

IN THE UNITED STATES DISTRICT COURT
FOR THE TENTH CIRCUIT

DOCKET NO. 13-4131

APPEAL FROM THE DISTRICT COURT OF UTAH
CASE NO. 2:12CV-0005
HONORABLE DUSTIN B. PEAD

KING & KING & JONES, P.C.,

APPELLANT,

V.

R. WAYNE KLEIN, THE COURT-APPOINTED RECEIVER
OF U.S. VENTURES LC, WINSOME INVESTMENT TRUST,
AND THE ASSETS OF ROBERT J. ANDRES
AND ROBERT J. HOLLOWAY,

APPELLEE.

BRIEF OF APPELLANT

NO ORAL ARGUMENT IS REQUESTED

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**IN THE UNITED STATES DISTRICT COURT
FOR THE TENTH CIRCUIT**

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

King & King & Jones, P.C., Appellant, v. R. Wayne Klein, the Court-Appointed Receiver of U.S. Ventures LC, Winsome Investment Trust, and the Assets of Robert J. Andres and Robert J. Holloway, Appellee.

DOCKET NO. 13-4131

COMES NOW the Appellant, and pursuant to Rule 26.1 makes this, its Certificate of Interested Persons and Corporate Disclosure Statement, and shows this Honorable Court the following:

1.

David C. Castleberry, Esq.

2.

William H. Christensen, Esq.

3.

Christopher Glauser.

4.

David H. Jones, Esq.

5.

King & King & Jones, P.C.

6.

R. Wayne Klein.

7.

Hon. Dustin B. Pead.

IN THE UNITED STATES DISTRICT COURT
FOR THE TENTH CIRCUIT

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Pursuant to Tenth Circuit Rule 28(C) there are no prior or related appeals.

STATEMENT OF JURISDICTION

- a) The basis of the District Court's jurisdiction was Federal Question 28§U.S.C. 1331.
- b) The basis of this Court's jurisdiction is U.S.C. §1291, in that it is an appeal from a final decision from the District Court.
- c) The District Court's grant of Plaintiff/Appellee's Motion for Summary Judgment was filed on August 20, 2013. The denial of Defendant/Appellant's Motion for Summary Judgment was denied on the same date.

The Notice of Appeal was filed, pursuant to F.R.A.P. §4(a)1(A) in a timely fashion on September 12, 2013.

- d) This appeal is from the final decision of the District Court in resolving all issues between the parties.

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

Was the payment of attorney's fees to the Appellant law firm taken by Appellant law firm in good faith, and for which services of equivalent value was provided subject to being a voidable transfer?

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

On January 17, 2012 Appellee filed a Complaint in the Utah District Court, seeking to recover \$25,000 in attorney's fees paid to Appellant. On March 9, 2012 Appellant filed a timely Answer to Complaint.

On August 20, 2013 the magistrate judge ruled in favor of Appellee on their Motion for Summary Judgment, and against Appellant on its Motion for Summary Judgment.

On September 12, 2013 Appellant filed a timely Notice of Appeal.

SUMMARY OF ARGUMENT

The transfer of payments to Appellant law firm in good faith and for reasonably equivalent value is not a voidable transfer. Appellant law firm was not the initial transferee, and is therefore entitled to the good faith defense.

STATEMENT OF FACTS

The facts in the instant case are not in dispute.

In 2006, an individual named Enrique Baca retained Appellant law firm King & King & Jones to represent him in regard to a pending criminal charge in Fulton County, Georgia. Appellant law firm is engaged almost exclusively in the practice of defending individuals charged with criminal offenses.

The method of payment was two wire transfers of \$12,500 each, deposited directly into Appellant law firm's business account. Appellant law firm represented Mr. Baca to the conclusion of the charges in Fulton County: the charges resulted in a dismissal in 2007.

It is undisputed that Appellant law firm had no knowledge of the source of the funds. It is undisputed that Appellant law firm provided services to Enrique Baca, and that Mr. Baca was the individual who caused the transfer and benefitted from it. It is unknown by the parties what Mr. Baca's relationship was to U.S. Ventures and Winsome Investment Trust.

ARGUMENT AND CITATION OF AUTHORITIES

According to Utah Code Annotated §25-6-9 (2012), a transfer is not voidable against a person who took it in good faith for reasonably equivalent value. King & King & Jones, P.C. (*hereinafter* “King”) was paid for legal services of reasonably equivalent value by Enrique Baca. King’s contract was with Mr. Baca. King had no reason to suspect any discrepancy in the payment from Mr. Baca. King did not invest in or have any other dealings with the receivership Defendants; and there certainly was no investment by King in a Ponzi scheme followed by false rewards that must now be repaid.

The Court of Appeals of Utah provides a thorough analysis of Utah’s Fraudulent Transfer Act in Ruth B. Hardy Revocable Trust v. Eagle Mountain City, (2012), Utah Appeals 352. In that case, the party claiming to be a subsequent good faith transferee who took it for value did not provide proof of value, and that claim failed. However, the opinion does provide an analysis of the law. Unlike the defendant in Hardy, King *did* provide services, for which it was paid. This is not in dispute.

In a 1996 case from the 9th Circuit Court of Appeals, found under the Uniform Fraudulent Transfer Act, transfers made to merchants by debtors were not voidable because, although they were made with actual intent to hinder, delay or defraud creditors, the merchants took the money in good faith for a reasonably equivalent value. Cohen , et al v. Metro Honda, 199 B.R. 709 (1996) at page 718.

In a 7th Circuit Court of Appeals case involving a fraudulent transfer prior to bankruptcy, the Court compares a subsequent holder of the fraudulently conveyed asset to a holder in due course of a commercial paper, or a bona fide purchaser of chattel. Citing the waste that would be created if people either had to inquire how their transferors obtained their property, or to accept the risk that a commercial deal would be reversed for no reason they could perceive at the time. The Court held:

“The initial transferee is the best to monitor; subsequent transferees usually do not know where the assets came from, and would be ineffectual monitors if they did.”

Bonded Fire Service v. European AM Bank, 838 F.2d 890 at 892.

In In Re: Potter, Et. Al v. Love Funeral Home, 386 B.R. 306 (2008), the Bankruptcy Court in Colorado engaged in an extensive analysis of the fraudulent transfer statutes. In the Love case, Harold and Carolyn Potter filed an individual bankruptcy. Subsequent to the filing, Mr. Potter passed away. Mrs. Potter contracted with Love Funeral Home (*hereinafter "Love"*) to conduct his funeral and burial service, and to purchase a headstone for Mr. Potter's grave.

Mrs. Potter assigned the proceeds of insurance policies to Love for payment of its services. The bankruptcy trustee sued, seeking return of the life insurance proceeds from Love. The Love court found the following:

"The only issue that remains as to the trustee's ability to void this payment is whether Love may assert a good faith defense [citations omitted]. Is Love the initial transferee, or the party for whose benefit such transfer was made and therefore strictly liable, or is Love a subsequent transferee?"

Love, supra, at page 309.

The Love court based its decision on the Bonded Fire decision, which holds:

"That the initial transferee is the first party to exercise dominion and control over the money or other assets . . . in the case of funds on deposit, dominion and control has been defined as the right to put the money to one's own purposes."

Love, supra, at pages 309 and 310.

The Love court found Mrs. Potter to be the initial transferee, and thus Love was a subsequent transferee entitled to the good faith defense. The Love court found that in Mrs. Potter's act of transferring the funds to Love, she had exercised dominion and control, and therefore, was the initial transferee.

It is of particular note that the Love court found the following:

“By way of contrast, Love had no way to protect itself from the situation. It provided goods and services without reason to suspect the voidability of the transaction. Holding Love liable for this transfer would, in essence, impose a duty on every merchant to conduct a bankruptcy search on its customer before parting with its goods and services.”

Love, supra, at page 313.

In the instant matter, the Appellant law firm did not even have the ability to search for bankruptcy filings to protect itself from a voidable transfer. The Ponzi scheme from which the funds came was not even discovered until years after the transfer to Appellant law firm.

Enrique Baca was the initial transferee, and King was a subsequent transferee entitled to the good faith defense.

CONCLUSION

The transfer of attorney's fees to King & King & Jones, P.C. was not a voidable transfer. Thus, the grant of the Motion for Summary Judgment for the Plaintiff/Appellee should be reversed, and the denial of the Defendant/Appellant's Motion for Summary Judgment should be reversed and granted.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)**

**Certificate of Compliance with Type-Volume Limitation, Typeface
Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains **1,056** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Font and Times New Roman.

(s) _____
WILLIAM H. CHRISTENSEN, ESQ.

Attorney for King & King & Jones, P.C., Appellant

Dated: December 6, 2013

**CERTIFICATE OF COMPLIANCE WITH
TENTH CIRCUIT RULE 25.5**

This is to certify that all required privacy redactions have been made pursuant to Tenth Circuit Rule 25.5.

Respectfully submitted,

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CERTIFICATION OF SCANNING FOR VIRUSES

This is to certify that the electronic submission was scanned by the most recent version of commercial virus-scanning program, and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was electronically filed this day with the Clerk of Court using the CM/ECF system, in accordance with Rule 25.3, which will automatically send e-mail notification of such filing to opposing counsel:

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This the 6th day of December, 2013.

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