and especially where the conveyance is to a near relative, the burden of proof is on the Grantee to show good faith. It is

clear that Judge Palmer did not feel that Wilmarth had met his burden of proof.

Proof of actual fraud is not required. Fraud is proved by the so called "Badges of Fraud". These do not necessarily constitute fraud, but are signs or indicia from which the existence of fraud may be inferred as a matter of evidence.

The term "Badges of Fraud" evidently first arose in the very early Twayne's Case, a Star Chamber case decided in 1601. (cited by Justice Crockett in Givan v Lamberth, 10 Utah 2d 287, 351 P.2d 959, 961, (1960):

> "The Debtor Pierce owed Twyne 400 pounds and was sued by a third party for 200 pounds. Before trial Pierce conveyed all of his property to Twyne reciting as consideration the prior debt. But he continued in possession, sold some of the sheep and evidenced all of the prerequisite of ownership. The conveyance was set aside as fraudulent, the court assigning the following reasons, which have often since been referred to as the badges of fraud: that in the conveyance Pierce reserved nothing even for his own use even though he continued in possession and used the property as his own; that this evidenced a secret trust between the parties; that the conveyance was made pending the suit; and was kept secret; and finally that the conveyance itself "protested too much" in reciting that it was made "honestly, truly, and bona fide."

Most of these same Badges of Fraud exist in this case and many others, as we will indicate. An interesting comment is made by Justice McDonaugh in the case of Cardon v Harper, 106 Utah 560, 151 P.2d 99, 101, (1944):

> "Whether consideration be treated as a detriment to one or a benefit to the other, the fact is that after the manipulation of funds took place, and after the deed and bill of sale were executed, both the properties and the funds were used in substantially the same manner and for substantially the same purposes as they would have been had these questioned transations never occurred, as far as grantor and grantee were concerned."

This is almost an exact description of what happened in this case. As we follow the paper trail and the oral evidence admitted at the trial the

following is a chronological sequence of events concerning the Millbrook Property:

1. On March 23, 1981, Davis purchased the Millbrook Property under Uniform Real Estate Contract, (Exhibit A).

2. On November 2, 1981, Davis assigned all of his right, title and interest in the property to Wilmarth for nominal consideration. Wilmarth did not sign the Assignment and did not see it until after the law suit was filed. (Exhibit C, Tr 69)

3. On or about November 24, 1981, Davis borrowered $50,000.00 from Arnel Heaps and the Millbrook Property was assigned by Davis to Heaps as security for the Loan. (Exhibit D, see Limited Assignment of Contract attached to Exhibit D). At the same time Davis gave Heaps a verbal option to purchase the property. (Tr 36). Davis at no time ever mentioned to Heaps that he had already assigned the Millbrook Property to Wilmarth. (Tr 33, 34, 35, 36, 37). Wilmarth did not know that Davis had used the Millbrook Property as security for a $50,000.00 loan or that Heaps was given a verbal option to purchase the Millbrook Property.

4. On February 5, 1982, Davis (not Wilmarth), signed an Earnest Money Agreement as seller, and Sherman B. Hawkes, as Buyer (Exhibit E) offering to sell the Millbrook Property to Hawkes. Davis did not at any time discuss with Wilmarth the terms and conditions of the sale or whether the sale should be made. Wilmarth knew nothing of the sale until after it was closed. (Tr 95).

5. The sale was closed on March 2, 1982. There were several interesting points about the sale:

a. All of the documents, except the Quit Claim Deed, are signed by Davis in his personal capacity or by Davis as attorney in fact for Wilmarth. The Power of Attorney was not properly acknowledged and was not properly recorded and did not contain a legal description of the property. (Exhibit 15). Judge Palmer stated: "The Power of Attorney is certainly questionable."

b. Part of the purchase price was paid by the March 2 Agreement, (Exhibit H). This March 2 Agreement shows that Davis is a one half owner in the lots or money to be delivered or paid by Clarus. Sid Davis, the Real Estate Broker testified that Davis' name was put on the agreement under the specific instructions of Davis. Davis considered himself at least the half owner of the property. (Tr 20-21). The assignment therefore created a Secret Interest of Davis in the Millbrook Property.

c. As indicated on the closing statement, part of the proceeds of sale were paid to Heaps as final settlement of Davis' obligation to Heaps. (Tr 38, Exhibit G).

d. A check in the amount of $15,562.50 was issued to Wilmarth as the balance of the proceeds of sale, (Exhibit Q). Wilmarth testified that he never saw this check and that the endorsement was a forgery (Tr 87-88). Sid Davis testified that the endorsee, Windy Whitney, was the fiancee or wife of Davis at this time. (Tr 21-11). Davis obviously received these funds. Wilmarth testified that he received copies of the closing statements and other closing documents but never inquired about where the funds went.

e. After the Assignment to Wilmarth on November 2, 1981, Davis continued in possession of the Millbrook Property and paid no rent to Wilmarth until March 2, 1982, when it was sold to Clarus. (Tr 104-5).

f. The Assignment of November 2, 1981 is a full assignment of all of Davis' right, title and interest in the Millbrook Property, yet he obviously retained a secret interest in the Millbrook Property as indicated by (Exhibit H), and the testimony of Wilmarth (Tr 105) and this assignment prevented most of Davis' creditors from discovering the property.

g. Wilmarth conveyed his interest by a Quit Claim Deed instead of by the usual Warranty Deed. This caused Judge Palmer to comment:

> "The fact that if the Defendant here had this property in his own right, he would have conveyed by Warranty Deed and not by Quit Claim Deed which just gives something, if he has something..." (Tr 133).

h. Davis did not indicate an obligation to Wilmarth in his financial statement delivered to CSB (Tr 125)

i. Wilmarth, as the purported owner of the Millbrook Property did not report the proceeds of sale in his 1982 income tax return. (Tr 104)

Wilmarth, in his brief, has argued that he was innocent of wrong doing. In this case Wilmarth did not prove that he paid a fair consideration for the property and therefore he is not a bona fide purchaser for value and he cannot take advantage of the provision of 25-1-13 U.C.A. 1953 which states:

> "Bona fide purchasers not affected. - The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

The annotation at 17 A.L.R. 1209, (1953), in its introduction states:

"I. In general. Although there is considerable difference of opinion upon other questions affecting the validity as against creditors of voluntary conveyances or transfers, i.e., conveyances or transfers not supported by a valuable consideration, the courts, as presently shown, are practically unanimous to the point that if the rule of the particular jurisdiction, as regards a showing of actual or constructive fraud on the part of the grantor or transferrer, is satisfied, a voluntary conveyance or transfer is avoided as to creditors; and it is immaterial whether or not the grantee or transferee participated in or knew of the fraud of the grantor or transferrer, or of the facts and circumstances from which fraud is imputed to the latter."

On the other hand, there is no question that Wilmarth did participate in the fraud for the following reasons:

Wilmarth admits that he did not acquire a full interest in the property (Tr 105), and the agreement of March 1, (Exhibit H) shows a 50% interest remaining in Davis. Thus a secret trust was created in Wilmarth.

The minute Wilmarth received a full conveyance of the property, where the clear intent is for Davis to retain a large interest, he has participated in the fraud. He may claim he didn't know about it but he either intentionally or unintentionally became a part of the fraud and this fraud prevented creditors from finding the real property.

Most of the above Badges of Fraud (or actual fraud), are tied to Wilmarth as well as to Davis, Wilmarth did not act as the owner of the Property. Davis, at all times, took actions, made conveyances, received money, paid his personal debts from the proceeds, as if he were the owner of the property. On the other hand, Wilmarth, at all times, acted as a party who was holding title for somebody else, but did not consider himself the owner. If Wilmarth was the real owner of the property, he was on notice, at least a prudent man would have been on notice, that his step son

was defrauding him in the transaction, but Wilmarth was not at all concerned.

The burden is on Wilmarth to prove his own good faith, as well as the good faith of Davis. He did not meet this burden.

CONCLUSION

The Plaintiff Dahnken is entitled to prevail under either 25-1-4 or 25-1-7 U.C.A. 1953.

The preponderance of the evidence shows:

(a) Davis was indebted to Dahnken.

(b) Davis was insolvent at the time he executed the Assignment of Contract.

(c) The alleged antecedent debt was not the obligation of Davis but of the three corporations and Davis was not personally obligated thereon.

(d) The debt of approximately $10,000.00 is not fair consideration for the transfer of an equity in real property of approximately $100,000.00.

Plaintiff can also prevail under 25-1-7. There is obviously an intent to hinder delay or defraud creditors. The "Badges of Fraud" cited above are too closely connected to Wilmarth for him to say he is innocent of any wrong doing and he participated in the Fraud by accepting title but allowing Davis to retain a secret 50% interest in the proceeds. Since a fair consideration was not paid he cannot stand in the position of a bona fide Purchaser for Value.

The failure to admit the checks (Exhibits 2, 3, 4, 5, 7 and 8) was not error, but even if it was error all of the evidence relating to the checks was before the court when he made his decision. Therefore Plaintiff (Respondent) respectfully requests this court to affirm the decision of the lower court.

Resepctively submitted
Woodbury, Bettilyon & Kesler

Verden E. Bettilyon
Jeffrey K. Woodbury

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Plaintiff Respondent's Brief on Appeal from the Judgment of the Second Judicial District Court, Case No. 19406 was mailed, postage prepaid, to Vaughn North, 9662 West South State, Sandy, Utah 84070.

DATED this 2 day of February.

Nadine Bettilyon