MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Keltner Property Group. LLC,

Appellant-Plaintiff,

v.

Brian K. Southard and Restor Company,

Appellees-Defendants,

And

Kristi Southard,

Appellee-Third-Party Defendant.

January 25, 2024

Court of Appeals Case No. 22A-PL-2683

Appeal from the Hamilton Superior Court

The Honorable J. Richard Campbell, Judge

The Honorable Darren J. Murphy, Magistrate

Trial Court Cause No. 29D04-1809-PL-9198

Memorandum Decision by Judge Riley
Judges Bailey and Tavitas concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Keltner Property Group, LLC (Keltner), appeals the trial court's judgment in favor of Appellees-Defendants, Brian Southard (Brian) and Restor Company (Restor)[1], and Appellee-Third-Party Defendant, Kristi Southard (Kristi), on its Complaint based on the Indiana Fraudulent Transfers Act (UFTA).

[2] We affirm.

ISSUE

[3] Keltner presents this court with one issue, which we restate as: Whether the trial court's determination that Brian's transfer of certain residential real estate was not fraudulent was clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] Brian and Kristi (collectively, the Southards) wed in 2000. Prior to 2007, the Southards had jointly owned at least three homes. In 2007, the Southards intended to jointly purchase residential real property located at 5883 William

[1] Restor does not participate in this appeal.

Conner Way, Carmel, Indiana (the Property). The approximately $40,000 downpayment for the Property came from a joint Southard bank account. On March 2, 2007, Brian executed a deed (2007 deed) for the Property. The 2007 deed acknowledged that Brian was a "married man" but that he took the Property "as his sole and separate property[.]" (Exh. Vol. p. 19). Both Kristi and Brian attended the closing for the Property, but Kristi did not see the 2007 deed at the closing. Thereafter, the Southards lived at the Property with their minor son.

[5] Prior to 2015, Brian was the sole owner of Restor Property Restoration Group (RPRG). Brian received a salary from RPRG. In 2015, the Southards discovered that RPRG's accountant had embezzled approximately $1.5 million from the company. Although the accountant was ultimately prosecuted for the embezzlement, the offense resulted in not only the loss of funds directly from the company but also the initiation of several lawsuits by entities who had not been paid while the embezzlement was ongoing. After 2016, Brian no longer drew a salary from RPRG. In the wake of the embezzlement, the Southards liquidated investments and retirement accounts they had held. In 2017, RPRG went bankrupt. Thereafter, Kristi operated Restor, a previously-existing entity, as its sole owner. Brian performed services for Restor but did not draw a salary. Kristi was paid approximately $70,000 a year by Restor.

[6] On September 26, 2018, Keltner, the owner of commercial real estate leased by Brian and Restor, initiated a lawsuit against Brian and Restor for breach of contract seeking unpaid rent and utilities, damages for cleaning and repairs, and

attorney's fees. On June 4, 2019, during the pendency of the Keltner lawsuit, the Southards executed and caused to be recorded a deed (the 2019 deed) for the Property which transferred the Property from Brian as sole owner to Brian and Kristi as co-owners. The trial in the Keltner lawsuit took place on August 2, 2019. On October 2, 2019, the trial court entered judgment in Keltner's favor against Brian and Restor for $242,060.70 plus 18% interest per annum until the judgment was paid. Brian appealed, and this court subsequently affirmed the trial court's judgment in *Southard v. Keltner Property Group, LLC*, 150 N.E.3d 256 (Ind. Ct. App. 2020)*, trans. denied*.

[7] Neither Brian nor Restor made any payments towards the Keltner judgment. At a November 7, 2019, post-judgment deposition of Brian by Keltner, Brian testified that the embezzlement had rendered him insolvent and that he did not own any assets with a value greater than $500. When asked why the Southards had executed the 2019 deed, Brian explained that Kristi should have been on the 2007 deed because the Property had been purchased partially with communal funds. As to the timing of the execution of the 2019 deed, Brian testified that they had only discovered in 2017 that Kristi was not on the deed to the Property and that it had taken almost two years of effort to have a judgment lien from an unrelated matter that had been extinguished taken off the Property's title.

[8] On July 6, 2020, Keltner filed its Complaint to Set Aside Fraudulent Transfer pursuant to the UFTA, alleging that the Southards had executed the 2019 deed to frustrate the collection of its judgment. On November 23, 2020, a hearing on

proceedings supplemental was held regarding the Keltner judgment at which Brian testified that, after RPRG went bankrupt and Brian ceased drawing a salary, Kristi paid all their bills, including the mortgage, taxes, and insurance on the Property from a joint bank account. Brian confirmed that no additional consideration was supplied for the execution of the 2019 deed.

[9] On June 3, 2022, the trial court held a hearing on Keltner's Complaint to set aside the 2019 deed. Brian testified that Kristi "has been paying with me on that house since the day we moved in" and that Kristi had contributed to the upkeep and maintenance of the Property by paying for improvements such as paint and new carpet. (Transcript p. 24). According to Brian, although he had not alerted Keltner to the execution of the 2019 deed, he and Kristi had not executed the 2019 deed in order to avoid Keltner's judgment. Kristi testified at the hearing that she had been very surprised to learn in 2017 that her name was not on the deed to the Property, as her name had appeared on documents attendant to the 2007 purchase of the home, such as the purchase agreement and the title insurance proposal for the Property, and because her name was on their home insurance bill. According to Kristi, she was a stay-at-home mother at the time of the 2007 Property purchase, and it was an industry practice to add the name of a stay-at-home mother to a home's deed after closing. Kristi further testified that she had not intended to defraud any creditors when executing the 2019 deed.

[10] On October 14, 2022, the trial court issued its judgment in favor of the Southards and Restor on Keltner's Complaint and entered the following relevant findings of fact and conclusions thereon:

> 27. The requirements for setting aside transfers differ for present and future creditors. Compare Ind. Code § 32-18-2-15 (present creditors) with Ind. Code § 32-18-2-14 (present and future creditors).
>
> 28. The rules applicable to present creditors do not apply here because Brian transferred [the Property] from himself to himself and Kristi before Keltner obtained a judgment. Ind. Code § 32-18-2-15(a).
>
> 29. Even if section 15 applied to Keltner's fraudulent transfer claim, Keltner could not satisfy the requirements for setting aside transfers because Brian did not make the transfer "without receiving a reasonably equivalent value in exchange for the transfer." Ind. Code § 32-18-2-15(a)(1).
>
> 30. Kristi contributed to the purchase of [the Property] and contributed to the maintenance and improvement of [the Property] throughout the time the Southards have owned [the Property].
>
> * * * *
>
> 36. Brian and Kristi Southard intended at the time of purchase to jointly own [the Property] as husband and wife, consistent with their prior home purchases.
>
> 37. Indeed, the Southards believed they jointly owned [the Property] and were surprised to discover otherwise.

38. The process of transferring [the Property] began in March 2018, before this lawsuit was filed in September 2018.

39. The efforts to transfer [the Property] continued until successful with the execution and recording of the quitclaim deed in June 2019, after the filing of this lawsuit but before entry of judgment in October 2019.

40. While he remained a resident at [the Property] after the transfer, Brian retained less legal control of [the Property] after the transfer as he could no longer independently dispose of it without Kristi's agreement.

41. The transfer was not concealed but was instead publicly recorded.

42. The transfer of [the Property] did not render Brian insolvent. Instead, it was the embezzlement committed by [RPRG's] bookkeeper that caused Brian's insolvency.

43. No evidence was presented that Brian concealed or removed assets, nor that he absconded.

44. Both Brian and Kristi testified they did not consider Keltner in their decision to affect the transfer.

45. The Southards used joint funds to purchase, maintain, and pay for [the Property].

46. Kristi's contributions to [the Property] via the joint checking account and funds realized from the sale of their prior residence, along with her ongoing contributions to the upkeep and improvement to the Family Home, constitute adequate consideration.

(Appellant's App. Vol. II, pp. 23, 25-26). Accordingly, the trial court concluded that Keltner had failed to prove by a preponderance of the evidence that the Southards had fraudulently transferred the Property.

[11] Keltner now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[12] Keltner appeals following the trial court's entry of Indiana Trial Rule 52 special findings of fact and conclusions of law thereon. Where a trial court has entered Rule 52 findings and conclusion, we deploy a two-tiered standard of review in which we will affirm if the evidence supports the findings and the findings support the judgment. *Wysocki v. Johnson*, 18 N.E.3d 600, 603 (Ind. 2014). When conducting our review, we neither reweigh the evidence, nor do we reassess the credibility of the witnesses. *Marion Cnty. Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213, 216 (Ind. 2012). We consider the evidence most favorable to the judgment, with all reasonable inferences drawn in favor of the judgment. *Stout v. Underhill*, 734 N.E.2d 717, 719 (Ind. Ct. App. 2000), *trans. denied*. We will not set aside the trial court's findings or judgment unless they are clearly erroneous. *Wysocki*, 18 N.E.3d at 603. Findings of fact are clearly erroneous only where they enjoy no factual support in the record, and a judgment is clearly erroneous if it applies an incorrect legal standard to properly-found facts. *Id*.

[13] Keltner draws our attention to the fact that the trial court adopted the Southards' proposed findings of fact and conclusions thereon verbatim. Although our supreme court has recognized that this practice has the practical benefit of helping a trial court to keep cases moving through the docket, the court has also observed that when a trial court adopts a party's findings and conclusions verbatim, "there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." *Prowell v. State*, 741 N.E.2d 704, 709 (Ind. 2001). Therefore, although the wholesale adoption of a party's findings and conclusion has not been banned, it is not encouraged by Indiana's appellate courts. *Bautista v. State*, 163 N.E.3d 892, 898 (Ind. Ct. App. 2021).

II. *The UFTA*

[14] Keltner brought its Complaint pursuant to the UFTA, which allows a creditor who establishes that a debtor's transfer was fraudulent to obtain, among other remedies, either the subject of the transfer or its value to satisfy the judgment held by the creditor. *See* I.C. § 32-18-2 *et seq*. Section 32-18-2-14 of the UFTA applies to present and future creditors and provides that the subject transfer is voidable if the debtor made the transfer

> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer . . . , and the debtor:
>
> > (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor

were unreasonably small in relation to the business or transaction; or

(B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

I.C. § 32-18-2-14(a). Section 32-18-2-15(a) of the UFTA applies only to a present creditor "whose claim arose before the transfer was made or the obligation was incurred" and provides in relevant part that a transfer made by a debtor is voidable if:

> (1) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
>
> (2) the debtor:
> (A) was insolvent at that time; or
> (B) became insolvent as a result of the transfer or obligation.

Thus, under Section 32-18-2-15(a), a present creditor is not required to show actual intent to defraud on the part of the debtor, while a present creditor may establish his claim under Section 32-18-2-14(a)(1) by showing actual intent to defraud. A creditor must establish his claim under either section by a preponderance of the evidence. I.C. §§ 32-18-2-14(c), -15(b). We will address Keltner's arguments in the order presented.

A. *Section 32-18-2-15*

[15] Keltner contends that the trial court erred when it concluded that Section 32-18-2-15(a) did not apply based on its finding that "Brian transferred [the Property]

from himself to himself and Kristi before Keltner obtained a judgment." (Appellant's App. Vol. II, p. 23). Keltner argues that it was entitled to bring its claim under Section 32-18-2-15(a) because it was a present creditor. Resolution of this argument entails interpretation of the statute. When we engage in statutory construction, our goal is to discern and give effect to the legislature's intent in enacting the statute. *Holcomb v. Bray*, 187 N.E.3d 1268, 1285 (Ind. 2022). Our starting point is the language of the statute itself, and we first determine whether a statute is clear and unambiguous. *Id*. A statute is only ambiguous if it is susceptible to more than one interpretation. *Hopkins v. Indianapolis Pub. Schs.*, 183 N.E.3d 308, 312 (Ind. 2022). When faced with an unambiguous statute, we need not apply any rules of construction, and we simply accord words their plain meaning. *Ind. Off. of Utility Consumer Counselor v. S. Ind. Gas & Elec. Co.*, 200 N.E.3d 915, 919 (Ind. 2023).

[16] Keltner contends that its "claim arose before the transfer or the obligation was incurred" within the meaning of Section 32-18-2-15(a), and we agree. The UFTA defines "claim" "except as used in 'claim for relief', [as] a right to payment, *whether or not the right is reduced to judgment*, liquidated, unliquidated, fixed, contingent, matured, unmatured, *disputed*, undisputed, legal, equitable, secured, or unsecured." I.C. § 32-18-2-2 (emphasis added). We find nothing ambiguous about these terms, and, therefore, we apply their plain meanings. *Ind. Off. of Utility Consumer Counselor,* 200 N.E.3d at 919. A creditor who has filed suit against a potential debtor possesses a disputed right to payment which

has not yet been reduced to judgment and, therefore, has a present "claim" against the debtor for purposes of Section 32-18-2-15(a).

[17] Although we did not uncover any Indiana cases addressing this precise issue, our conclusion finds some support in *Lei Shi v. Cecilia Yi*, 921 N.E.2d 31 (Ind. Ct. App. 2010). Shi filed suit against Yi, and while that litigation was pending, Yi transferred property she had purchased into an LLC. *Id*. at 33. After the transfer of the property, trial was held on Shi's Complaint, and Shi prevailed. *Id*. at 33-34. Shi subsequently brought a Complaint under the UFTA against Yi and other third parties pursuant to Section 32-18-2-15(a). *Id*. at 35. While this court ultimately upheld the trial court's dismissal and summary judgment rulings in favor of one of Shi's named third-party defendants, neither party questioned the applicability of Section 32-18-2-15(a) to Shi's claim. *Id*. at 36-40. In addition, in *Indianapolis Indiana Aamco Dealers Advertising Pool v. Anderson*, 746 N.E.2d 383, 387 (Ind. Ct. App. 2001), we observed that, where the allegedly fraudulent transfers had occurred after Aamco filed suit but before the judgment in its favor had been entered, Aamco was required to show a lack of reasonably equivalent value under Section 32-18-2-14's and -15's predecessor statutes.

[18] Here, the transfer in question was made after Keltner had filed suit on its breach of contract claim but before trial and entry of judgment. We reject the Southards' attempt to reframe the operative event as the obligation which Brian purportedly incurred when he executed the 2007 deed "to add Kristi to the title of their home when they purchased the home together using joint funds in 2007." (Appellees' Br. p. 14). The event which potentially frustrated Keltner's

effort to collect its debt against Brian was not the execution of the 2007 deed but was, rather, the execution of the 2019 deed. We conclude that the trial court erred when it determined that Section 32-18-2-15(a) did not apply to the instant proceedings.

[19] Keltner also contends that the trial court clearly erred when it found that, even if Section 32-18-2-15(a) applied, Keltner had failed to establish that Brian had not received a reasonably equivalent value in exchange for the transfer. However, the record reflects that the approximately $40,000 downpayment for the purchase of the Property came from a joint Southard bank account, that only Kristi was making an income after 2016, that the mortgage, insurance, and taxes for the Property were paid from the couple's joint bank account, and that Kristi had contributed to the maintenance and improvement of the Property by paying for tangible items such as paint and new carpeting. Therefore, the record reflects that Kristi did not merely contribute unpaid domestic services, as Keltner argues on appeal.

[20] Keltner bore the burden of proof at trial to establish that these financial contributions were not "a reasonably equivalent value in exchange for the transfer" pursuant to Section 32-18-2-15(a)(1). I.C. § 32-18-2-15(b). Keltner cites the fact that no consideration was listed on the deed. Yet, Keltner does not provide any direct legal authority for his apparent proposition that Kristi's financial contributions to the Property during the course of Brian's ownership of the Property could not constitute reasonably equivalent value. At trial Keltner did not establish the market value of the Property on the day of the

transfer, the amount of the mortgage, insurance, and taxes paid on the Property from the joint account which was funded only by Kristi's salary after 2016, or the value of any improvements made to the Property paid for by Kristi in order to show that Brian had not received reasonably equivalent value for the transfer. These factual defenses came to light during the post-judgment deposition and proceedings supplemental initiated by Keltner, but Keltner apparently did not perform additional discovery to determine the specific values that could be attributed to these contributions by Kristi necessary to show that they did not constitute adequate value. Accordingly, we conclude that the trial court's conclusions were not clearly erroneous.[2] *Wysocki*, 18 N.E.3d at 603.

B. *Section 32-18-2-14*

[21] Keltner also challenges the trial court's findings and conclusions that it had failed to show that Brian made the transfer with actual fraudulent intent pursuant to Section 32-18-2-14(a)(1). The UFTA provides that, in determining whether the debtor acted with fraudulent intent, a fact-finder may consider "among other factors," whether

> (1) the debtor retained possession or control of the property transferred after the transfer;
>
> (2) the transfer or obligation was disclosed or concealed;

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[2] Given our conclusion that the trial court's findings and conclusions as to whether Brian received reasonably equivalent value for the transfer were not clearly erroneous, we do not address Keltner's arguments pertaining to the trial court's findings and conclusions regarding his insolvency. *See* I.C. § 32-18-2-15(a) (listing the reasonably equivalent value and insolvency elements as both necessary to a claim under that section).

> (3) before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
>
> (4) the transfer was of substantially all the debtor's assets;
>
> (5) the debtor absconded;
>
> (6) the debtor removed or concealed assets;
>
> (7) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (8) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; and
>
> (9) the transfer occurred shortly before or shortly after a substantial debt was incurred.

I.C. § 32-18-2-14(b). None of these nine indicia of fraudulent intent is determinative, and "there is no set formula or threshold number of factors that warrant a finding of fraudulent intent." *Shri Rukmani Balaji Mandir Trust v. Michigan City*, 170 N.E.3d 247, 254 (Ind. Ct. App. 2021). The trier of fact must consider the evidence as a whole and within the context of the case to determine if fraudulent intent exists. *Id*. In addition, a trial court may consider common law "badges of fraud", including

> (1) the transfer of property by a debtor during the pendency of a suit;
>
> (2) a transfer of property that renders the debtor insolvent or greatly reduces his estate;
>
> (3) a series of contemporaneous transactions which strip a debtor of all property available for execution;
>
> (4) secret or hurried transactions not in the usual mode of doing business;

(5) any transaction conducted in a manner differing from customary methods;

(6) a transaction whereby the debtor retains benefits over the transferred property;

(7) little or no consideration in return for the transfer;

(8) a transfer of property between family members.

Hernandez-Velazquez v. Hernandez, 136 N.E.3d 1130, 1138 (Ind. Ct. App. 2019).

[22] Keltner's primary argument on this issue is that it proved the UFTA factors that Brian retained possession or control of the Property after the transfer, Brian had been sued before the transfer was made, the transfer was of substantially all of Brian's assets, and that Brian was insolvent or became insolvent shortly after the transfer. Keltner also asserts that it established badges 1, 2, 6, 7, and 8 of the common-law factors listed above. However, this argument is unpersuasive, as a trial court's determination on actual fraudulent intent is not formulaic, and simply establishing a certain number of factors does not warrant a finding of the requisite intent. *Shri Rukmani Balaji Mandir Trust*, 170 N.E.3d at 254.

[23] Here, the trial court considered other evidence, including the Southards' history of joint ownership of their homes, that they had intended since 2007 to own the Property jointly and were surprised to discover Kristi's name was not on the deed, that the process of adding Kristi's name to the deed had begun before Keltner filed suit, that Brian retained less legal control over the Property after the transfer, that the transfer was publicly recorded, that Brian did not abscond or conceal or remove assets, and that Brian had testified that he did not make the transfer in order to frustrate Keltner's collection of its judgment. This

evidence was probative of Brian's lack of fraudulent intent, and the trial court was entitled to rely upon it in making its determination. *Id.; see also* I.C. § 32-18-2-14(b) (providing that the fact-finder may consider the listed factors "among other factors"). Even though there were many indicia of fraud present in this case, pursuant to our standard of review, we are not entitled to reweigh the evidence before the trial court, nor are we allowed to reassess Brian's credibility, as Keltner requests by drawing our attention to contradictions in the evidence, evidence which does not support the trial court's judgment, and to the negative assessment of Brian's credibility drawn by the trial court that issued the Keltner judgment. *Wysocki*, 18 N.E.3d at 603. Because there was evidence to support the trial court's findings and conclusions that Brian did not act with the requisite fraudulent intent, its determination was not clearly erroneous. *See id.* Accordingly, we affirm the trial court's judgment.[3] *See Indianapolis Ind. Aamco Dealers Advert. Pool*, 746 N.E.2d at 391 (holding that a determination of fraudulent intent rests with the trier of fact and declining to reverse the trial court's specific finding of lack of fraudulent intent, even though the evidence indicated that several badges of fraud may have been present).

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[3] Inasmuch as Keltner argues that it proved its claim under Section 32-18-2-14(a)(2) which requires a showing of a failure to receive a reasonably equivalent value for the transfer, we hold that our conclusions regarding that factor pertaining to Section 32-18-2-15(a)(1) also apply to any claim under Section 32-18-2-14(a)(2), and we do not further address Keltner's arguments regarding the trial court's findings and conclusions pertaining to reasonably equivalent value or the effect of the transfer on Brian's asset balances or on his ability to pay debts.

CONCLUSION

[24] Based on the foregoing, we hold that the trial court's determination that Keltner had failed to prove that the transfer was fraudulent under the UFTA was not clearly erroneous.

[25] Affirmed.

[26] Bailey, J. and Tavitas, J. concur