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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-35 / 89-589

**G. DEAN GARLAND** and **SECURE BEEF, LTD.**,
a Limited Partnership,

Appellees,

vs.

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**PAUL W. THIELKING, et al.**,

Appellants.

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Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Defendants appeal from a district court order determining defendants' transfers to their professional corporations were constructively fraudulent and imposing a constructive trust as to this property in favor of plaintiffs to satisfy their judgment against the defendants. **AFFIRMED.**

Stephen D. Lombardi of the Lombardi Law Firm, Des Moines, for appellants.

Joel T. S. Greer of Cartwright, Druker & Ryden, Marshalltown, for appellees.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

**HAYDEN, J.**

In March of 1984 G. Dean Garland entered into an agreement to sell Marshall Packing Company to Paul W. Thielking, Stephen K. Thielking, Paul M. Thielking and John L. Henss. The purchasers personally guaranteed the performance of Capital Resources Corporation for this transaction. Capital Resources defaulted. Garland sought performance from the purchasers individually on their guarantee. When this was not forthcoming, Garland brought an action against each defendant and Capital Resources Corporation. After a trial, a judgment was entered against each defendant jointly and individually for $2,606,750.00. Garlands' attempts at collection through garnishment have been unsuccessful. Garland instituted this action which was tried to the court. The court determined the defendants' transfers to their professional corporations and their employee stock option trusts (E.S.O.T.s) were constructively fraudulent. The court imposed a constructive trust on this property in favor of Garland to satisfy the judgment.

Defendants appeal. We affirm.

Each defendant practices his profession through a professional corporation in which they individually serve as the sole officer. The three defendants assert they receive no income from their professional corporation, as they assign their income to an Employee Stock Ownership Trust. The E.S.O.T.s, named after the three defendants

individually (Paul M. Thielking was dismissed from the action), own all the stock of the professional corporations and are administered through an interlocking trustee system. The John L. Henss, C.P.A., P.C., E.S.O.T. has Stephen as its trustee. John is the trustee for the Stephen K. Thielking, C.P.A., P.C., E.S.O.T. The same interrelationship exists between Paul and a Daniel Hinson. The beneficiaries of these E.S.O.T.s are the defendants' wives, except for the Paul W. Thielking C.P.A., P.C., E.S.O.T., which names his grandchildren as beneficiaries.

None of the three defendants own their homes or various rental properties. The individual professional corporation has title to the real estate in which the professional is living as well as income-producing property. The professional "pays" rent to the professional corporation although there is no cash transaction. Rather, an adjustment is made on the books. The professional corporation pays the utilities, expenses of the house, and the cablevision expenses. The three men claim they have neither income nor assets, other than clothing.

The trial court's findings of fact include a multitude of transactions transferring real property, personal property, and money from individual ownership to ownership by the professional corporation. The Stephen K. Thielking's transferred to the Stephen K. Thielking C.P.A., P.C. a 1981 Corvette, a 1980 Toyota, a 1974 Cadillac, their home in Des Moines, and two rental properties. This real property was transferred the day the first trial began.

The day before the first trial commenced, Central Iowa Real Estate Financing Corporation, a corporation solely owned by Stephen Thielking, Paul's son, transferred a Toyota to the Paul W. Thielking O.D., P.C. The following day Paul transferred his Des Moines home to his professional corporation. Three days later a 1984 Dodge Daytona was transferred and the next day the Paul W. Thielking O.D., P.C. purchased a $70,000 certificate of deposit.

The trial court further found the defendants have also, on a regular and continuing basis, used their professional corporation's checking accounts to pay for personal expenses, utilities, and vacations. At the end of each year the accounts would be settled by an accounting adjustment. This adjustment typically takes the form of dividends, issued by the professional corporations for the amount of the advancement made to defendants or their families. The dividend then went by assignment to each E.S.O.T., which would use the funds to purchase more stock in the defendants' corporations.

The trial court found as a matter of law the transfers of the homesteads and some of the automobiles were exempt from general execution.

Transfers between Stephen and Paul Thielking, their wives and their professional corporation appeared to the trial court to be for insufficient or no consideration. Although withdrawals from the professional corporation were

ostensibly to set off debts the individuals owed to the professional corporation, the court concluded, as did the Internal Revenue Service, these withdrawals were constructive dividends, not loans to the sole corporate officer.

Additionally, the court found a number of transactions occurred where an insider relationship existed.

The court concluded the transfers of property and the rights to income by the defendants, the professional corporations, and their E.S.O.T.s are constructively fraudulent. It imposed a constructive trust in favor of plaintiffs on non-exempt assets transferred to the professional corporations and on the proceeds from income and dividends from the professional practice. The court ordered a receiver appointed to determine the value of the constructive trusts and to direct the liquidation of non-exempt property not related to the practice of the defendants' professions and/or the E.S.O.T.s, including the professional corporation's stock in the E.S.O.T.s up to the amount of the constructive trust.

We review the issues and facts of this equity case de novo. Iowa R. App. P. 4. When considering the credibility of witnesses we accord weight to the trial court's fact findings, but are not bound by them. Rouse v. Rouse, 174 N.W.2d 600, 665 (Iowa 1970).

Our de novo review leads us to the conclusion the transfers were constructively fraudulent. We affirm the trial court's order to appoint a receiver.

Fraud is not to be presumed in any transactions, but must be shown by clear, satisfactory and convincing evidence. Rouse v. Rouse, 174 N.W.2d at 669.; Travelers Indemnity Co., v. Cormaney, 258 Iowa 237, 138 N.W.2d 50, 55 (Iowa 1965).

> Because fraud is an offense of secrecy, direct evidence is rarely obtainable. Frequently, it can be shown only by the circumstances admitted by the parties to it. Fraud may, and usually must be proved by circumstantial evidence. The individual circumstances are usually inconclusive and attacked separately may be blown away. The circumstances must ordinarily be considered together and the force and weight to be given them are that of them in combination.
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> The circumstances of a bona-fide transaction are ordinarily consistent with each other and with generally recognized business methods and fair dealing, and not incredible. A fraudulent transaction naturally begats stilted, contradictory, and incredible evidence.

Rouse v. Rouse, 174 N.W.2d at 669.

In the case of transfers for no or insufficient consideration, the long standing rule in Iowa is to presume the transfer fraudulent. First Nat. Bank v. Frescoln Farms, Ltd., 430 N.W.2d 432, 435 (Iowa 1988). Unless the transferee is able to show the transferor remained solvent after the transfer, the transfer may be set aside by the transferor's creditors. Id. Neither actual dishonesty nor intent to deceive is necessary to prove constructive fraud. Id.

We agree with the trial court the only reasonable conclusion is the defendants are not personally solvent. The Uniform Fraudulent Transfers Act at section 2(a)

defines a debtor as insolvent "if the sum of the debtor's debts is greater than all of the debtor's assets at fair valuation." Paul Thielking, Stephen Thielking, and John Henss jointly and individually have a judgment against them for $2,606,750. These professionals have gone to a great deal of trouble to render themselves judgment proof by personally divesting themselves of any and all forms of assets.

We affirm the trial court's findings the transfers for no or insufficient consideration were fraudulent and should be set aside.

A fraud may be shown by the transfer to an "insider," which may include a relative of a transferor, a corporation controlled by the transferor, or a person who stands in a fiduciary capacity. Frescoln Farms, 430 N.W.2d at 436. The trial court correctly concluded some of the transactions in this case occurred between the transferor and an insider and were therefore, fraudulent.

The court concluded Garland established his right to a constructive trust by clear, convincing and satisfactory evidence. Regal Insurance Co. v. Summit Guarantee Corp., 324 N.W.2d 697, 705 (Iowa 1982). We concur. The court may trace property subject to the constructive trust wherever it is held and may reach anything obtained through the use of it. Id. Thus, the constructive trust can reach into the professional corporations or E.S.O.T.s to satisfy plaintiff's claim. It is important to note the

professional corporations and the E.S.O.T.s are not, themselves, disturbed by the imposition of this constructive trust.

This court has considered the case cited by appellant during oral argument and in the motion to rebrief the issues. Guidry v. Sheet Metal Workers National Pension Fund, § 58 U.S.L.W. 4131. We find it is not analogous to the instant case and therefore, not applicable.

The imposition of a constructive trust and appointment of a receiver is affirmed.

**AFFIRMED.**