

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2011-CP-07-128 and 2011-CP-07-129

FEB 22 2016

SC Court of Appeals

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.

INITIAL RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the lower court correctly determine that S.C. Code §15-41-30(A)(14) exempts from execution Lindgren's interest in his ERISA-qualified 401(k) Plan notwithstanding that some of the funds in the Plan were contributed after entry of judgments against Lindgren by the Bank?

STATEMENT OF THE CASE

This appeal arises out of supplemental proceedings initiated by First Citizens Bank and Trust Company, Inc. ("Bank") to effect collection of two judgments entered by confession against Blue Ox, LLC and J. Chris Lindgren. One judgment in the amount of \$100,000.00 had been entered in case number 2011-CP-07-128 and the other in the amount of \$13,702.04 had been entered in case number 2011-CP-07-129. Both judgments were entered on January 6, 2011.

On July 11, 2014, the Bank filed petitions for supplemental proceedings in each case and the clerk entered orders referring the matters to the Honorable Marvin H. Dukes, III, master-in-equity for Beaufort County. Thereafter, rules to show cause were issued and duly served on the defendants requiring, among other things, that they appear before Judge Dukes to be examined under oath concerning their assets. J. Chris Lindgren ("Lindgren") appeared as ordered and was extensively examined in court on September 2, 2014 concerning his assets and those of Blue Ox, LLC.¹

In response to questioning by the Bank's counsel, Lindgren testified that subsequent to the entry of the judgments in question he had made contributions to an Individual Retirement Account and a Roth Individual Retirement Account, both of which were held by Fidelity Investments. ("IRA" and "Roth IRA" respectively). Lindgren also testified that he participated in a 401(k) pension plan sponsored by his employer, Rockmoor, Inc., to which contributions had been made by Rockmoor,

¹ Blue Ox, LLC has no assets and is not involved in this appeal.

Inc. after entry of the Bank's judgments ("401(k) Plan").

During the examination, the Bank moved that any contributions made to the IRA, Roth IRA and 401(k) Plan accounts after entry of the judgments be set aside as fraudulent transfers. Lindgren opposed the motion on the grounds the funds were exempt from creditors' claims. Judge Dukes deferred ruling and agreed to hear from the parties at a later date.

On October 27, 2014, an order for substitution of counsel was entered by which the undersigned became counsel of record for Lindgren and Blue Ox, LLC.

Thereafter, Lindgren provided the Bank with additional records it requested concerning the 401(k) Plan and the investment accounts at issue. He also filed an affidavit detailing contributions to the three retirement accounts and to a 529 Plan established for his youngest daughter's college education expenses.²

After receiving memoranda from the parties, Judge Dukes heard arguments by telephone on November 19, 2014. By email on January 16, 2015, Judge Dukes requested comments from the parties concerning the potential applicability of certain provisions of the state homestead exemption statute and the federal bankruptcy code. Both parties responded by email on January 19, 2015. Lindgren's email included an amended version of a memorandum previously filed correcting several typographical errors in the original. On January 26, 2015, Judge Dukes requested in an email that the Bank's counsel submit a proposed "Order for the Claimant as to everything but the 401(k)."

On June 11, 2015, Judge Dukes entered an order holding that Lindgren's post-judgment contributions to his IRA accounts were fraudulent transfers subject to execution but finding that

² The 529 Plan had been exhausted by payment of qualifying educational expenses and is not involved in this appeal.

assets in the 401k plan were exempt from execution. Fidelity was ordered to issue payment to the Bank in amounts specified in the order: \$18,500.00 from the IRA account and \$6,500.00 from the Roth IRA.

Lindgren timely made a Rule 59 motion to reconsider on June 22, 2015. The court held a hearing on the motion on July 8, 2015, which was reported. The court asked that the parties submit via email whatever materials they wished the court to consider. Both parties complied. The Bank's email included, among other items, a memorandum in opposition to the motion to reconsider that was later filed on July 20, 2015.

On October 7, 2015, the court entered Form 4 orders in each case denying Lindgren's motion to reconsider. Counsel received notice of entry of the orders by email the same day. Lindgren timely served and filed his notice of appeal in both cases on October 12, 2015. Lindgren seeks reversal of the court's determination that his IRA contributions were fraudulent and subject to execution by the Bank. The Bank served notice of its cross-appeal and seeks reversal of the court's decision that Lindgren's 401(k) Plan is exempt from execution.

On November 6, 2015, the court below entered a consent order for stay of execution to preserve the status quo pending the outcome of these appeals.

The IRA contributions at issue in Lindgren's appeal total \$25,000.00. The 401(k) Plan contributions at issue in the Bank's cross-appeal total \$45,366.37.

STATEMENT OF FACTS

The evidentiary hearing in this matter was held on September 2, 2014 before Judge Dukes. Lindgren was extensively interrogated about his assets, income and other aspects of his financial condition for over two hours. Counsel's examination was facilitated by his having tax returns and

a personal financial statement Lindgren had provided to the Bank in March of 2014. Counsel also questioned Lindgren from a list of entities for whom Lindgren was the designated registered agent for service of process. Lindgren testified that he had formed 38 limited liability companies. [R. Tr 22] He was asked specific questions about 31 of them. Some had never commenced operating or were otherwise dormant. Some were single-purpose entities formed to acquire and develop real estate, had accomplished their objective and sold their assets in the ordinary course. Eight LLCs, as was the case with Blue Ox, LLC, had acquired real estate for development but had lost the property to foreclosure or a deed-in-lieu thereof.

Some of the LLCs continued to own real estate at the time of the hearing. To summarize, either personally or through LLCs Lindgren owned membership interests in LLCs owning: half a trailer park in Ridgeland, South Carolina; an office building on Hilton Head Island; an undeveloped parcel in Bluffton, South Carolina; a 35 acre mobile home park in Bluffton; and, a developed commercial parcel, also in Bluffton. [R. Tr 34, 43, 46, 47, 49] Lindgren's tax returns reflected rental receipts from these properties in excess of \$1 million dollars. [R. Tr 77]

Lindgren also testified to his ownership personally of 3 parcels of real estate: his personal residence, owned jointly with his wife; a golf cottage at Belfair Plantation in Bluffton; and, a vacation condominium unit in Vail, Colorado. [R. Tr 84, 100, 99, 54]

Lindgren also testified that he is the sole shareholder of Rockmoor, Inc., a company formed to manage the operations of the various other entities in which Lindgren is involved. That company owns 10,000 shares of stock in Coastal States Bank. [R. Tr 26]

In addition to describing his assets, Lindgren also testified about his income. He had been an employee of Rockmoor, Inc. for many years, but at the time of the hearing Lindgren was no longer

on the payroll of Rockmoor, Inc. as an employee. [R. Lindgren Aff. ¶¶ 2, 6; Tr 93] His income at that time consisted of self-employment income through Rockmoor, Inc., for which Lindgren takes distributions of about \$120,000 annually. [R. Tr 93, 107]

Lindgren answered questions from Bank counsel about his retirement contributions and later filed an affidavit detailing the particulars. He also provided the Bank with account statements for his retirement accounts and documents establishing the 401(k) Plan. [R. Lindgren Aff. ¶ 2; Bank Memo p 2] A chart depicting Lindgren’s history of retirement contributions is included in the Statement of Facts of his Appellant’s Brief. For the convenience of the reader the chart is repeated here:

Year	401(k)	IRA	Roth IRA
2006	\$26,550	\$5,000	
2007	\$20,850	\$5,000	
2008	\$29,200	\$6,000	
2009	\$19,975	\$6,000	
2010	\$4,463	- 0 -	
2011	- 0 -	\$6,000	
2012	\$20,450	\$6,000	
2013	\$23,000	\$6,500	
2014	\$1,917		\$6,500

At issue in the Bank’s appeal are 3 contributions made to a 401(k) Plan established by Rockmoor, Inc. A 401(k) Plan is funded through payroll deferrals. [R. Lindgren Aff. ¶ 4] That is to say, a portion of the participating employees’ wages are withheld and paid by the employer to the Plan. The amounts withheld each year appear on the employee’s W-2 for that year. [R. Tr 60] The Plan assets are held by Mass Mutual f/k/a The Hartford. [R. Tr 14; Bank Memo p. 2] For additional

information about 401(k) Plans see: [https://www.irs.gov/Retirement-Plans/401\(k\)-Resource-Guide](https://www.irs.gov/Retirement-Plans/401(k)-Resource-Guide).

The contributions for Lindgren about which the Bank complains were made in 2012, 2013 and 2014 and total \$45,366.37. [R. Bank Memo p. 2]

During the hearing the Bank moved to execute on the post-judgment retirement contributions, including the IRA, the Roth IRA and the 401(k) Plan. [R. Tr 59] It did not seek relief directed at any of the other assets, real or personal, described by Lindgren in his testimony. The Bank introduced no evidence of Lindgren's solvency or net worth; it did not put in evidence Lindgren's financial statement or tax returns, even though Bank counsel brought these materials to the hearing. [R. Tr 13, 75, 82] Contrary to the Bank's assertion, Lindgren never "maintained that he had no property or assets to satisfy" the Bank's judgments, nor did he testify to this effect. The evidence of record actually reflects Lindgren's ownership of significant assets and property.

The Bank did not seek to execute on Lindgren's corporate stock or his membership interests in the various LLCs about which he testified. Instead, the Bank moved to execute on Lindgren's 401(k) Plan on the theory that the post-judgment contributions made into the Plan were fraudulent transfers. But there is not a shred of evidence that Lindgren's 401(k) Plan contributions were made with the intent or purpose to delay, hinder or defraud the Bank or any other creditor. To the contrary, the undisputed facts show that the retirement contributions at issue were not made in anticipation of or in response to the Bank's judgments. Lindgren simply continued his long-standing practice of regular, annual retirement savings. [R at Lindgren aff]

Being unable to establish Lindgren's fraudulent intent as a factual matter, the Bank is left with one argument: that all retirement contributions made by a judgment debtor after entry of judgment are per se fraudulent and subject to execution by the judgment creditor. [R. Bank Br. p

11, 13] If this were the case, no judgment debtor could make contributions to his or her 401(k) Plan. Thus, the ultimate question to be decided by this Court is whether South Carolinians are to be denied the opportunity to save for retirement whenever a judgment has been entered against them.

STANDARD OF REVIEW

The Bank asserts that this case is an action at law decided by a judge without a jury and is to be reviewed under standards described in *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008). [R. Bank Br. p 6] This could be advantageous to Lindgren, as there is evidence that reasonably supports the lower court's implicit finding that Lindgren's 401(k) Plan contributions were not fraudulent transfers. [R. Lindgren Aff] But the Bank is incorrect about the standard of review. Supplementary proceedings are equitable in nature. *Ag-Chem Equip. Co., Inc. v. Daggerhart*, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct.App. 1984). In an equitable matter referred to a master-in-equity for final judgment, the appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Van Blarcum v. City of North Myrtle Beach*, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct.App. 1999). However, the appellate court is not required to disregard the findings of the master-in-equity. *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n*, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct.App. 1995). Further, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). Questions of law are decided with no deference to the lower court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

DID THE LOWER COURT CORRECTLY DETERMINE THAT S.C. CODE §15-41-30(A)(14) EXEMPTS FROM EXECUTION LINDGREN'S INTEREST IN HIS ERISA-QUALIFIED 401(K) PLAN NOTWITHSTANDING THAT SOME OF THE FUNDS IN THE PLAN WERE CONTRIBUTED AFTER ENTRY OF JUDGMENTS AGAINST LINDGREN BY THE BANK?

Since 1992, Lindgren's employer, Rockmoor, Inc., has sponsored a 401(k) retirement plan. The plan is funded by wages withheld from Rockmoor's employees at each pay period. The money in the plan is currently held and invested by Mass Mutual. Lindgren has participated in the plan in every year since 1992 in which he has had qualifying wages. Rockmoor's other employee also is a plan participant whose wages were withheld and contributed to the 401(k) Plan on her behalf. [R. Tr 30] The Bank obtained judgments against Lindgren in 2011. After entry of the judgments Rockmoor continued withholding wages from Lindgren and its other employee and contributing those withheld wages to the plan. The post-judgment contributions on behalf of Lindgren total to \$45,366.37. The Bank moved for an order requiring Mass Mutual to pay the Bank \$45,366.37 from Lindgren's interest in the 401(k) plan. [R. Bank memo p 7] The lower court denied the Bank's motion, holding:

With regards to the 401(k), I find that the statute, SC Code 15-41-30(14) precludes execution on the 401(k) plan. SC Code 15-41-30(A)(14) provides that the debtor has an exemption in: 'The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974.' Since the 401(k) is an ERISA plan, I find the proceeds in the 401(k) exempt from execution.[R. Order p 8]

The lower court ruled correctly. The 401(k) Plan sponsored by Rockmoor is a qualified ERISA retirement plan. [Lindgren Aff. ¶ 3] As such, it is exempt from creditors' claims under South Carolina's homestead exemption statute:

The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:

The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code § 15-41-30(A)(14).

The Bank argues in this Court, as it did below, that the exemption statute should be interpreted to except from its reach contributions into an ERISA-qualified plan that are deemed to be fraudulent transfers. Further, the Bank argues that any contribution made by a judgment debtor to a 401(k) Plan after entry of judgment against him is *ipso facto* fraudulent. The lower court did not explicitly rule on these issues. Other than its conclusion, quoted above, the only indication of the court's reasoning is in these two paragraphs in the order:

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *See In re Goldschein*, 241 B.R. 370 (Bkry. D. Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *Id.* at 379 (emphasis mine).

Notwithstanding this fact, this Court notes that Lindgren has submitted an Affidavit in an effort to show/establish a 'pattern' of contributing to his retirement account for a number of years. Having carefully reviewed and considered Lindgren's Affidavit, this Court finds that the voluntary post-judgment transfers to the 401k are not subject to execution by First Citizens Bank. [R. Order p 4]

These passages, in particular the underlined phrase emphasized by the court, suggest that the court believed that the exemption provided for ERISA plans in South Carolina's homestead statute is subject to a fraudulent conveyance exception, despite the absence of any language in the statute to that effect. If that was indeed the lower court's conclusion concerning the proper legal

interpretation of the exemption statute, then it must have found, based on Lindgren's history of consistent retirement contributions, that the 401(k) contributions at issue were not fraudulent conveyances as a factual matter. *See Waring v. Jennings*, 91 S. C. 426, 74 S. E. 987 (1912)(in the absence of a direct finding upon the facts, the rendition of a judgment for plaintiff presupposes that all facts in issue were decided in his favor).

Lindgren certainly agrees with the latter point. Not only did he deny, under oath, any fraudulent intent, the record demonstrates beyond dispute that the retirement contributions at issue were not motivated by or connected in any way to the Bank's judgments. Lindgren and his employer simply continued what they had done in every year since 1992; they withheld a portion of Lindgren's wages and payed them to Mass Mutual for investment in Lindgren's 401(k) Plan. The undisputed evidence showing Lindgren's history of retirement contributions is a relevant fact tending to establish an absence of fraudulent intent on his part. *In re Channon*, 424 B.R. 895 (Bkrtcy. D. N.M. 2010). That his behavior did not deviate from his historical conduct is likewise supportive of a finding that the contributions in question were not fraudulent. *In re Beaudin*, No. 0935557-EEB (Bkrtcy. D. CO. 2010). There is evidence in the record reasonably supporting the lower court's finding that the 401(k) contributions were not fraudulent transfers and if the Bank is correct as to the appropriate standard of review the lower court's order must be affirmed. *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008) *citing Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)(in an action at law the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports them).

Lindgren cannot agree with so much of the lower court's order as implies an interpretation of the exemption statute for ERISA-qualified plans that includes an exception for contributions

deemed to be fraudulent transfers. S.C. Code Ann. §15-41-30(A)(13), dealing with individual retirement accounts, expressly provides: “A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan.”³ In contrast, the very next subsection, the one that exempts ERISA-qualified plans from execution, has no fraudulent transfer qualification or limitation. It provides, simply and concisely, that “[t]he debtor’s interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended” is “exempt from attachment, levy, and sale.” S.C. Code Ann. §15-41-30(A)(14).

A 401(k) Plan is different from an IRA in ways that explain the difference in treatment established by the Legislature. Contributions to a 401(k) Plan are made by the taxpayer’s employer rather than by the taxpayer himself. The employer withholds wages in amounts strictly limited by law and pays these funds directly to the Plan. The employee does not acquire possession of the funds unless and until they are withdrawn from the Plan as permitted by law. Further, wages are not subject to garnishment in South Carolina. S.C. Code Ann. §15-39-410. Thus, the 401(k) Plan contributions - consisting of the employee’s withheld wages - are exempt from levy or execution while in the hands of the employer and remain so after payment to the Plan. When an employer pays withheld wages to the 401(k) Plan, there is no conversion of exempt cash to non-exempt retirement plan assets, nor is there a transfer by a debtor to be subjected to scrutiny as a possible fraudulent conveyance.

The Bank invites this Court to adopt “an interpretation” of the statute to protect only “pre-judgment contributions and earnings stemming from those contributions.” [Bank Br p 11, 12, 13]

³ The words “other plan” refer to the other retirement vehicles listed in §15-41-30(A)(13): “individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code.”

The Bank's invitation should be declined. Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "[Courts] are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App.1985). That the homestead exemption statute included an exception for fraudulent conveyances in §15-41-30(A)(13) but not in §15-41-30(A)(14) evidences legislative intent that the exception not apply in the latter case under the principle "*expressio unius est exclusio alterius*." See *Hodges, supra*. Had the legislature intended the exception to apply to both types of retirement plans there would have been no need to deal with IRAs and ERISA-qualified plans in separate subsections.

The Bank argues that the legislature could have used "more specific language" if it intended to exempt from creditors' claims funds in a 401(k) Plan contributed after entry of a judgment against the plan participant. In this case the Bank seeks an order directing the depository institution to take money out of the plan and pay it to the Bank. The relief the Bank seeks is squarely prohibited by the plain language of the statute. Lindgren's interest in the 401(k) is "exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding." The language could not be more specific or clear.

At page 12 of its brief the Bank cites *Dona Ana Savings and Loan Association v. Dofflemeyer*, 115 N.M. 590, 855 P.2d 1054 (1993), in which the Supreme Court of New Mexico, construed that state's exemption statute to be subject to a fraudulent conveyance exception notwithstanding the plain meaning of the statute pursuant to New Mexico rules of statutory construction:

In interpreting a statute, a court not only looks to the plain meaning of the language employed, but also to the object of the legislation. Our interpretation of statutes must be consistent with legislative intent, and our construction must not render a statute's application absurd, unreasonable, or unjust.

115 N.M. at 592, 855 P.2d at 1056 (citations omitted).

Principles of statutory interpretation in South Carolina are similar:

However, the plain meaning rule is subject to this caveat:

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(quoting *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Even so, what the legislature says in the text of a statute is the best evidence of legislative intent. *Id.* And the fact that the General Assembly included a fraudulent transfer exception and a monetary limit with respect to IRAs but did not do so in the very next subsection dealing with ERISA-qualified plans should be dispositive on the question of legislative intent as to those features.

The Bank cites *Webster v. Rodrick*, 64 Wn.2d 814, 394 P.2d 689 (Wash., 1964) for the proposition that exemption statutes cannot be used as instruments of fraud and imposition. [Bank Br p 12] In that case funds embezzled by one of the defendants were used to purchase and improve the defendants' residence. Washington law requires that an exemption must be claimed in good faith. The court held that the homestead exemption statute would not be applied to prevent a lien in favor of the embezzled party from attaching to the defendants' residence. This case has no application to the circumstances presented here.

Breedlove v. Breedlove, 100 Nev. 606, 691 P.2d 426 (1984), also cited by the Bank, supports Lindgren's position. [Bank Br p 12] The defendant claimed a homestead exemption as one of a lengthy series of devices by which he sought to avoid paying child support payments owed to his former wife. As the Nevada Supreme Court explained in denying the exemption on public policy grounds:

Homestead laws in this country were designed for the purpose of protecting families and making families secure in their homes from creditors they are unable to pay. As such, when an ex-wife or child attempts to enforce court-ordered support payments, the rationale behind upholding the homestead exemption can no longer be said to apply since the policy of protecting the family would no longer be served by such an application. A former family member attempting to enforce a support judgment can hardly be said to be a creditor of the sort against which the legislature sought to protect the homesteader, and it would be extremely unfair to permit the homestead to be used as a shield under these circumstances to insulate a father from being forced to pay the support that is owed to his own children.

100 Nev. at 608, 691 P.2d at 427 (internal citations omitted)

Needless to say, the Bank is not Lindgren's child or former spouse. The judgments the Bank seeks to collect arise out of Lindgren's guarantees of deficiencies owed to the Bank following a deed in lieu of foreclosure by Blue Ox, LLC of property acquired by that entity for business purposes. [R. COJs] To the extent *Breedlove* is relevant at all, it suggests the Bank is exactly the sort of creditor against whom the exemption statutes were intended to apply.

Even if the Court were inclined to consider interpreting §15-41-30(A)(14) to except fraudulent transfers in a proper case, this is not such a case. The Bank relies on authorities finding transfers to be fraudulent when the debtor failed to retain sufficient property to pay the indebtedness, citing *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993) and *Mathis v. Burton*,

319 S.C. 261, 460 S.E.2d. 406 (Ct. App. 1995). The Bank states in its brief: “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.” [Bank Br p 9] The Bank provides no references to the record for these supposed “facts.” Indeed, it would be impossible to do so because there is nothing in the evidentiary record to support them.⁴ Lindgren never testified, much less “continuously maintained,” that he owned no property.

To the contrary, in response to the Bank’s questions Lindgren described his ownership interests in companies owning: half a trailer park in Ridgeland, South Carolina; an office building on Hilton Head Island; an undeveloped parcel in Bluffton, South Carolina; a 35 acre mobile home park in Bluffton; and, a developed commercial parcel, also in Bluffton. Collectively these properties are of sufficient value that they generate over a \$1 million in annual rents as reflected on Lindgren’s personal tax returns. Lindgren also testified to his personal ownership of a condominium in Vail, Colorado and his joint ownership with his wife of their residence. Indeed, in arguing that Lindgren is not deserving of protection under the exemption statute the Bank states: “In addition several [sic] properties in South Carolina, Lindgren owns a vacation home in Vail, Colorado of which the current assessed value is \$1,636,000.” [Bank Br p 13] ⁵ The Bank’s admissions concerning property and

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The lower court’s order recited that: “Lindgren has failed to retain sufficient property/assets to pay First Citizens” and “Lindgren maintains that he has no assets that can be used to apply towards the Judgments [sic] that First Citizens holds against him.” In his motion to reconsider Lindgren noted that there is no evidentiary support for these “findings” in the record and asked that they be stricken.

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The value of the condominium is not in the record on appeal. Ordinarily, facts stated in a party’s brief that are outside the record will not be considered by the appellate court. *Becker v. Uhe*, 221 S.C. 334, 70 S.E.2d 346 (1952). But inasmuch as the valuation of the condominium is adverse

assets retained by Lindgren should be fatal to its claim that the 401(k) Plan contributions are fraudulent transfers under *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993) and *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d. 406 (Ct. App. 1995), both of which require the creditor to establish that the debtor failed to retain sufficient property to pay the indebtedness.

Alternatively, the Bank argues that the 401(k) Plan contributions are subject to execution because they were made with the actual intent to defraud creditors. [Bank Br p 9] As discussed above, beginning at page 9, comments made in its order imply that the lower court found as a matter of fact that the post-judgment 401(k) Plan contributions were not fraudulent transfers. The Bank asks this Court to reverse the lower court's finding on this point based upon the presence of "badges of fraud" as set forth in *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973).

The "badges of fraud" argument was not made prior to or addressed in the lower court's order, nor did the Bank move for reconsideration of the order. Issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Id.* 330 S.C. at 76, 497 S.E.2d at 733. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Id.*

The Bank mentioned badges of fraud in opposing Lindgren's motion to reconsider the court's decision regarding the IRAs, but that is insufficient. [R. Trans pp 41 - 44] The so-called "badges of fraud" have not until now been raised by the Bank in regard to the 401(k) Plan contributions. Even

to the Bank it could be treated as an admission and properly considered by this Court. *See Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 343 S.E.2d 446 (1986) (party bound by facts included in statement of the case).

had the Bank made its own motion to reconsider the court's denial of its motion to execute on the 401(k) Plan, which it did not, it would have been too late. *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App.1999)(issue may not be raised for the first time in a motion to reconsider). Thus, the Bank's "badges of fraud" argument is not properly before this court.

On the merits, the Bank's "badges of fraud" argument is unavailing. It cites *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) for its recitation of 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. [Bank br p 9]

Examination of these factors in light of the facts of record reveals the following conclusions:

- Insolvency or indebtedness of the transferor: Rockmoor not Lindgren was the transferor, and in any case there is no evidence of insolvency on the part of Lindgren. The Bank brought to the hearing, but chose not to put into evidence, Lindgren's financial statement.
- Lack of consideration for the conveyance: There was valuable consideration involved. Lindgren suffered a detriment in the form of reduced current income for the future benefit of tax-free earnings on his retirement savings.
- Relationship between transferor and transferee: The actual transfer was by Lindgren's employer to the investment company holding the Plan assets.
- Pendency or threat of litigation: There was no litigation pending; all of the contributions at issue were made in the years between the conclusion of the Bank's initial cases against Lindgren and the filing of the Bank's petition for supplemental proceedings.

- Secrecy or concealment: There was none. Prior to the institution of supplemental proceedings Lindgren voluntarily provided the Bank with his personal financial statement and copies of his tax returns. At the hearing he forthrightly answered all questions put to him by the Bank and after the hearing he provided to the Bank account statements and other documents related to the 401(k) Plan.
- Departure from the usual method of business: Again, there was none; Lindgren and Rockmoor did exactly what they had done in every year since 1992.
- Transfer of the debtor's entire estate: Lindgren's entire estate was not transferred; the record reflects, and the Bank acknowledges, that Lindgren retains substantial other valuable properties.
- Reservation of benefit to the transferor: Again, Lindgren is not the actual transferor, but he acknowledges that he is the owner of the "interest" in the 401(k) Plan exempted from creditor claims by §15-41-30(A)(14).
- Retention by the debtor of possession of the property: Lindgren does not and never did have possession of the funds at issue; they were withheld from him and paid directly into the Plan by his employer. Lindgren acknowledges that he has the right to obtain possession by making withdrawals from the 401(k) Plan but if he were to do so the funds withdrawn or any non-exempt assets purchased with them would be subject to execution by the Bank.

Contrary to the Bank's argument, the facts of record do not support a factual finding that Lindgren, who did not change his behavior in any way in response to the Bank's judgments, made any retirement contributions with the purpose or intent to hinder, delay or defraud the Bank or any other creditor. The lower court's implicit finding to this effect should be affirmed.

The undersigned has been unable to find cases involving a creditor's challenge to an employer's contribution of withheld wages to a 401(k) Plan. There are cases, however, dealing with debtors' repayment of loans taken from 401(k) Plans. *See In re Hoetmer*, 2012 WL 4482387 (Bkrctcy. S.D. Ind., Slip Copy, Sept. 26, 2012) and *In re Dunbar*, 313 B.R. 430, 436 (Bankr. C.D. Ill.2004). These cases are distinguishable and not relevant here because the money at issue in those cases was

transferred from the debtors' own bank accounts to their 401(k) Plan, not as we have here, from the debtor's employer to the Plan. Both cases turned upon a consideration of circumstances under which it is permissible for a debtor to convert non-exempt assets to exempt assets. Here there has been no conversion of non-exempt cash to exempt retirement plan assets and therefore no basis for finding any cognizable legal injury to the Bank or for finding any fraudulent transfer. Again, exempt wages were withheld from Lindgren's paycheck and paid by his employer to the exempt 401(k) Plan.

The Bank argues that Lindgren is not deserving of the protections of the homestead exemption statute because he owns several properties in South Carolina, a condominium in Vail and a 401(k) Plan that would still have a balance in excess of \$240,000. [Bank Br p 13] The short answer to this is that Lindgren has not asserted a claim of exemption with respect to anything other than his retirement accounts and the statutory exemption provided for his 401(k) Plan is not subject to a monetary limit. The Bank's assessment that "Lindgren is in no danger of becoming dependent on the state," even if accurate, is not germane to the important legal issues presented by this case.

Finally, the Bank likens Lindgren's 401(k) Plan to an "offshore bank account," suggesting that debtors could treat retirement plans as simply "another checking account" to which they would move money back and forth to defeat the claims of creditors. [Bank Br p 13] Elsewhere the Bank asserts "Lindgren freely took distributions from his 401(k) which clearly shows that his 401(k) was simply another checking account." [Bank Br p 10] The Bank's concerns are misplaced and its characterization of Lindgren's distributions as having been "freely" taken are erroneous.

As a matter of law, an employee is not permitted to take distributions from the Plan prior to age 59 ½ absent "hardship." 26 U.S. Code § 401(k)(2)(B)(i)(III). Meeting this test requires showing that "[the distribution] is made on account of an immediate and heavy financial need of the employee

and is necessary to satisfy the financial need.” 26 CFR 1.401(k)-1(d)(3)(I). The determination of this two-part test “must be made in accordance with nondiscriminatory and objective standards set forth in the plan.” *Id.* The plan standards in this case have been reviewed and approved by the Internal Revenue Service. [R. Ex to Lindgren Aff.] Specific, detailed regulations are in place to prevent the casual withdrawal of funds about which the Bank expresses concern. 26 CFR 1.401(k)-1(d)(3)(iii)(B) and (C).

In the absence of evidence in the record to the contrary, it must be assumed that the Plan provisions comply with applicable law in regard to hardship distributions and that Lindgren’s distributions were properly taken. As appellant on the 401(k) issue the Bank has the burden of presenting this Court with an adequate record. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). “The appellate court will not consider any fact which does not appear in the record on appeal.” Rule 210(h), SCACR. Contrary to the Bank’s assertions, a 401(k) Plan is not and should not be treated as simply another checking account, offshore or otherwise.

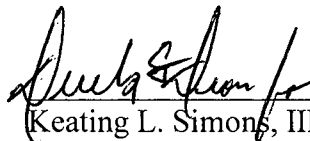
The Bank argues that only pre-judgment retirement contributions and the earnings thereon should be protected from creditors’ claims. This means, of course, that in the Bank’s view all retirement contributions made after entry of a judgment and any earnings on those contributions would be subject to seizure by judgment creditors. Effectively, judgment debtors would be prevented from putting money aside for retirement in otherwise exempt ERISA-qualified plans or IRAs. Why would debtors defer current income and put it aside for retirement knowing that at any time some creditor could step in and seize their hard-earned savings? And if the law were as urged by the Bank, why would it be applicable only to judgment debtors? The Statute of Elizabeth is not so limited in its reach; entry of a judgment is not necessary for relief under the statute. *Lebovitz v. Mudd*, 293 S.C.

49, 358 S.E.2d 698 (1987). Anyone sued for money damages, or merely threatened with such a suit, or whose debts exceeded their assets at a point in time, would be subject to claims such as those made by the Bank in this case. If the Bank were to prevail, only those with no financial problems could be safe or secure in their retirement planning. Others, including financially vulnerable individuals needing help the most, would be deprived of the benefits of tax-free retirement savings accounts and protections afforded those accounts by South Carolina's homestead exemption statutes. The Bank's position in this case is not supported by the facts, the law or public policy considerations favoring retirement savings.

CONCLUSION

For all the reasons stated this Court should affirm the order of the lower court denying the Bank's motion to set aside and execute upon Lindgren's post-judgment 401(k) Plan contributions.

Respectfully submitted



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