**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

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SC Court of Appeals

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

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

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Appellate Case No.: 2015-002156

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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.

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**APPELLANT'S INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT**

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## ARGUMENTS IN REPLY

I. FIRST CITIZENS MISTATED THE PROPER STANDARD OF REVIEW.

II. AN EXEMPTION CLAIMED PURSUANT TO S.C. CODE § 15-41-30(A)(14) CAN BE REDUCED OR ELIMINATED BY THE AMOUNT OF A FRAUDULENT CONVEYANCE.

III. THE BADGES OF FRAUD ARGUMENT WAS PRESERVED FOR APPEAL AND SUPPORTS FIRST CITIZENS POSITION THAT LINDGREN ACTED WITH FRAUDULENT INTENT.

V. LINDGREN'S ADMISSIONS REGARDING HIS OTHER ASSETS ARE EVIDENCE OF HIS INTENT TO HINDER, DELAY AND DEFRAUD FIRST CITIZENS.

## I. FIRST CITIZENS MISTATED THE PROPER STANDARD OF REVIEW.

First Citizens recognizes that it misstated the proper standard of review in its Appellant's Brief of Respondent/Appellant. Lindgren set forth the proper standard of review. 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).

## II. AN EXEMPTION CLAIMED PURSUANT TO S.C. CODE § 15-41-30(A)(14) CAN BE REDUCED OR ELIMINATED BY THE AMOUNT OF A FRAUDULENT CONVEYANCE.

Lindgren argues that the absence of language in S.C. Code 15-41-30(A)(14) which states that transfers to a 401(k) may be reduced or eliminated if deemed to be fraudulent evidences the legislature's intent to provide a complete exemption for transfers to a 401(k). This argument is without merit. Lindgren's argument is based on the fact that S.C. Code 15-41-30(A)(13) specifically states that "[a] claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance" whereas S.C. Code 15-41-30(A)(14) contains no similar language. Under Lindgren's theory, only transfers falling under S.C. Code 15-41-30(A)(13) could be reduced or eliminated if a transfer was deemed fraudulent because that subsection is the only subsection of S.C. Code 15-41-30(A) which contains specific language regarding fraudulent conveyances. The language of S.C. Code § 27-23-10 (hereinafter "Statute of Elizabeth") proves that the legislature intended it to apply to all transfers of property. It begins with the phrase "[e]very gift, grant, alienation, bargain, transfer, conveyance of lands, tenements, or hereditaments, goods and chattels." This is clear evidence that the legislature intend the Statute of Elizabeth to apply to all transfers of property. Additionally, as noted by the lower court's Order, courts outside of South Carolina have found that "the anti-alienation provision of ERISA

and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *See* R. at June 11 Order of Judge Dukes at 4 (citing *In re Goldschein*, 241 B.R. 370 (Bkry. D. Md. 1999)). Despite the absence of specific language, S.C. Code 15-41-30(A)(14) is still subject to the Statute of Elizabeth.

## III. THE BADGES OF FRAUD ARGUMENT WAS PRESERVED FOR APPEAL AND SUPPORTS FIRST CITIZENS POSITION THAT LINDGREN ACTED WITH FRAUDULENT INTENT.

As an initial matter, First Citizens reiterates that it must only prove that Lindgren acted with fraudulent intent if this Court finds that the transfers at issue were support by valuable consideration. *See Durham v. Blackard*, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993). First Citizens takes the position that the transfers were nothing more than Lindgren moving money from one pocket to the other. Lindgren was in the same position before and after the transfers; the funds were simply in a different account. Lindgren neither received a benefit nor suffered a detriment. Therefore, the transfers were not supported by consideration.

If this Court finds that the transfers were supported by consideration, the issue of fraudulent intent becomes relevant. *See id.* Lindgren asserts that the badges of fraud argument raised by First Citizens is not properly before this Court. Early in this case, First Citizens argued that a claimed exemption may be reduced or eliminated if the debtor is found to have made a fraudulent conveyance. *See* R. at Memo in Support of Plaintiff's Motion to Execute at 3. The badges of fraud are used by courts to determine whether a debtor acted with fraudulent intent. *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.'") First Citizens set forth the badges of fraud argument to support its underlying argument that Lindgren's transfers to his 401(k) were fraudulent conveyances. The

badges of fraud are not a separate and distinct issue. Furthermore, as noted by Lindgren, First Citizens raised the badges of fraud argument before the lower court in its Memorandum in Opposition to Lindgren's Motion for Reconsideration. *See* R. at Memo In Opposition. The case cited by Lindgren as support of his argument that an issue may not be raised for the first time in a motion to reconsider involved a party bringing an entirely new issue before the court in its motion to reconsider. *See Commercial Credit Loans, Inc. v. Riddle,* 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999). This is not the case here. Lindgren's argument that the badges of fraud argument is not properly before this Court should be rejected.

On the merits, the badges of fraud argument supports First Citizens' position that Lindgren's contributions to his 401(k) were fraudulent. One of the badges of fraud examines the relationship between the transferor and transferee. *See Coleman*, 261 S.C. at 209, 199 S.E.2d at 79. It is important to note that Lindgren is the sole shareholder of Rockmoor, Inc. ("Rockmoor"). *See* Transcript of September 2, 2014 Hearing at 26, lines 15-17. Although Lindgren attempts to distinguish himself from Rockmoor, Lindgren has total control over the company. In his brief, Lindgren also claims that Rockmoor contributed to the 401(k). Lindgren contends that he contributed nothing. *See* Respondent's Brief of Appellant/Respondent at 17-18. This contradicts the testimony given by Lindgren during the September 2, 2014 supplemental proceedings hearing. When asked about Rockmoor's contributions over the years, Lindgren stated that Rockmoor contributed "nothing." Transcript of Sept. 2, 2014 Hearing at 16, line 4. Lindgren then stated "I contributed." *Id.* at 16, line 7. Finally, although Lindgren argues that his post-judgment contributions part of a historical trend of annual contributions, the evidence in the record shows a different story. In the two years prior to the judgments being filed, Lindgren contributed just over $4,000 to his 401(k). *See* R. at Affidavit of Lindgren at 2; Respondent's

Brief of Appellant/Respondent at 5. After the judgments were filed, Lindgren's contributions increased significantly. *Id.* From 2012 to 2014, Lindgren contributed more than $45,000 to his 401(k). *Id.* Lindgren's increased contributions along with the fact that he took distributions shortly after making the contributions evidences Lindgren's fraudulent intent. *See* Transcript of Sept. 2, 2014 Hearing at 19-20. Lindgren deliberately increased his contributions to the 401(k) after the judgments were filed knowing that he could (and would) take distributions when needed.

## IV. LINDGREN'S ADMISSIONS REGARDING HIS OTHER ASSETS ARE EVIDENCE OF HIS FRAUDULENT INTENT.

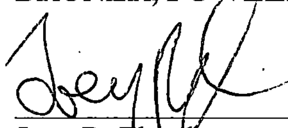
For the first time, Lindgren now makes the argument his post-judgment contributions to his 401(k) are not fraudulent because he has other assets that can be used to satisfy the judgments against him. Essentially, Lindgren argues that he is able to pay but has chosen not to do so. Lindgren's counsel points 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* R. at Transcript of Sept. 2, 2014 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.* As to the vacation home in Colorado, First Citizens domesticated its judgment in Colorado; however, it is behind substantial prior liens which effectively precludes First Citizens from collecting on the judgments. Up to this point, Lindgren has consistently testified that he, individually, has 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. 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. 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 further supports First Citizen's contention that Lindgren has acted with actual intent to hinder delay or defraud First Citizens.

## CONCLUSION

Based on the foregoing and the arguments set forth in the Appellant's Brief of Respondent/Appellant, First Citizens requests that this Court reverse the lower court's ruling finding that Lindgren's post-judgment contributions to his 401(k) are not subject to execution.

**BRUNER, POWELL, WALL & MULLINS, LLC**



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Columbia, SC
February 29, 2016

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

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## CERTIFICATE OF SERVICE

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I, Rita DeCarlis, with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Respondent-Appellant, do hereby certify that on this 29th day of February, 2016, I served Respondent-Appellant, First Citizens Bank & Trust Company's, **Appellant's Initial Reply Brief of Respondent-Appellant** 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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February 29, 2016
Columbia, SC

Rita DeCarlis
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February 29, 2016

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The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. 11629
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SC Court of Appeals

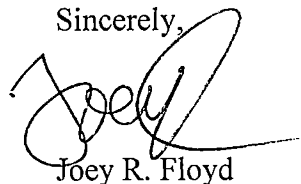

**Re: First Citizens Bank and Trust Company, Inc. v. Blue Ox, LLC, and J. Chris Lindgren**
**Appellate Case No.: 2015-002156**

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 Reply Brief of Respondent-Appellant* in the above-referenced matter. In addition, you will find a certificate of service evidencing service 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