THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No.: 2011-CP-07-128 and 2011-CP-07-129

Appellate Case No.: 2015-002156

First Citizens Bank and Trust Company, Inc. .....Respondent/Appellant,

v.

Blue Ox, LLC, and J. Chris Lindgren.....Defendants,

Of Whom J. Chris Lindgren is the Appellant/ Respondent.

APPELLANT'S INITIAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

I. WHETHER THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT A DEBTOR'S VOLUNTARY POST-JUDGMENT CONTRIBUTIONS TO A 401(k) PLAN ARE NOT SUBJECT TO EXECUTION BY A CREDITOR, WHERE THE DEBTOR, HAVING FULL KNOWLEDGE OF THE JUDGMENTS AGAINST HIM AND CLAIMING TO HAVE NO ASSETS WHICH COULD BE APPLIED TO THE JUDGMENT, CONTRIBUTED $45,366.67 TO THE 401(K) AFTER THE JUDGMENTS ARE FILED?

STATEMENT OF THE CASE

On May 13, 2010, Blue Ox, LLC ("Blue Ox") and Chris Lindgren ("Lindgren") executed two Confessions of Judgments in the amounts of $100,000.00 and $13,702.24 in Favor of Respondent/Appellant, First Citizens Bank and Trust Company, Inc. ("First Citizens"). (Confessions of Judgment of January 6, 2011). Both Confessions of Judgment were filed with the Beaufort County Clerk of Court on January 6, 2011. (*Id.*). On September 2, 2014, the parties appeared before the Honorable Marvin H. Dukes, III, the Beaufort County Master-in-Equity, for a Supplemental Proceedings hearing. During the supplemental proceedings hearing, it was discovered that Lindgren made a number of voluntary post-judgment contributions to a 401(k) and Individual Retirement Accounts ("IRAs"). (Order of Judge Dukes of June 11, 2015 at 2-3) (hereinafter "June 11, 2015 Order"). Counsel for First Citizens moved to execute on the voluntary post-judgment contributions to the 401(k) and the IRAs. (*Id.* at 1-2). After the parties submitted briefs on the issue, on June 11, 2015, Judge Dukes entered an Order finding that First Citizens was entitled to execute on Lindgren's voluntary post-judgment contributions to his IRA account; however, Lindgren's voluntary, post-judgment contributions to the 401k were not subject to execution. (*Id.* at 3-9). On June 22, 2015, Lindgren filed a Motion to Reconsider and for Stay of Execution and supporting memorandum. A hearing on the Motion for Reconsideration was held on July 8, 2015. First Citizens filed a reply memorandum in

opposition to the Motion for Reconsideration on July 20, 2015. On October 7, 2015, Judge Dukes issued a Form 4 Order denying Lindgren's Motion for Reconsideration in both cases. On October 12, 2015, Lindgren filed a Notice of Appeal. First Citizens filed its Notice of Cross Appeal on October 20, 2015.

FACTS

Blue Ox and Lindgren executed Confessions of Judgment in favor of First Citizens on May 13, 2010, both of which were filed with the Beaufort County Clerk of Court on January 6, 2011.[1] (Confessions of Judgment of January 6, 2011). Combined, the judgments amounted to $113,702.24. (*Id.*) On September 2, 2014, a Supplemental Proceedings hearing was held before the Honorable Marvin H. Dukes. Lindgren is a former practicing attorney with a LLM in tax law and now a businessman residing on Hilton Head Island, South Carolina. (Transcript of September 2, 2014 Supplemental Proceedings Hearing at 27, 70, 83). During the hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. ("Rockmoor") (*Id.* at 7-8, lines 24-1). Lindgren also testified that he was formerly an employee of Rockmoor. (*Id.* at 15, line 2). In addition to Rockmoor, Lindgren testified that he had formed 38 LLCs to serve as "investment vehicles." (*Id.* at 22, lines 2-6). Lindgren owns a membership interest in various LLCs (some of which are single member LLCs and some of which are multiple member LLCs) and the various LLCs own real properties. Rockmoor is Lindgren's company that he uses as a management company to manage payroll and operations for the various LLCs. (*Id.* at 26, lines 18-22). While an employee with Rockmoor, Lindgren established a 401(k) that is a profit sharing plan funded through "employee deferrals." (*Id.* at 14, lines 5-24). At the hearing, Lindgren testified that the balance of his 401(k) was approximately

[1] C/A No.: 2011-CP-07-128 ($100,000.00) and C/A No.: 2011-CP-07-129 ($13,702.24).

$300,000. (*Id.* at 20, line 6). The balance previously exceeded $550,000.00 prior to Lindgren taking more than $250,000.00 in distributions during the spring of 2014. (*Id.* at 19, lines 11-20).

After the supplemental proceedings hearing on September 2, 2014, the parties engaged in the exchange of documents and post-judgment discovery. (June 11, 2015 Order at 1). Through discovery, First Citizens discovered that Lindgren made $45,366.67 in post-judgment contributions to his Rockmoor 401(k) between 2012 and 2014.[2] (*Id.* at 2.) Despite making these contributions, Lindgren maintained that he had no property or assets to satisfy the judgments First Citizens held against him and he made no payments towards the Judgments.

STANDARD OF REVIEW

"An appellate court's 'scope of review for a case heard by a Master-in-Equity who enters final judgment is the same as that for review of a case heard by a circuit court without a jury.'" *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 243 (Ct. App. 2008) (quoting *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)). In an action at law decided by a Master-in-Equity, the appellate court will correct any error of law. *Id.* at 275, 659 S.E.2d 243-44 (citing *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach,* 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App.1999)). The appellate court must affirm the Master's factual findings unless no evidence reasonably supports those findings." *Id.*

ARGUMENT

First Citizens respectfully requests that this Court reverse the Master-in-Equity's holding that Lindgren's voluntary, post-judgment transfers to his 401(k) account are not subject to execution.

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[2]Specifically, Lindgren contributed $20,450.00 in 2012, $23,000 (the maximum allowed by the IRS) in 2013 and $1,916.67 in 2014. *See* Plaintiff's October 31, 2014 Memo at "Exhibit A".

I. BECAUSE SOUTH CAROLINA LAW PROHIBITS A DEBTOR FROM MAKING FRAUDULENT CONVEYANCES DESIGNED TO DELAY, HINDER OR DEFRAUD CREDITORS, THE MASTER-IN-EQUITY INCORRECTLY DETERMINED THAT LINDGREN'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO HIS 401(K) ARE NOT SUBJECT TO EXECUTION.

A. Because Lindgren was (1) indebted to First Citizens when he made contributions to his 401(k); (2) the contributions were voluntary; and (3) Lindgren failed to retain sufficient funds to satisfy the judgment against him, Lindgren's contributions are subject to execution.

The Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

> **Every gift, grant, alienation, bargain, transfer, and conveyance** of lands, **tenements, or hereditaments, goods and chattels** or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or **made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken** (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) **to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding**. (emphasis added).

In *Durham v. Blackard*, this Court, interpreting the Statute of Elizabeth, held that conveyances can be set aside in two instances:

> First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. **Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was**

> **indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full-not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.**

313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993) (emphasis added).

There was no consideration for the transfer of the money from Lindgren to his 401(k). Under South Carolina law, "consideration...may consist either in some right, interest, profit or benefit accruing to one party, or some forebearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Furman Univ. v. Waller*, 124 S.C. 68,---, 117 S.E. 356, 358 (1923). Here, Lindgren neither received a benefit nor suffered a detriment because he did nothing more than move money from one pocket to another in an effort to protect his assets (i.e., cash) from his judgment creditors. Because of the absence of consideration, First Citizens need not prove "actual intent to hinder or delay creditors." *See Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d, 406, 408 (Ct. App. 1995). Rather, First Citizens must only prove that (1) Lindgren was indebted to First Citizens at the time of the contributions at issue; (2) Lindgren's contributions were voluntary; and (3) Lindgren failed to retain sufficient funds to satisfy the judgment against him. *See id.*

All of the funds First Citizens seeks to execute upon were voluntarily transferred to Lindgren's 401(k) after the judgments were entered against him on January 6, 2011. As such, there can is no dispute that Lindgren was indebted to First Citizens at the time of the voluntary contributions at issue. Lindgren personally executed the Confessions of Judgment in favor of First Citizens and was, at all relevant times, fully aware of the judgments against him. As to the second element set forth in *Mathis*, Lindgren admits that the post-judgment contributions were voluntary in his Amended Memorandum in Opposition to Plaintiff's Motion to Set Aside and

Execute. *See* Def.'s Am. Mem. Opp. Pl.'s Motion to Set Aside and Execute at 10. The fact that Lindgren failed to retain sufficient property or assets to satisfy the judgment against him is also not in dispute. Lindgren has continuously maintained that he is unable to satisfy the judgments against him. Accordingly, pursuant to the Statute of Elizabeth, this Court should find Lindgren's post-judgment transfers to his 401(k) were fraudulent transfers and therefore subject to execution.

Even assuming that there was consideration for the transfers, something First Citizens denies, Lindgren's post-judgment contributions should be set aside as fraudulent. As discussed above, Lindgren was indebted to First Citizens when the contributions at issue were made. There is also is evidence that Lindgren's actions were made with the "intent of defrauding his creditors." *See Durham*, at 432, 438 S.E.2d at 262. Finally, the issue of whether the grantor's intent is imputable to the grantee is irrelevant because Lindgren is both the grantor and the grantee.

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, courts often evaluate the particular circumstances of the transfer for "badges of fraud." *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) ("Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as 'badges of fraud.' The badges tend to excite suspicions as to the Bona fides of a challenged conveyance."). In *Coleman*, the Supreme Court of South Carolina stated the following regarding the badges of fraud:

> The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment,

> departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Id. (citing 37 Am.Jur.(2d), Fraudulent Conveyances, § 10 (1968)). The circumstances of Lindgren's post-judgment contributions to his 401(k) meet at least seven of the nine badges of fraud listed above.[3] "Although the presence of a single factor, i.e., badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud." *Gilchinsky v. Nat'l Westminster Bank*, 732 A.2d 482, 490 (1999). Here, Lindgren (1) was indebted to First Citizens at the time of the contributions; (2) transferred the funds to himself, the person with whom he clearly has the closest relationship, (3) made the contributions while litigation was pending, (4) attempted to conceal the contributions from First Citizens and increased his contributions after the judgments were filed, (5) reserved the benefit of the funds to himself, and (6) retained possession of the funds. The presence of these badges of fraud surrounding Lindgren's post-judgment contributions reveals Lindgren's "actual intent to hinder, delay, or defraud" First Citizens from obtaining the debt they are rightfully owed. Also relevant is the degree of control Lindgren maintained over the funds in his 401(k). Lindgren freely took distributions from his 401(k) which clearly shows that his 401(k) was simply another checking account. In the spring of 2014, Lindgren took a distribution of approximately $250,000.00 from his 401(k). *See* Transcript of September 2, 2014 Supplemental Proceedings Hearing at 19, lines 11-20. Based on the foregoing, regardless of whether this Court finds that the contributions were made on valuable consideration, the contributions should be subject to execution.

[3] One of the badges of fraud satisfied is lack of consideration. First Citizens takes the position that the contributions at issue were not made on valuable consideration. *See supra* pp. 7-8. However, as this section of the brief assumes, *arguendo*, that there was consideration, First Citizens will only address the other badges of fraud that are present.

The lower court relied on S.C. Code 15-41-30(A)(14) in finding that Lindgren's post-judgment contributions to his 401(k) were not subject to execution. S.C. Code 15-41-30(A)(14) provides that a "debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974..." is "exempt from attachment, levy, and sale." First Citizens does not deny that this statute protects a debtor to the extent that it prevents creditors from executing on funds which have already been contributed to a 401(k) account. However, there is a significant distinction between allowing a debtor to protect assets which have previously been set aside in a retirement account and allowing a debtor to contribute more than $45,000 to his 401(k) all the while claiming he has no assets to satisfy a judgment against him. First Citizens takes the position that 15-41-30(A)(14) only protects a debtor's pre-judgment contributions and any earnings stemming from those contributions. The exemption does not protect a debtor's post-judgment contributions to a 401(k) plan. Had the legislature intended to exempt a debtor's post-judgment contributions to a debtor's 401(k), it could have done so using more specific language.

In *Scholtec v. Estate of Reeves*, this Court stated that the "rationale for Homestead exemptions is well established: to protect from creditors a certain portion of the debtor's property, and to prevent citizens from becoming dependent on the State for support." 327 S.C. 551, 560, 490 S.E.2d 603, 607 (1997) (quoting *Cerny v. Salter,* 311 S.C. 430, 432, 429 S.E.2d 809, 811 (1993); *American Service Corp. v. Hickle,* 312 S.C. 520, 435 S.E.2d 870 (1993)). Adopting an interpretation of section 15-41-30(A)(14) which only protects pre-judgment contributions to a 401(k) is consistent with what this Court has determined to be the legislature's intent. It allows a debtor to protect his retirement account; however, it prevents a debtor from funneling money that would otherwise be subject to execution into a "sheltered account" from creditors.

Courts from other jurisdictions have established that while exemption statutes are intended to provide protection to debtors, they are not to be abused. In *Dona Ana Savings and Loan Association v. Dofflemeyer*, 115 N.M. 590, 855 P.2d 1054 (1993), the Supreme Court of New Mexico stated that the object of exemptions statutes is to "allow for exemptions in certain funds, but [exemption statutes do] not allow a debtor to find shelter in these statutes by perpetrating fraud upon his or her creditors....'The legislature did not intend that these generous provisions be prostituted to the encouragement of extravagance, and the evasion of just indebtedness.'" *Id.* at 593, 855 P.2d 1054 (quoting *New Mexico Nat'l Bank v. Brooks*, 9 N.M. 113, 129 49 P. 947, 952 (1897)). Similarly, in *Webster v. Rodrick*, the Supreme Court of Washington stated that an exemption statute "cannot be used as an instrument of fraud and imposition." 64 Wash.2d 814, 818, 394 P.2d 689, 691 (1964). These cases demonstrate that courts around the country recognize the need to strike a balance between protecting debtors and allowing creditors to collect debts they are rightfully owed.

The reasoning and decision of the Supreme Court of Nevada in *Breedlove v. Breedlove*, 100 Nev. 606, 691 P.2d 426 (1984) is also applicable to the case at hand. In *Breedlove*, a former spouse who was owed back child support payments sought to execute on her ex-husband's home. *Id.* at 607, 691 P.2d at 426. The ex-husband attempted to use a homestead exemption to prevent his former spouse from executing on the home. *Id.* The Court, noting that the ex-husband purchased the home for a substantial amount after defaulting on payments to his ex-wife, ruled that the ex-husband was not entitled protection from the exemption. The *Breedlove* court stated that the ex-husband was "not the type of debtor whom the legislature sought to protect" and interpreting the exemption statute in a highly technical fashion would lead to absurd results and contravene the legislature clear intent in enacting the statute. *Id.* at 608-09, 691 P.2d at 427-28.

Like the ex-husband in *Breedlove*, Lindgren is "not the type of debtor whom the legislature sought to protect." In addition several properties in South Carolina, Lindgren owns a vacation home in Vail, Colorado of which the current assessed value is $1,636,000. *See* Transcript of September 2, 2014 Supplemental Proceedings Hearing at 55, line 1). Furthermore, should this Court find that the post-judgment contributions are subject to execution, the remaining balance in Lindgren's 401(k) will still exceed $240,000. Clearly, Lindgren is in no danger of becoming dependent on the state.

"Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). First Citizens urges this Court to recognize the inherent unfairness in allowing a debtor to avoid his creditors under the guise of "retirement planning." This is not a situation where Lindgren seeks to protect his retirement savings. In essence, Lindgren has used his 401(k) as his personal "offshore bank account", funneling, in a number of instances, the maximum amount of money possible on an annual basis and then taking distributions as needed. In effect, using his retirement account as another checking account. Again, First Citizens only seeks to execute on the funds which Lindgren contributed to his 401(k) after the judgments were filed against him. First Citizens recognizes that it is sound policy to exempt certain funds from creditors. However, the lower court's ruling creates dangerous precedent whereby debtors, even those in no danger of becoming destitute, can not only protect past savings but also continue to set aside additional funds while maintaining they have no assets to satisfy a judgment against them. An interpretation of section 15-41-30(A)(14) which does not exempt post-judgment contributions to a 401(k) adequately protects debtors without unreasonably limiting the rights of creditors.

CONCLUSION

First Citizens respectfully requests that this Court reverse the lower court's decision finding Lindgren's post-judgment contributions to his 401(k) as exempt from execution. For the reasons set forth herein, Lindgren's voluntary post-judgment contributions to his 401(k) should be set aside as fraudulent transfers, thereby allowing First Citizens to execute on the funds contributed to the 401(k) account after the Confessions of Judgments were filed.

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January 18, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
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The Honorable Marvin H. Dukes, Master-in-Equity

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First Citizens Bank and Trust Company, Inc. .....Respondent/Appellant,

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Of Whom J. Chris Lindgren is the Appellant/ Respondent.

CERTIFICATE OF SERVICE

I, Rita DeCarlis, with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Respondent-Appellant, do hereby certify that on this 19th day of January, 2016, I served Respondent-Appellant's **Appellant's Initial Brief of Respondent-Appellant** and **Designation of Matter to be Included in the Record on Appeal** upon counsel for the Appellant-Respondent by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

VIA U.S. Mail
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January 19, 2016

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
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Re: First Citizens Bank and Trust Company, Inc. v. Blue Ox, LLC, and J. Chris Lindgren
Appellate Case No.: 2015-002156

Dear Ms. Kitchings:

Enclosed herewith you will find an original and two copies of Respondent-Appellant, First Citizens Bank and Trust Company's *Appellant's Initial Brief of Respondent-Appellant* and Respondent-Appellant's *Designation of Matter to be Included in the Record on Appeal* in the above-referenced matter. In addition, you will find a certificate of service evidencing service of both on Counsel for the Appellant-Respondent. I kindly ask that you file the originals in accordance with your procedures and that the "filed" copies be returned to my runner who will be waiting. Thank you for your assistance in this matter.

With my kindest regards, I am,

Sincerely,

Joey R. Floyd

jrf:rco
Enclosures