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.

RESPONDENT'S INITIAL BRIEF OF RESPONDENT-APPELLANT

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I. WHETHER THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT A DEBTOR'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ACCOUNTS ARE 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 $25,000 TO HIS INDIVIDUAL RETIREMENT ACCOUNTS AFTER THE JUDGMENTS WERE 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").[1] (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.[2] (*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 401(k) were not

[1] Blue Ox, LLC has no assets and is not a party to this appeal.

[2] First Citizens only seeks to execute on the amounts contributed to the 401(k) and IRAs after the judgments were filed. First Citizens does not dispute that the contributions made prior to the filing of the judgments are exempt from execution.

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 challenging Judge Duke's ruling as to the IRAs. First Citizens filed its Notice of Cross Appeal on October 20, 2015 challenging Judge Duke's ruling as to the 401(k).

FACTS

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). In his role as a businessman, Lindgren has formed at least 38 LLCs to serve as "investment vehicles." (*Id.* at 22, lines 2-6). Lindgren's investments generally performed well affording Lindgren and his family the opportunity to buy luxury vehicles and a mountain home in Vail, Colorado.[3] (*Id.* at 6-8, 100-101).

In spite of his financial success, 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.[4] (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. During the Supplemental Proceedings hearing, Lindgren testified that he had an Individual Retirement Account ("IRA") and a Roth Individual Retirement Account ("Roth IRA"), both of which were

[3] First Citizens domesticated its judgment in Colorado; however, First Citizens is behind substantial prior liens which effectively precludes the bank from collecting on the judgment.
[4] C/A No.: 2011-CP-07-128 ($100,000.00) and C/A No.: 2011-CP-07-129 ($13,702.24).

held through Fidelity Investments. (Transcript of September 2, 2014 Supplemental Proceedings Hearing at 17-18). Lindgren also testified that he established a 401(k) funded through "employee deferrals" while an employee with one of his various LLCs, Rockmoor, Inc. (*Id.* at 14, lines 5-24). After the hearing, it was discovered that Lindgren contributed $25,000 to his IRAs and more than $45,000 to his 401(k) **after** the judgments held by First Citizens against him were filed.[5] Despite making these contributions, Lindgren maintained that he had no property or assets to satisfy the judgments First Citizens held against him. To date, Lindgren has made no payments towards the Judgments.

STANDARD OF REVIEW

"When both equitable and legal causes of action are maintained in one suit, each must be analyzed separately according to its own identity as legal or equitable." *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 142, 641 S.E.2d 53, 57 (Ct. App. 2007) (citing *Jordan v. Holt,* 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); *Future Group, II v. Nationsbank,* 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996)). In an action at law decided by a Master-in-Equity, the appellate court will correct any error of law. *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 243 (Ct. App. 2008) (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)). However, the appellate court must affirm the Master's factual findings unless no evidence reasonably supports those findings." *Id.* An action to set aside a fraudulent 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) (citing *Future Group, II*, 324 S.C. at 97 n. 6, 478 S.E.2d at 49 n. 6).

[5] Specifically, Lindgren contributed $18,500 to his IRA and $6,500 to his Roth IRA after First Citizens filed the judgments against him.

ARGUMENTS

First Citizens requests that this Court affirm the Master-in-Equity's holding that Lindgren's voluntary, post-judgment contributions to his IRAs are subject to execution.

I. BECAUSE S.C. CODE § 15-41-30(A)(13) ONLY EXEMPTS PRE-JUDGMENT CONTRIBUTIONS TO AN IRA AND SPECIFICALLY EXCLUDES FRAUDULENT CONVEYANCES, THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT LINDGREN'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO HIS IRA ACCOUNTS ARE SUBJECT TO EXECUTION.

A. Because S.C. Code § 15-41-30(A)(13) provides that "[t]he interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in 11 U.S.C § 522(d) under federal bankruptcy law", only pre-judgment contributions to an IRA and any earnings accruing from those pre-judgment contributions are exempt from the creditor process.

A judgment creditor is generally entitled to execute on the assets of a debtor. However, under South Carolina law, debtors are entitled to exempt certain assets. *See* S.C. Code § 15-41-30. These exemptions are commonly referred to as homestead exemptions and cover various types of property. *Id.* One homestead exemption provides a limited exemption for a debtor's interest in certain types of retirement accounts, including IRAs. That exemption, S.C. Code § 15-41-30(A)(13) (hereinafter referred to as the "homestead exemption"), states:

> 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 right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, 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. **A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan.** For purposes of this item, "Internal Revenue Code" has the meaning provided in Section 12-

> 6-40(A). **The interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law** and is an exception to Section 15-41-35. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise. (emphasis added).

The homestead exemption provides that "[t]he interest of an individual under a retirement plan shall be exempt from the creditor process **to the same extent permitted in section 522(d) under federal bankruptcy law**...." *Id.* Therefore, determining the scope the homestead exemption requires that this Court look to federal bankruptcy law for guidance.

The procedure used in determining what exemptions and the amount of each exemption to which a debtor is entitled is well established. At the time a debtor files for bankruptcy, a bankruptcy estate is created which includes all of the debtor's interest in property and/or assets. *See In re Peterson*, 897 F.2d 935, 936 (8th Cir. 1990); *see also* 11 U.S.C. § 541. However, pursuant to 11 U.S.C. § 522, debtors may exempt certain property from becoming part of the bankruptcy estate. A debtor claims exemptions by filing a list of exempt property at the time the bankruptcy petition is filed. *See In re Peterson*, 897 F.2d at 936 (emphasis added).

"The [United States] Supreme Court has long held that exemptions are determined on the bankruptcy filing date." *In re O'Brien*, 443 B.R. 117, 130 (Bankr. W.D. Mich. 2011) (citing *White v. Stump*, 266 U.S. 310, 45 S.Ct. 103 (1924); *see also Owen v. Owen*, 500 U.S. 305, 314 n. 6, 111 S.Ct. 1833, 1841 n. 6 (1991) (stating the proper date for determining whether an exemption exists is the date of filing of the bankruptcy petition). State courts have also consistently followed this rule. *See e.g., In re Tetreault*, 11 A.3d 635, 642 (R.I. 2011) ("It is well established in bankruptcy law that a debtor's exemptions are determined as of the date of filing of the bankruptcy petition."). Therefore, the property that a debtor is entitled to exempt is

determined solely by the property held by that debtor on the date of filing. Stated another way, "bankruptcy exemptions are fixed on the date of filing." *In re Peterson*, 897 F.2d at 937. A debtor who files for bankruptcy is not entitled to take exemptions throughout the bankruptcy process.

The language of 11 U.S.C § 522(d)(12) (referred to hereinafter as "section 522(d)(12)") also plainly indicates that it is only meant to exempt assets contributed to an IRA prior to the date that the bankruptcy petition is filed. 11 U.S.C. § 522(d)(12) states that a debtor may exempt "retirement funds to the extent that those funds are in a fund or account that is exemption from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986" from becoming part of the bankruptcy estate. The use of the phrase "to the extent that those funds are in a fund or account" shows that Congress only intended to exempt funds which are already "in" a retirement fund or account. Noticeably absent is any mention of the exemption protecting future contributions.

Given the well-established practice of determining bankruptcy exemptions on the date of filing and the language of section 522(d)(12), it is clear that section 522(d)(12) only protects funds which are held in the account on the day that the bankruptcy petition is filed. Section 522(d)(12) does not permit a debtor to file bankruptcy, take an initial exemption on the filing date, and then continue to take exemptions throughout the bankruptcy process. Allowing a debtor to continue to take exemptions (i.e., continue to make contributions to an IRA) throughout the bankruptcy process would frustrate the entire purpose of filing for bankruptcy. Almost undoubtedly, a debtor would continue to contribute funds to the IRA rather than working to get out of bankruptcy.

The homestead exemption's reference to section 522(d) supports First Citizens' position that the homestead exemption only exempts Lindgren's pre-judgment contributions to his IRA and any earnings from those pre-judgment contributions. Because section 522(d)(12) only exempts funds which have been contributed to an IRA up to the date that a debtor files bankruptcy and because the homestead exemption provides that IRAs are exempt "from the creditor process to the same extent permitted in section 522(d)…", it follows that only a debtor's pre-judgment contributions and any accrued earnings thereon are exempt from creditors. S.C. Code 15-41-30(A)(13). The homestead exemption does not protect post-judgment contributions to an IRA. The same logic and reasoning which prohibits a debtor who files for bankruptcy from taking exemptions throughout the bankruptcy process should be applied to situations where a debtor is indebted to his creditors but chooses not to file for bankruptcy.

B. Because S.C. Code § 15-41-30(A)(13) prohibits a debtor from making fraudulent conveyances designed to delay, hinder or defraud creditors, the Master-In-Equity properly determined that Lindgren's voluntary, post-judgment contributions to his IRAs are subject to execution.

While the homestead exemption provides that a debtor's interest in an IRA is generally exempt from creditors, the exemption also states that "[a] claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." S.C. Code 15-41-30(A)(13). This caveat shows that although the statute is designed to protect debtors to a certain extent, the legislature did not intend to create a blanket exemption. The legislature envisioned situations where a debtor's use of the exemption would constitute fraud upon his creditors.

In determining what constitutes a "fraudulent conveyance", South Carolina courts have long looked to S.C. Code 27-23-10 (hereinafter referred to as "the Statute of Elizabeth") and related case law. Lindgren argues that the lower court erred in looking to the Statute of Elizabeth

in determining what constitutes a fraudulent conveyance. Lindgren argues that because the homestead exemption references section 522(d), a completely different section of the federal bankruptcy code, 11 U.S.C. § 548, should be used to determine what constitutes a fraudulent conveyance. First Citizens takes the position that section 522(d) provides guidance in determining the scope and timing of South Carolina's homestead exemption. However, the Statute of Elizabeth and related South Carolina case law still governs what constitutes a fraudulent conveyance. Regardless of what this Court determines to be the proper standard, the facts support the Master-In-Equity's finding that Lindgren's post-judgment contributions to his IRAs were fraudulent transfers and therefore subject to execution.

The Statute of Elizabeth states that:

> **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).

S.C. Code § 27-23-10. 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).

Here, First Citizens need not prove "actual intent to hinder or delay creditors" because the transfers at issue were not based upon valuable consideration. *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, i.e., based upon no consideration or upon nominal consideration; and (3) Lindgren failed to retain sufficient funds to satisfy the judgment against him. *See id*; *see also First State Sav. And Loan Ass'n v. Nodine*, 291 S.C. 445, 450, 354 S.E.2d 51, 54 (1987) ("A conveyance made upon a mere nominal consideration or without consideration is 'voluntary.'").

All of the funds First Citizens seeks to execute upon were contributed to Lindgren's IRAs after the judgments were entered against him on January 6, 2011. As such, it is undisputed that Lindgren was indebted to First Citizens at the time of the 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 in *Mathis*, there was no consideration for the transfer of the money from Lindgren to his IRAs. Under South Carolina law, "consideration...may consist either in some right, interest, profit or benefit **accruing to one party**, or some forbearance, 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) (emphasis added). The definition of consideration set forth in *Waller* clearly shows that that consideration involves two separate parties. 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. Lindgren was in the exact same position before and after the transfers to his IRAs. His assets were simply in different accounts. Lindgren maintained full control over the accounts and could withdraw or invest the funds as he chose.

Furthermore, "where a conveyance to a family member or close relative is attacked on account of its voluntary character, the law imposes a duty of the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence." *Nodine*, 291 S.C. at 450, 354 S.E.2d at 54 (citing *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973)). Here, the transfer involved only one person—Lindgren. When a debtor transfers assets from one account into another account controlled by the same debtor, the transfer should be scrutinized in the same manner as a transfer to a "family member or close relative." *See id.* As such, the burden of proving that the transfer was supported by consideration shifts to Lindgren. Lindgren's argument that the tax advantages associated with investing in an IRA constitute consideration is insufficient to meet this burden.

The final element set forth in *Mathis* is that the debtor fails to retain sufficient funds to satisfy his debts. *See Mathis*, 319 S.C. at 266, 460 S.E.2d at 408. This element is seemingly

easily established by the fact that Lindgren has not paid a single dollar towards the judgments. However, Lindgren disputes that he is unable to pay. Lindgren states that he is able to pay the judgments but has chosen not to do so. *See Appellant's Brief of Appellant/Respondent* at 17-18. Lindgren's counsel points to rental receipts from 2011 which were in excess of $1,000,000 as evidence that Lindgren has sufficient assets to pay the judgment. However, Lindgren testified that much of the rental income was paid to his various LLCs which are not a party to this action. *See* Transcript of September 2, 2014 Supplemental Proceedings Hearing at 101. Additionally, opposing counsel failed to mention that those receipts do not account for expenses incurred. After accounting for expenses, Lindgren testified to a "net $200,000 loss." *Id.* Regardless of whether Lindgren is unable to the pay the judgments or he has simply chosen not to pay the judgments, the fact remains that First Citizens has not been paid the debt they are rightfully owed. Lindgren's actions, even in this appeal, demonstrate his clear intent to frustrate, delay, hinder and defraud First Citizens.

Because the evidence shows that (1) Lindgren was indebted to First Citizens at the time of the contributions at issue; (2) the contributions were "voluntary" in that they were not supported by valuable consideration; and (3) Lindgren has either failed to retain sufficient funds to satisfy the judgments or chosen not to pay, the Master-In-Equity properly determined that Lindgren's post-judgment transfers to his IRAs are subject to execution.

If this Court finds that the post-judgment contributions were supported by consideration or that 11 U.S.C. § 548 provides the proper standard as to what constitutes a fraudulent conveyance, Lindgren's post-judgment contributions are still subject to execution. Under South Carolina law, if the transfers at issue were supported by consideration, the transfers should be set aside if it is shown that the transfers were (1) 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. *See Durham*, 313 S.C. at 437, 438 S.E.2d at 262. Pursuant to 11 U.S.C § 548, a transfer is fraudulent if made "with actual intent hinder, delay or defraud." As discussed above, it is undisputed that Lindgren was indebted to First Citizens when the contributions at issue were made. The issue of whether the grantor's intent is imputable to the grantee is irrelevant because Lindgren is both the grantor and the grantee. Therefore, if this Court finds that there was consideration for the transfers or that 11 U.S.C. § 548 applies, the only real issue for the court is whether Lindgren's post-judgment contributions were made with the "intent of defrauding his creditors." *See id*; 11 U.S.C. § 548.

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, South Carolina and federal courts evaluate the particular circumstances of the transfer for "badges of fraud." *See 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 re Maryland Prop. Associates, Inc.*, 309 F. App'x 737, 753 (4th Cir. 2009). 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 IRAs meet at least seven of the nine badges of fraud listed above.[6] "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) failed to voluntarily disclose the contributions, (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 collecting the judgments.

Also relevant to Lindgren's intent is that that Lindgren now states that he has assets which can be used to pay the judgment. *See Appellant's Brief of Appellant/Respondent* at 17-18. Up to this point, Lindgren has consistently testified that he, individually, has very few assets. Lindgren testified that the car he drives is owned by his wife. *See* Transcript of September 2, 2014 Supplemental Proceedings Hearing at 6, line 17. When asked about the amount of cash kept at his home, Lindgren answered "[p]robably about 30 bucks. A jar of coins." *See id* at 25, line 15. When asked whether he personally owned stocks or securities, he responded "no". *See id* at 25, line 23. The fact that Lindgren now admits to making a conscious decision to not make a single payment towards the judgments even though he claims to have the assets to do so only

[6] 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. 12-13. 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.

further supports First Citizen's contention that Lindgren has acted with actual intent to hinder delay or defraud First Citizens.

Lindgren cites at least ten cases in support of the argument that the conversion of non-exempt assets to exempt assets is not fraudulent per se. *See Appellant's Brief of Appellant/Respondent* at 9-11. However, the cases cited by Lindgren are distinguishable from the facts of this case in at least one respect—all of the cases cited by Lindgren involve pre-bankruptcy planning. That is, in each of the cases cited, the debtor took some action prior to filing bankruptcy. First Citizens does not dispute that "exemption planning", to a certain degree, is permissible under the law. However, Lindgren has not cited a single case in which the court permitted a debtor to convert an exempt asset into a non-exempt asset after filing bankruptcy or after a judgment had been filed. The distinction is critical.

In *In re Gepfrich*, 118 B.R. 135, 138 (1990), the court recognized the conversion of non-exempt assets into exempt assets is generally allowed under the law. However, the *Gepfrich* court also recognized that the general rule has limits and "the conversion of the nonexempt assets into exempt assets **must be made prior to the [bankruptcy] filing....**" *Id.* (emphasis added). The court went on to state that where nonexempt property is converted post petition, the debtor's conduct is objectionable under the federal bankruptcy code. The *Gepfrich* court ultimately found that the debtor's conversion of a non-exempt asset into an exempt asset one day after the filing of the bankruptcy petition rendered the transaction void as it was "made with the intent to delay, hinder and defraud" his creditors. *Id.* at 139. *Gepfrich* illustrates the distinction between pre-bankruptcy planning and the conversion of non-exempt assets into exempt assets after the bankruptcy petition is filed. First Citizens urges this Court to adopt a similar rule as it relates to debtors seeking to exempt property and/or assets from judgment creditors.

Establishing that a debtor acted with actual intent to hinder, delay or defraud a creditor is rarely proven by direct evidence. *In re Schmit*, 71 B.R. 587, 590 (Bankr. D. Minn. 1987). It is typically inferred from the facts and circumstances of the debtor's conduct. *Id; see also Farmers Co-op. Ass'n v. Strunk,* 671 F.2d 391, 395 (10th Cir.1982) ("Fraudulent intent of course may be established by circumstantial evidence, or by inferences drawn from a course of conduct."). Here, the totality of the circumstances establishes that after the judgments were filed, Lindgren took deliberate action designed to put his assets beyond the reach of First Citizens. The law does not condone such action. Lindgren argues that because he made contributions to his retirement accounts in the past, he should be allowed to continue to set aside money for retirement notwithstanding the fact that he is indebted to First Citizens. This argument is flawed and unsupported by case law. Additionally, the evidence shows that in the year prior to the judgments being filed, Lindgren did not contribute to his IRAs. After the judgments were filed, Lindgren's contributions to his retirement accounts increased significantly.

Lindgren argues exhaustively on an issue which First Citizens does not dispute—pre-bankruptcy exemption planning is not fraudulent per se. However, Lindgren has not cited a single case in which a court permitted a debtor to convert a non-exempt asset into an exempt asset either after filing for bankruptcy or after a judgment has been filed. Once the judgments were filed, the homestead exemption no longer exempts contributions made to Lindgren's IRAs. Lindgren's post-judgment contributions were fraudulent conveyance designed to hinder, delay and defraud First Citizens. Therefore, the Master-In-Equity's holding that Lindgren's post-judgment contributions to his IRA are subject to execution should be affirmed.

II. BECAUSE AN INTERPRETATION OF S.C. CODE § 15-41-30(A)(13) WHICH ONLY PROTECTS PRE-JUDGMENT CONTRIBUTIONS TO AN IRA IS CONSISTENT WITH WHAT THIS COURT HAS DETERMINED TO BE THE LEGISLATIVE INTENT OF THE HOMESTEAD EXEMPTIONS, THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT LINDGREN'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO HIS IRA ACCOUNTS ARE SUBJECT TO EXECUTION.

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)(13) which only protects pre-judgment contributions to an IRA and any earnings stemming from those pre-judgment contributions 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 *Gilchinsky v. National Westminster Bank N.J.*, a case involving a debtor's attempted use of a homestead exemption covering IRAs, the Supreme Court of New Jersey found that "the exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment." 159 N.J. 463, 483, 732 A.2d 482, 493 (1999). The *Gilchinsky* court went on to state that the legislature did not intend to allow debtors to funnel money into IRAs in order to avoid paying judgments. 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 judgments.

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."

"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 set aside more than $25,000 for "retirement" all the while claiming that he has no assets to satisfy judgments against him. Again, First Citizens only seeks to execute on the funds which Lindgren contributed to his IRAs after the judgments were filed against him. First Citizens recognizes that it is sound policy to exempt certain funds from creditors. However, Lindgren proposes an interpretation of the homestead exemption whereby debtors, even those in no danger of becoming destitute, can not only protect past retirement savings but also continue to set aside additional funds while maintaining they have no assets to satisfy judgments against them. A proper interpretation of section 15-41-30(A)(13), one which only exempts pre-judgment contributions to IRAs and any earnings accruing on those pre-judgment contributions, adequately protects the rights of both debtors and creditors. An interpretation which allows a debtor to ignore his creditors while continuing to increase his retirement savings is in direct conflict with the ideals of justice and fairness.

CONCLUSION

For the reasons set forth above, First Citizens respectfully requests that this Court affirm the Master-In-Equity's decision finding Lindgren's post-judgment contributions to his IRAs are subject to execution.

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February 18, 2016

THE STATE OF SOUTH CAROLINA
IN THE 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.

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 18th day of February, 2016, I served Respondent-Appellant, First Citizens Bank & Trust Company's, **Respondent'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
Keating L. Simons, III, Esquire
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February 18, 2016
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February 18, 2016

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. 11629
Columbia, SC 29211

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 *Respondent'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
cc: Keating L. Simons III, Esquire