THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No. 2015-002156

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

v.

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

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

# APPELLANT'S BRIEF OF APPELLANT/RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

## STATEMENT OF ISSUE ON APPEAL

Did the lower court err in finding regular, annual contributions to individual retirement accounts to be fraudulent transfers and therefore not exempt from creditors' claims where there was no evidence of actual intent of the judgment debtor to hinder, delay or defraud his creditors?

## 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. [R. pp. 27, 31] The judgments were entered in both cases on January 6, 2011.

On July 11, 2014, the Bank filed petitions for supplemental proceedings in each case and by order of the clerk both matters were referred to the Honorable Marvin H. Dukes, III , master-in-equity for Beaufort County. [R. pp. 35, 38, 3, 4] 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. [R. pp. 5, 8] 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] [R. pp. 97 - 208]

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

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[1] Blue Ox, LLC has no assets and is not involved in this appeal. [R. p. 162, line 24 - p. 163, line 1]

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 at The Hartford sponsored by his employer, Rockmoor, Inc., to which contributions had been made by Rockmoor, Inc. after entry of the Bank's judgments ("401(k)").

During the examination, the Bank moved that any contributions made to the IRA, Roth IRA and 401(k) accounts after entry of the judgments be set aside as fraudulent transfers. [R. p. 155, lines 4 - 21] Lindgren opposed the motion on the grounds the funds were exempt from creditors' claims. [R. p. 153, line 23 - p. 154, line 16] Judge Dukes deferred ruling and agreed to hear from the parties at a later date. [R. p. 157, line 15 - p. 158, line 13]

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 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] [R. p. 275]

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. [R. p. 282] Both parties responded by email on January 19, 2015. [R. pp. 284, 286] Lindgren's email included an amended version of a memorandum previously filed correcting several typographical errors in the original. [R. p. 81] On January 26, 2015, by email

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[2] The 529 Plan had been exhausted by payment of qualifying educational expenses and is not involved in this appeal. [R. p. 278, ¶ 11]

Judge Dukes requested 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 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. [R. p. 11]

Lindgren timely made a Rule 59 motion to reconsider on June 22, 2015. [R. p. 41] The court held a hearing on the motion on July 8, 2015, which was reported. [R. p. 209] The court asked that the parties submit via email whatever materials they wished the court to consider. Both parties complied. [R. pp. 287, 288] 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. [R. p. 48]

On October 7, 2015, the court entered Form 4 orders in each case denying Lindgren's motion to reconsider. [R. pp. 20, 22] 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 review of the court's determination that his IRA contributions were fraudulent and subject to execution by the Bank. The Bank has served notice of its cross-appeal, presumably to challenge the court's decision that Lindgren's 401(k) Plan is exempt from execution.

The amount at issue in Lindgren's appeal is $25,000.00. The amount at issue in the Bank's cross-appeal is $45,366.37.

On November 6, 2015, the court entered a consent order for stay of execution to preserve the status quo pending the outcome of these appeals. [R. p. 24]

## STATEMENT OF FACTS

Lindgren will be 60 years old by the time this case is likely to be heard. [R. p. 113, line 8] Since 1992 and up until 2014, he has participated in a 401(k) pension and profit-sharing plan sponsored by his employer, Rockmoor, Inc. [R. p. 275, ¶¶ 2, 5, 6] A portion of Lindgren's income has been contributed to the 401(k) in every year but one during that period. In 2014 Lindgren's employment with Rockmoor terminated and no further plan contributions are permitted. In addition, since 1986 Lindgren has made regular annual contributions to an individual retirement account in the maximum tax-deductible amounts permitted by law. [R. p. 277, ¶¶ 8, 9]

Records available to Lindgren from Fidelity Investments online go back to 2006. In the 9 years preceding the filing of supplemental proceedings in this case the following retirement contributions have been made by Lindgren or on his behalf by his employer:

| 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 |

Lindgren's history of regular, annual retirement savings has been interrupted only in years of depressed income, 2010 and 2011, and in the year his employment terminated, 2014. Otherwise

Lindgren's history of regular, consistent retirement savings contributions is plain and undisputed. [R. p. 277, ¶¶ 7, 10]

The reduction in Lindgren's income in 2010 affected not only his retirement savings but also his ability to meet other financial obligations. On May 13, 2010, Lindgren executed confessions of judgment in favor of the Bank. [R. pp. 30, 34] In the following year, January 6 of 2011 to be precise, the Bank filed the confessions. [R. pp. 27, 31] However, the Bank did not seek collection of the judgments by filing supplemental proceedings until July 11, 2014. [R. pp. 35, 38] The retirement contributions the Bank challenges as fraudulent were all made between January of 2011 and July of 2014.

The facts as just recounted are undisputed. The only question of fact - indeed the ultimate issue in this particular appeal - is whether Lindgren's four deposits to the IRA accounts made between the entry of judgment and the filing of supplemental proceedings are deemed to be fraudulent. That is, in making these retirement contributions did Lindgren intend to hinder, delay or defraud creditors? There is not a shred of evidence in the record on which to base a finding of fraudulent intent on the part of Lindgren. To the contrary, the undisputed facts show that Lindgren's actions were not taken in anticipation of or in response to the Bank's judgments; he simply continued his long-standing practice of regular, annual retirement savings. [R. p. 277, ¶¶ 7, 10]

The question to be decided is whether South Carolinians are to be denied the opportunity to save for retirement simply because a judgment has been entered against them. Lindgren submits that this is a question of law for this court to decide de novo without deference to the decision of the lower court.

## STANDARD OF REVIEW

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 ERR IN FINDING REGULAR, ANNUAL CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ACCOUNTS TO BE FRAUDULENT TRANSFERS AND THEREFORE NOT EXEMPT FROM CREDITORS' CLAIMS WHERE THERE WAS NO EVIDENCE OF ACTUAL INTENT OF THE JUDGMENT DEBTOR TO HINDER, DELAY OR DEFRAUD HIS CREDITORS?

It is undisputed that Lindgren has made regular, annual contributions to individual retirement accounts since 1986. [R. p. 277, ¶¶ 8 - 10] With one exception, in each year Lindgren has contributed the exact amount permitted by law for which one may qualify for the favorable tax treatment accorded to contributions to and earnings of IRAs. The Bank asks the court to hold that contributions made after entry of its judgments against Lindgren were fraudulent transfers and that the Bank can recover these amounts directly from Fidelity, where the accounts are held.

## HOMESTEAD EXEMPTION STATUTE

Individual retirement accounts are exempt from execution under South Carolina's homestead statute, S.C. Code §15-41-30(A)(13), quoted in its entirety:

> 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.

Sections 408(a) and 408A of the Internal Revenue Code establish IRAs and Roth IRAs respectively. The funds held by Fidelity in Lindgren's IRA and Roth IRA accounts are therefore exempt from attachment, levy and sale under the South Carolina statute. However, this exemption "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." *Id.* The question becomes: Under what circumstances is a deposit made into an IRA or Roth IRA fraudulent within the meaning of the exemption statute? To answer this question the lower court looked to the South Carolina Fraudulent Conveyance Statute, S.C. Code Ann. § 27–23–10 (hereinafter the Statute of Elizabeth). [R p. 13] This was erroneous as a legal matter. The standard for determining a fraudulent conveyance in this context is to be found in the exemption statute, not the Statute of Elizabeth.

The homestead exemption statute explicitly provides that 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." S.C. Code § 15-41-30(A)(13). Federal bankruptcy law at 11 U.S. Code § 522(d) provides that the "following property may be exempted under subsection (b)(2)

of this section: ... (12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." The exemption provided is subject to limitations, as where the debtor makes a transfer "with actual intent to hinder, delay, or defraud" a creditor. 11 U.S. Code §548(a)(1)(A). The exemption for retirement funds is also limited to an amount that is provided for in 11 U.S. Code § 522(n) and adjusted for inflation every three years under 11 U.S. Code § 104(a). As of April 1, 2013, IRA account balances up to $1,245,475.00 are exempt from creditors. [3] This number is indicative of the strong public policy in favor of protecting debtors' retirement savings.

The references to federal law in South Carolina's exemption statute are of fairly recent origin. In 2012, S.C. Code §15-41-30(A)(13) was amended "so as to delete the provision that the exemption only applies to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and to provide that the interest of an individual is exempt from creditor process in certain circumstances." 2012 Act No. 153, § 1, eff May 14, 2012. The phrase "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor" at the end of the first sentence was deleted. And the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans, were added.

Adding the reference to federal bankruptcy law to the exemption statute substituted a specific monetary limit for a need-based test for exempting IRA accounts on a case-by-case basis. Further, in providing that an individual's interest in an IRA is exempt from creditor process "to the same extent" provided under federal bankruptcy law, the amendment incorporated by reference the federal

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[3] Notice published by the Judicial Conference of the United States, dated February 12, 2013, at 2013 Fed. Reg. Vol. 78, No. 35, 12089.

substantive standard for evaluating claims that contributions to individual retirement accounts are fraudulent transfers. Under the amended statute, individual retirement accounts are exempt up to an amount set by federal law except to the extent they have been inflated as a result of contributions deemed to be fraudulent transfers under federal bankruptcy law. As noted above, under federal bankruptcy law, a transfer is fraudulent if made "with actual intent to hinder, delay, or defraud." 11 U.S. Code §548(a)(1)(A).

EXTRINSIC EVIDENCE OF FRAUD

Courts applying this standard uniformly require extrinsic evidence of fraud beyond the mere fact of a transfer of assets before finding a debtor intended to defraud a creditor. This rule - requiring extrinsic evidence of fraud - has been recognized and applied for nearly a century. In 1923, a South Dakota farmer on the eve of bankruptcy exchanged some of his cattle and hogs plus some cash for 21 sheep. He did this because the South Dakota homestead exemption statute permitted him to protect from creditors 2 horses, 2 cows, 5 hogs, and his farm machinery. Cows and hogs over these limits would be lost to creditors. However, the exemption statute also permitted him to protect up to 25 sheep. The farmer had no sheep. By exchanging his excess cattle and hogs for 21 sheep the farmer was able thereby to maximize the benefits and protections accorded to him by the homestead exemption statute. A creditor objected and sought to have the transaction set aside as a fraudulent conveyance. The farmer prevailed. *Forsberg v. Security State Bank*, 15 F.2d 499 (8th Cir.1926)

"It is well settled that it is not a fraudulent act by an individual who knows he is insolvent to convert a part of his property which is not exempt into property which is exempt, for the purpose of claiming his exemptions therein, and of thereby placing it out of the reach of his creditors." *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir.1926) *quoting Crawford v. Sternberg*,

220 F. 73 (8th Cir. 1915). In so doing the debtor "merely avails himself of a plain provision of [the exemption] enacted for the benefit of himself and his family." *Id.* "Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor, because that which the law expressly sanctions and permits cannot be a legal fraud." *Id.* "We do not think one should be penalized for merely doing what the law allows him to do." *Id.* To make out a case of fraudulent conveyance, "there must appear in evidence some facts or circumstances which are extrinsic to the mere facts of conversion of nonexempt assets into exempt and which are indicative of such fraudulent purpose." 15 F.2d at 502.

The principle of *Forsberg* - requiring creditors to make a showing of extrinsic evidence of actual wrongful intent beyond the mere fact of conversion of assets from non-exempt to exempt - has been followed by many other courts in myriad circumstances. *See e.g., In re Addison*, 540 F.3d 805 (8th Cir. 2008); *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985); *In re Reed*, 700 F.2d 986 (5th Cir.1983); *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10th Cir.1991); *In re Jones*, 397 B.R. 765 (Bkrtcy. D.S.C. 2008); *In re Koehler*, 2012 WL 719744 (Bkrtcy. E.D.N.C. 2012); *In re Duncan*, No. S-06-00025-5-AP (Bkrtcy. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrtcy. E.D.N.C. Jun. 18, 2007); *In re Channon*, 424 B.R. 895 (Bkrtcy. D.N.M. 2010); *In re Beaudin*, No. 0935557-EEB (Bkrtcy. D.CO. 2010); *In re Crater*, 286 B.R. 756 (Bankr. D. Ariz. 2002). Some of these cases have involved contributions to IRAs.

A debtor's withdrawing funds from a non-exempt brokerage account and paying down his home mortgage and opening a Roth IRA is not fraudulent. *In re Addison*, 540 F.3d 805 (8th Cir. 2008). The court held that in the absence of extrinsic evidence of fraudulent intent the bankruptcy judge erred in denying discharge to the debtor.

The debtors sold their non-exempt household furnishings at auction, using $12,000 of the proceeds to open two IRA accounts. This was not a fraudulent transfer. *In re Koehler*, 2012 WL 719744 (Bkrtcy. E.D.N.C. 2012).

In another North Carolina bankruptcy case involving retirement plans, the debtor sold his non-exempt truck and used the proceeds to pay off loans secured by his and his wife's retirement accounts. The court refused to find these transactions to be fraudulent, noting: "The effect of the transfers may have been to convert nonexempt assets to assets that would be exempt in bankruptcy, but the amounts are not excessive and the transfers are consistent with the debtors' legitimate attempts to provide for their retirement." *In re Duncan*, No. S-06-00025-5-AP (Bkrtcy. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrtcy. E.D.N.C. Jun. 18, 2007) at page 6 of 8.

A debtor used a tax refund, comprising substantially all of his non-exempt assets, to open a Roth IRA, in which he made the maximum allowable tax exempt contributions for two tax years. This was not a fraudulent conveyance. *In re Channon*, 424 B.R. 895 (Bkrtcy. D.N.M. 2010). Another case involving conversion of a non-exempt tax refund into an IRA reached the same conclusion. *In re Beaudin*, No. 0935557-EEB (Bkrtcy. D.CO. 2010).

Neither the Bank nor the lower court addressed these IRA cases nor did they address the broader principle generally recognized in cases involving conversion of assets from non-exempt to exempt. Indeed, the only case involving retirement funds mentioned by the lower court in its order was discussed in a quoted passage from an ALR annotation, *Gilchinsky v. National Westminster Bank*, 732 A.2d 482 (N.J. 1999). [R. p. 16] In *Gilchinsky,* the debtor withdrew funds from a New York profit-sharing account and transferred them to an IRA account she opened in New Jersey. Not only did the transfer involve all of the debtor's assets, the transfer also violated a temporary

restraining order that had been entered by the New York Supreme Court prohibiting any transfer of the debtor's real or personal property in the State of New York. On these facts the New Jersey Supreme Court had no trouble finding the transfer fraudulent and depriving the debtor of the exemption the IRA account would otherwise have enjoyed under New Jersey law. The *Gilchinsky* case is inapplicable to the situation presented in this case. The actions of the debtor there went far beyond Lindgren's continuation of regular, annual deposits into an IRA.

Other cases demonstrate that debtors can lose the benefit of their statutory exemptions when they take aggressive actions that courts find to present extrinsic evidence of fraudulent intent. For example, *In re Zouhar*, 10 B.R. 154 (Bankr. N.M.1981), involved a particularly aggressive scheme. The debtor borrowed money and secured the loan with non-exempt stock he owned. He used the proceeds to purchase an annuity contract, an exempt asset under New Mexico law. He then arranged for the annuity contract to require that its payments be made to the holder of the note secured by the debtor's stock. Had this been approved, the creditors would have been unable to reach the stock - because it was encumbered by the security agreement - or the annuity contract - because it was statutorily exempt. Had this transaction been approved, the stock would have come back to the debtor after the annuity contract paid off the note. In finding this transaction fraudulent the court aptly observed: "There is a principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered." 10. B.R. at 157, *quoting Dolese v. United States of America*, 605 F.2d 1146, 1154 (10th Cir. 1979).

*Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8th Cir. 1988) is another case worthy of the expression, "pigs get fat and hogs get slaughtered." As summarized by the court:

> Indeed, this case presents a situation in which the debtor liquidated

> almost his entire net worth of $700,000 and converted it to non-exempt property in seventeen transfers on the eve of bankruptcy while his creditors, to whom he owed close to $19,000,000, would be left to divide the little that remained in his estate. Borrowing the phrase used by another court, Tveten "did not want a mere *fresh* start, he wanted a *head* start." *In re Zouhar, supra*, 10 B.R. at 156 *(emphasis in original).* His attempt to shield property worth approximately $700,000 goes well beyond the purpose for which exemptions are permitted.

848 F.2d at 876.

The court in *Tveten* cited a Fourth Circuit case, *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985), for the proposition that "...absent extrinsic evidence of fraud, mere conversion of non-exempt property to exempt property is not fraudulent as to creditors even if the motivation behind the conversion is to place those assets beyond the reach of creditors." *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871, 874 (8th Cir. 1988). In *Ford v. Poston,* a judgment debtor deeded to himself and his wife, as tenants by the entirety with rights of survivorship, certain real property that had been deeded to the debtor by his parents some six months prior. The debtor claimed that this was merely to correct a mistake made by his parents in their deed to him. Applying the extrinsic evidence of fraud rule discussed above, the Fourth Circuit held that the extrinsic fact that the supposedly corrective deed was recorded the day after entry of judgment was sufficient to warrant a finding of intent to defraud on the part of the debtor.

The *Tveten* court also cited *In re Reed*, 700 F.2d 986 (5th. Cir. 1983) in support of the requirement of extrinsic evidence of fraud in such cases. *Id.* In that case the debtor diverted daily receipts from his business to a newly opened personal account, used the money to pay off loans taken to purchase antiques, which he then sold, using the proceeds to reduce mortgage indebtedness on his otherwise exempt personal residence. The debtor was also unable to account for large amounts of

cash expended by him in the year prior to filing. The court recognized that "... mere conversion is not to be considered fraudulent unless other evidence proves actual intent to defraud creditors" but found that "Reed's whole pattern of conduct evinces that intent." *In re Reed*, 700 F.2d 986, 991 (5th. Cir. 1983).

The case before this court presents none of the aggressive or excessive features of the fraudulent transfers described in the above five cases. None of the subject transactions - in this case Lindgren's retirement contributions - was made in response to or in anticipation of the Bank's judgments. To the contrary, as the undisputed evidence makes plain, Lindgren's pattern of regular, annual contributions to retirement accounts remained unchanged. Also, the challenged transactions did not involve all or substantially all of the debtor's net worth; Lindgren's retirement contributions were no more than permitted by applicable law and made at time he was approaching retirement age. His retirement contributions were "not excessive," rather they were "consistent with the debtor's legitimate attempts to provide for [his] retirement." *In re Duncan*, *supra*.

STATUTE OF ELIZABETH

The order prepared by the Bank's counsel, and ultimately entered by the lower court, does not address, much less refute, any of the foregoing points. There is no discussion of: (1) the language of the exemption statute; (2) the purpose and effect of the 2012 amendment thereto; (3) the applicability of federal bankruptcy law to the fraudulent transfer issue; (4) the well-settled rule requiring extrinsic evidence of fraud; or, (5) the numerous cases approving transfers to individual retirement accounts in similar situations. The lower court simply concluded that: "Based on the case law of South Carolina, there is no requirement that a judgment creditor prove 'actual fraud' or a 'fraudulent intent' [and] [e]ven if he did not have fraudulent intent, I find that the case law of this

state clearly prohibits the transfers of non-exempt assets into 'exempt assets' to the detriment of Judgment creditors." [R. pp. 17 - 18] Despite the references to "case law" by the court, no cases in support of the Bank's position are cited, because there are none, in South Carolina or anywhere else.

The court cited *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139 (1932), as support for the proposition that proof of fraudulent intent is not necessary. [R. p. 17] That case, however, involved what the court treated as a gift, a conveyance of lands from a husband to wife without consideration. The holding was unremarkable but inapposite. In this case Lindgren did not, in the words of the *Penning* court, "give his property away."

Under the Statute of Elizabeth, a transfer may be found fraudulent under two conditions: first, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). The Bank argued, and the lower court erroneously agreed, that Lindgren's retirement contributions should be treated as a transfer without consideration, citing in support *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995). That case involved a deed of real property from mother to son without consideration and actual fraudulent intent on the part of the mother to avoid paying her creditors. Like *Penning*, it has no bearing on the issues presently before the court.

Lindgren submits that existing Statute of Elizabeth jurisprudence is not pertinent to an analysis of whether contributions by a debtor to his retirement accounts are fraudulent under South Carolina's homestead statute, S.C. Code §15-41-30(A)(13). As noted at the outset, the exemption statute provides that retirement accounts are exempt "to the same extent permitted" under federal bankruptcy law. Under bankruptcy law a debtor may lose his exemption or be denied discharge if

found to have transferred property with actual intent to hinder, delay, or defraud a creditor. 11 U.S. Code §548(a)(1)(A) and §727(a)(2)(A). This is substantively indistinguishable from the language of South Carolina's Statute of Elizabeth, that refers to transfers made with intent to delay, hinder, or defraud creditors. If there is indeed any difference, in particular as to whether proof of actual intent is required, Lindgren submits that the federal standard is applicable, having been incorporated by reference into the exemption statute by the 2012 amendment discussed above at page 7.

Even if that were not the case, the Statute of Elizabeth by its terms is inapplicable to Lindgren's IRA contributions. The statute speaks to a "gift, grant, alienation, bargain, transfer [or] conveyance." S.C. Code Ann. § 27-23-10. All of the nouns used in this portion of the statute involve a transfer of some kind to another party. That is not what we have here. Just as a movement of funds from an individual's checking account to his savings account is not a transfer, a movement of funds from a debtor's checking account to an investment account, IRA or otherwise, is not a transfer. In neither case is there a change in ownership or control. When Lindgren made payments to Fidelity to be credited to his IRA and Roth IRA accounts, he did not part with ownership or control. The funds remained available to Lindgren at all times and he could withdraw them at will, subject only to his incurring the applicable tax consequences. The payments to Fidelity changed the character of the funds, i.e., from non-exempt to exempt, but that consequence does not transmute the payments into transfers subject to the Statute of Elizabeth. As discussed extensively above, conversion of assets from non-exempt to exempt to take advantage of statutory exemptions is not per se unlawful.

The lower court characterized the retirement contributions as Lindgren "moving money from one pocket to another pocket." But rather than recognize that a movement from one pocket to another does not constitute a transfer, the court erroneously concluded that such a movement "cannot

be a transfer supported by consideration." Lindgren submits that the court was wrong on the question of a transfer.

Further, the lower court erred in failing to recognize the valuable consideration supporting Lindgren's contributions to his Fidelity IRAs. Lindgren did indeed receive valuable consideration, as did Fidelity. With respect to the traditional IRA, Lindgren received: Fidelity's custodial and investment advisory services; an income tax deduction for the amounts contributed; tax-free treatment of all future earnings within the account; and, the right to have the funds repaid to him, with earnings, at a later date, and to be taxed at a potentially lower marginal rate. With respect to the Roth IRA, he received: Fidelity's custodial and investment advisory services; tax-free treatment of all future earnings; and, the right to have the funds repaid to him, with earnings, at a later date, tax-free. And in both accounts Fidelity received fees for its services.

Thus, if one insists that deposits into an IRA are indeed transfers subject to the Statute of Elizabeth, the deposits should be treated as transfers for valuable consideration. *See In re Dunbar*, 313 B.R. 430, 436 (Bankr. C.D. Ill. 2004) (increased value of retirement account following loan repayment constituted debtor's receipt of reasonably equivalent value). If the IRA contributions are treated as transfers for consideration they are exempt from creditors' claims in the absence of actual intent to defraud. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012).

Even if Lindgren's deposits into his IRA accounts are deemed to be transfers subject to the Statute of Elizabeth, and also found to be unaccompanied by consideration, the Bank has still not established its right to relief. In such cases the creditor must show that the debtor failed to retain sufficient property to pay the indebtedness. *Mathis v. Burton*, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995) The Bank has made no such showing. The lower court's order states that

"Lindgren has failed to retain sufficient property/assets to pay First Citizens" and that "Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him." These statements are unsupported by the record.

Lindgren never testified or maintained that he failed to retain assets or that he owned no assets that could be applied to the Bank's judgments. The evidence is to the contrary. He was extensively examined about what the court described as "his 38 investment vehicles," largely consisting of interests in various LLCs and corporations. [R. p. 12] The Bank elicited testimony from Lindgren showing that he continues to own interests in various entities such that his tax return reflected rental receipts in excess of $1 million and cash distributions to Lindgren personally of $10,000.00 per month. [R. p. 173, line 24; p. 203, line 15] The Bank should not be permitted to collect its judgment from exempt retirement accounts simply because it has chosen, for whatever reasons, to ignore Lindgren's other assets. Again, the Bank should be required to establish fraudulent intent on Lindgren's part to overcome the statutory exemption provided for Lindgren's IRAs.

The Bank offered no evidence - other than the retirement contributions themselves - to even attempt to prove fraudulent intent on the part of Lindgren. The lower court's order nevertheless includes a "finding" that Lindgren's retirement contributions were "made with an intent to delay, hinder and defraud his creditors." [R. pp. 15 - 16] To the extent this conclusion is considered to be a finding of fact, it is unsupported by the evidence. It also was controlled or influenced by an error of law inasmuch as the lower court failed to require extrinsic evidence of fraudulent intent beyond the contributions themselves. In any case, because the Bank's fraudulent transfer claim sounds in equity, this court conducts a de novo review and may determine the facts in accordance with its own view of the evidence. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012).

Lindgren filed an affidavit in which he stated under oath: "The IRA and Roth IRA contributions challenged by Plaintiff as fraudulent transfers were part of a decades-long, regular pattern of retirement savings and were not motivated by any intent to evade claims of Plaintiff or any other creditor." [R. p. 278, ¶ 10] On what evidence did the lower court base its finding to the contrary? The only facts before the court and referenced in the court's order included: that Lindgren's IRA contributions were made after entry of the Bank's judgments and with knowledge of the judgments. These facts are plainly insufficient as a matter of law to support the court's conclusion. As demonstrated above, courts uniformly hold that the mere conversion of non-exempt assets into exempt assets, without more, does not establish fraudulent intent. In such cases creditors must come forward with extrinsic evidence, beyond the transfers themselves, to establish that the transfer was accompanied by fraudulent intent. The court's failure to recognize and apply these principles amounts to an error of law requiring reversal of the finding of fraudulent intent.

That the challenged contributions were knowingly made by Lindgren after the entry of judgments against him is, without more, insufficient to establish a fraudulent transfer. As one court aptly observed:

> If conversion of nonexempt into exempt assets should not itself result in denial of discharge, should it do so when it occurs shortly after the debtor has been sued or incurred a large debt, or is insolvent, or is about to file bankruptcy? If that were the rule, it would mean that prospective debtors could engage in exemption planning only up until the point where it appeared they might need to do so.

*In re Crater*, 286 B.R. 756, 765 (Bankr. D. Ariz. 2002).

Other "facts" mentioned by the court in its order and which may have influenced its ultimate conclusion on the question of intent were erroneous and unsupported by the evidence of record. For

example, the court stated: "Lindgren has used the IRA accounts in a number of instances, the maximum amount of money possible on an annual basis (as allowed by the IRS) [sic] to put the money beyond the reach of his judgment creditors." [R. p. 15] It is true that the record reflects a "number of instances" in which Lindgren contributed to his IRAs. In fact the record establishes that Lindgren made payments to his IRAs in every year since 1986, with specifics provided for years 2006 through 2014. [R. pp. 277 - 278, ¶¶ 8 - 9]The court's phrasing of this contribution history as Lindgren's having "used the IRA accounts" in those instances - rather than factually stating that Lindgren made deposits or contributions in a number of instances - is curious but not problematic.

However, when the court states that the use of the IRA accounts in a number of instances was "to put the money beyond the reach of his judgment creditors," it goes too far. "To put" implies purposeful conduct on the part of Lindgren to protect money from creditors. There is no evidence that any of Lindgren's IRA contributions were motivated by any such concern. Thus, this passage suggests that the court based a finding of intent to put the IRA contributions at issue out of reach of the Bank by finding that Lindgren had sought to put money out of the reach of creditors in a "number of instances." The argument is circular and unsupported by any evidence. The undisputed evidence shows that the overwhelming majority of the "instances" Lindgren "used" his IRA account predated the Bank's judgments and could not have been intended "to put" the money beyond the reach of the Bank.

The court also stated that "Lindgren was aggressively moving money into his IRAs." [R. p. 17] The court's characterization of Lindgren's IRA contributions as the maximum possible allowed on an annual basis by the IRS is simply wrong as a matter of law. Lindgren regularly contributed the maximum amount for which a tax deduction could be taken; he did not contribute the maximum

amount possible. The court's misunderstanding of tax law, coupled with its ignoring evidence establishing Lindgren's historical contributions, led it to erroneously describe Lindgren's post-judgment contributions as "aggressive." Lindgren could have contributed sums in excess of the annual contributions he made, but he could not have taken tax deductions for contributions over the maximum permitted. Had he made contributions in excess of the tax deductibility limit the excess could perhaps be characterized as "aggressive" and "fraudulent" within the meaning of South Carolina's homestead statute, S.C. Code §15-41-30(A)(13). But Lindgren's continuing to make regular, annual IRA contributions in amounts qualifying for beneficial tax treatment cannot be properly characterized as aggressive and provides no evidentiary support for a finding of fraudulent intent.

There is no extrinsic evidence in this case that Lindgren's IRA contributions were made with the intent to hinder, delay or defraud because, as Lindgren affirmed under oath, he harbored no such wrongful intent. [R. p. 278, ¶ 10] Being unable to show otherwise the Bank has made the only argument it can come up with: that it is not required to prove fraudulent intent and that a debtor's moving money from a non-exempt checking account to an exempt IRA account is a fraudulent transfer per se. Not only is this position contrary to authority regarded as well-settled as long ago as 1926, *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir.1926), it also leads to a result contrary to the public policy of this state.

PUBLIC POLICY CONSIDERATIONS

It is common knowledge and the court may take judicial notice that contributions to IRA accounts are made with pre-tax dollars, that investment earnings in an IRA are not taxed and that no income taxes are paid until funds are withdrawn. Contributions to a Roth IRA are made with after-

tax dollars but earnings and withdrawals are tax-free. This favorable treatment accorded to contributions to qualifying retirement plans under state and federal tax laws makes plain the public policy of our state and nation to encourage retirement savings. Further, it is the public policy of this state, as expressed through its homestead exemptions, to protect from creditors portions of debtors' property so as to prevent citizens from becoming dependent upon the state for support. *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct.App. 2002) *citing Scholtec v. Estate of Reeves*, 327 S.C. 551, 560, 490 S.E.2d 603, 607 (Ct.App.1997).

In furtherance of this objective South Carolina's homestead statute shields from creditors the very retirement plans to which federal and state tax laws encourage all citizens to contribute. Under current law South Carolinians can protect over a million dollars in an IRA. If the Bank's position were to be sustained it would mean that only those South Carolinians without creditors would be permitted to put aside money to build their retirement nest-egg. That result would be completely at odds with the homestead exemption statute and the important public policy objectives in promoting retirement savings and security of the citizens of South Carolina.

There are situations in which a debtor could seek to abuse or take advantage of the system. Some examples have been provided above. *See Gilchinsky v. National Westminster Bank*, 732 A.2d 482 (N.J. 1999); *In re Zouhar*, 10 B.R. 154 (Bankr. N.M.1981); *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8th Cir. 1988); *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985); *In re Reed*, 700 F.2d 986 (5th. Cir. 1983). In such cases a creditor should obtain relief. But here Lindgren has done no more than the law permits and encourages him to do. Pertinent here is the observation made by the court in dealing with the South Dakota farmer in 1923: "We do not think one should be penalized for merely doing what the law allows him to do." *Forsberg v. Security State Bank*, 15 F.2d 499, 501

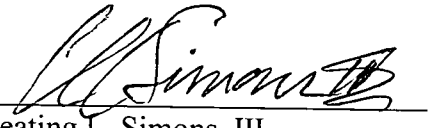
(8th Cir.1926).

If the Bank's argument in this case - that every post-judgment retirement contribution is *ipso facto* fraudulent - were to be accepted it would mean that judgment debtors, even individuals who had merely been sued or threatened with suit or were simply behind on their bills, could no longer engage in reasonable, prudent retirement planning. Nor could they act to take advantage of statutory exemptions at the time they needed them most. The Bank offered, and the lower court cited, no authority in support of the Bank's extreme position. No court in the country has adopted a *per se* rule that any IRA contributions made by a judgment debtor are *ipso facto* fraudulent transfers. Lindgren respectfully submits that this Court should not be the first to do so.

## CONCLUSION

For all the reasons stated the order of the lower court holding Lindgren's post-judgment IRA contributions to be fraudulent transfers and directing Fidelity Investments to issue payment to the Bank in the amount of those contributions should be reversed.

Respectfully submitted



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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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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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that the Appellant's Brief of Appellant/Respondent complies with Rule 211(b), SCACR.

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April 19, 2016

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# PROOF OF SERVICE

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I, Debra Y. Coffey, a paralegal with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Appellant's Brief of Appellant/Respondent upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

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