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, III, Master-in-Equity

Docket Nos.: 2011-CP-07-128 and 2011-CP-07-129

Appellate Case No.: 2015-002156
(Opinion No. 5532 filed January 31, 2018)

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/APPELLANT'S
MEMORANDUM IN SUPPORT OF ITS PETITION FOR REHEARING

Joey R. Floyd, Bar No. 68491
Chelsea J. Clark, Bar No. 102211
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for Respondent

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STATEMENT OF THE CASE

J. Chris Lindgren (Lindgren) and Blue Ox, LLC (Blue Ox) executed confessions of judgment on May 13, 2010 in favor Respondent/Appellant First Citizens Bank and Trust Company, Inc. (First Citizens or the Bank). (R. 27–34). The Honorable Marvin H. Dukes III, Beaufort County Master-in-Equity, held a Supplemental Proceedings hearing on September 2, 2014. (R. 8). Lindgren was extensively examined as to any assets that may have been subject to execution, including funds in retirement accounts. (R. 97–206). First Citizens moved to execute on voluntary post-judgment retirement contributions to these retirement accounts. (R. 11–12). On June 11, 2015, Judge Dukes entered an Order finding that First Citizens was entitled to execute on Lindgren's voluntary post-judgment contributions to his IRA account; however, Lindgren's voluntary, post-judgment contributions to the 401k were not subject to execution. (R. pp. 13–19). Lindgren filed a Motion to Reconsider and a hearing was held on the motion on July 8, 2015. (R. 41–47, 209–74). First Citizens filed a reply memorandum in opposition to the Motion for Reconsideration on July 20, 2015. (R. p. 48–53). On October 7, 2015, Judge Dukes issued a Form 4 Order denying Lindgren's Motion for Reconsideration in both cases. (R. pp. 20–23). On October 12, 2015, Lindgren filed a Notice of Appeal. First Citizens filed a Notice of Cross Appeal on October 20, 2015. The Court of Appeals held oral arguments on October 3, 2017 and issued its opinion affirming and part and reversing in part on January 31, 2018. Presently before the Court is First Citizens' Petition for Reconsideration.

STATEMENT OF THE FACTS

J. Chris Lindgren owes First Citizens one hundred thirteen thousand seven hundred two dollars and four cents, plus interest. (R. 27, 31). First Citizens has not been able to recoup these funds from Lindgren, even though Lindgren has acknowledged that he owes this money. (*Id.*).

Lindgren is an exceptionally sophisticated financial operator who has layered limited liability companies like matryoshka dolls. (R. 130–32). Lindgren, who has an LLM in tax law, has few personal assets, despite having at least thirty-eight different companies that have held such assets as 10,000 shares in Coastal State Bank and a Maserati. (R. 103, 118, 122, 166). Lindgren does not personally own a car, although his spouse, who is self-employed as a skincare salesperson, owns three or four. (R. 102–05).

Lindgren is a former employee and current sole shareholder and president of Rockmoor, Inc. (R. 122–24). Rockmoor, Inc. exists to collect fees for managing the operations of Lindgren's other companies. (R. 126–27, 145). These other companies include real estate investments and export operations. (R. 127–28). Rockmoor, Inc. receives part of its funds through inner-company transfers under Lindgren's multi-corporation consolidated tax accounting scheme. (R. 187–88). Lindgren receives "self-employment income" from Rockmoor, Inc., although he is not presently on the payroll. (R. 189).

Rockmoor, Inc. administers a 401(k) plan for its employees. (R. 275). Rockmoor, Inc. currently has one administrative and bookkeeping employee. (R. 122–24). Previously, Rockmoor, Inc. also employed Lindgren. (R. 123, 275). During that time, Lindgren contends that he regularly contributed to the 401(k) program he sponsored through his company and for which he acted as trustee. (R. 275–76). This account has contained hundreds of thousands of dollars according to

documents submitted by Lindgren to First Citizens. (R. 109). Between the year of judgment, 2010, and 2014, Lindgren contributed just under fifty thousand dollars. (R. 276–77).

Lindgren also has two individual retirement accounts (IRAs). (R. 114–116). One account is a traditional IRA that existed prior to judgment. (R. 277). Between the year of judgment, 2010, and 2014, Lindgren contributed $18,500 to this account. (R. 276–77). The other account is a Roth IRA that was created post-judgment. (*Id.*). In 2014, Lindgren began contributing to this account with $6,500. The subject of this appeal is the money placed in these three accounts following the confessions of judgment.

POINTS FOR REHEARING

The Court's decision in this matter overlooked certain facts about Lindgren's intent. The Court's decision misapprehended legislative intent when construing the homestead exemption statute. The Court's decision will create a number of unintended public policy consequences.

I. The Bank respectfully asserts that the Court overlooked material points of fact indicating intent to defraud in its decision.

The Court may find its own facts in this case. Opinion at 3–4. The Court found that Lindgren's retirement contributions were not fraudulent. Opinion at 6–7. However, the record holds all the evidence necessary to reach the conclusion that Lindgren shielded his money with intent to evade his creditors. For all intents and purposes, Lindgren owns no assets in his personal name, yet companies under his sole control own multiple assets. All of his personal property is arguably "judgment-proof." This is intentional, as reflected by a striking and relentless pattern of stashing, stockpiling, and shielding assets. Through each door lies yet another LLC. The Bank submits that the funds in question would not be in Lindgren's personal name but for the fact that he intended them to be beyond the reach of a judgment creditor. In this case, it is not a sudden dash to relocate funds that betrays the schemer, but instead the careful planning of a man who dedicated his entire academic and professional life to the creation and maintenance of an empire designed like a compartmented submarine to confine any harm to a single LLC, while leaving the others intact. Lindgren has for the intents and purposes of this case turned himself into yet another hollow LLC, one empty compartment. The intent to defraud creditors is not to be found in the mysteriousness of Lindgren's activity, but in the barefaced exploitation[1] of every available

[1] Indeed, Lindgren is so open about the nature of his scheme that his attorney stated at oral arguments in this matter that Lindgren possessed multiple assets such as real estate or trailer parks to pay his creditors, but they would have to do some "piercing" first. This assertion appears to be the subject of the Court's note that "Lindgren cannot shield assets through the use of entities and then contend he has sufficient assets to pay the judgment to advance his legal argument in this case." Opinion at 8 n.5.

mechanism in state and federal law to retain the use of money that belongs to those he has taken from and not repaid. The Court should not look for evidence of fraud or deceptive intent in crude financial dealings of an amateur, but instead in the artful craftsmanship of an expert.

Under the authority cited by the Court, a single badge of fraud creates a rebuttable presumption while multiple badges of fraud create an inference. Opinion at 8 (quoting *Coleman v. Daniel*, 261 S.C. 198, 210, 199 S.E.2d 74, 80 (1973) and *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999)). The Court also quoted, "The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all." Opinion at 7–8 (quoting *Coleman v. Daniel*, 261 S.C. at 209, 199 S.E.2d at 80). One indication of fraud not discussed in the Court's opinion is "'the magnitude of the conveyance compared with the grantor's means.'" *Bates v. Cobb*, 29 S.C. 395, 404, 7 S.E. 743, 745 (1888) (citations omitted). The Court noted that Lindgren does not personally possess assets, outside of those in question, to pay the judgments. Opinion at 8 n.5. The Bank asserts that it indicates intent to defraud creditors to transfer the bulk or sum total of a person's assets into shielded accounts. It not only indicates that Lindgren has created a method whereby he is able to generate income he uses to support himself without it ever being reachable by his creditors, it also shows intent to exploit the generosity of the legislature in allowing exemptions such as this one.

Of the indicia cited by the Court, the following apply to the specific circumstances in this case: indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, 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. Opinion at 7–8 (quoting *Coleman v. Daniel*, 261 S.C. at 209–10, 199 S.E.2d at 80). Lindgren prepared his entire professional life for the threat of litigation, he routinely

kept his entire estate in shielded companies or accounts, all of which were controlled by himself. He has intentionally and with intent to defraud placed the only assets he personally owns in accounts his creditors cannot reach through execution.[2] An inference of fraud is warranted by the facts on the record in this case. The fact that Lindgren made a habit of contributing to his retirement accounts means little when weighed against the series of indicia present in this case. It is the Bank's opinion that Lindgren should not escape justice merely because he is exceptionally talented at doing so.

II. The Bank respectfully asserts that the Court misapprehended key points of law in interpreting the exemption statute.

In the Court's opinion, it held that retirement account contributions are "converted into a protected asset, but *ownership* is not gifted, transferred, granted, or otherwise conveyed to another party." Opinion at 6 (emphasis in original). This holding overlooks prior Court of Appeals precedent regarding the execution of assets held by banks in supplemental proceedings. In 1995, the Court held, that funds on deposit with a bank are "no longer the personal property of the depositor; instead, the depositor has a chose in action against the bank for recovery of the deposit." *Johnson v. Serv. Mgmt.*, 319 S.C. 165, 168, 459 S.E.2d 900, 902 (Ct. App. 1995) (citing *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933) and 30 *Am. Jur. 2d Executions & Enforcement of Judgments* § 651 (1994). Funds owing to a judgment debtor may not be reached through execution by the sheriff, but only by supplemental proceedings precisely because they are no longer the personal property of the judgment debtor. *See generally McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933). For this reason, the Court misapprehended the nature of the "conversion" of Lindgren's funds and the fact that a transfer or conveyance did occur.

[2] Indeed, the very fact that there is no consideration in this case point to intent to defraud. Instead of a sham conveyance to another company or family member, Lindgren has "converted" his assets while still maintaining total control over them, even in name.

Because a conveyance or transfer did occur, and as the Court properly ruled, occurred without consideration, the Statute of Elizabeth does apply to the analysis of fraud in this case.

The Bank argues that the Court's decision misapprehends the plain language of the Homestead Exemption statute. The statute provides:

> (A) 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:
>
> ***
>
> (13) 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.
>
> (14) The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code Ann. § 15-41-30(A)(13)–(14) (Supp. 2017) (emphasis added).

Under South Carolina principles of statutory construction, the cardinal rule is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). This means that "it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* (citing *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998)).

The Homestead Exemption statute exempts "the right to receive" individual retirement accounts. S.C. Code Ann. § 15-41-30(A)(13) (Supp. 2017). The plain-language definition of "receive" is "to come into possession of." *Receive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/receive (last visited Feb. 7, 2018). This is consistent with the legal concept

of accounts receivable. Black's Law Dictionary variously defines "receivable" as "awaiting receipt of payment," "subject to call for payment, or "an amount owed." BLACK'S LAW DICTIONARY 1383 (9th ed. 2009). The plain language meaning of "right to receive" does not encompass a right to contribute post-judgment. It encompasses payments a debtor may *receive*. This is supported by comparison to the Georgia exemption statute, which protects the debtor's "right to receive" a "payment from an individual retirement account within the meaning of Title 26 U.S.C. Section 408 to the extent reasonably necessary for the support of the debtor and any dependent of the debtor . . . ." O.C.G.A. § 44-13-100(a)(2)(F).

Furthermore, the exemption statute provides, "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 Ann. § 15-41-30(A)(13) (Supp. 2017) (emphasis added). The Court's decision states that converting money by transferring it into a retirement account is not a "conveyance." *See* Opinion at 6. However, the specific language of the statute contemplates a "fraudulent conveyance." To hold that there cannot be a fraudulent conveyance is to not only disregard the plain language of the statute, but also to flout the intent of the legislature. "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Hodges v. Rainey*, 341 S.C. at 85, 533 S.E.2d at 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Additionally, to hold that the "conversion" is not a conveyance is to render meaningless words of the statute. A statute should never be construed so that a word, clause, sentence, provision or part is rendered superfluous or meaningless. *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008) (citations omitted). "The legislature is presumed to intend that its statutes accomplish something." *Id.* (citing

State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 812 (2005)). To give full meaning to the plain language of the statute and to effectuate the meaning of the legislature, the Court should conclude that placing funds in a retirement account may be a conveyance.

The same sentence of the statute provides, "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 Ann. § 15-41-30(A)(13) (Supp. 2017) (emphasis added). The Court held in its opinion that the funds in a 401(k) account are not subject to execution under subsection (14). This holding disregards the phrase in the subsection directly above that addresses fraudulent conveyances to an IRA or "other plan." To read this sentence as applying only to the IRAs covered in subsection (13) is to not give meaning to the words "other plan." The rules of statutory construction state that "statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). To give effect to the intent of the legislature, the Court should hold that this sentence applies to all retirement plans, including those covered by subsection (14).

III. The Bank respectfully asserts that the Court's decision will create negative public policy implications.

The Court's decision protects professional judgment evaders. The facts and law emphasized in the Court's opinion, such as the habitual nature of Lindgren's actions, lend themselves to persons who carefully strategize to protect their assets in case of bankruptcy or judgment. By essentially concluding that any retirement transfer that is not shockingly fraudulent, is shielded from judgment, the Court is creating a loophole that debtors will easily be able to exploit. Funds to be protected must simply change accounts. This can be instantaneous shielding

in the age of online banking and could occur while in the court house for supplemental proceedings.

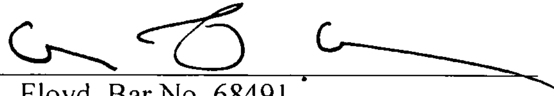
"The primary source of the declaration of the public policy of the State is the General Assembly; the Courts assume this prerogative only in the absence of legislative declaration." *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925). In this case, the Court's opinion is broader than it must be and has the potential to set precedent that leads to abuse of the exemption statute. The Court's opinion may be confined to findings of fact regarding the specific situation at head without reaching the construction of the statutes. The Court's construction of the statutes, combined with its opinion of the facts, creates the impression that only the most scandalous "conversion" of assets to exemption form might be under question in supplemental proceedings. Judgment debtors will be able to manipulate their funds in such a way that they maintain total use and control with impunity while the parties to whom they owe money are left with nothing. This is unjust. Courts hearing matters in equity like this one have the inherent power to do all things reasonably necessary to ensure 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) (citations omitted).

CONCLUSION

For the above-stated reasons, Respondent/Appellant petitions the Court to rehear this matter.

[SIGNATURE PAGE TO FOLLOW]

BRUNER, POWELL, WALL & MULLINS, LLC



Joey R. Floyd, Bar No. 68491
Chelsea J. Clark, Bar No. 102211
Post Office Box 61110 (29260)
1735 St. Julian Place, Suite 200 (29204)
Columbia, South Carolina
(803) 252-7693
Attorneys for the Respondent/Appellant

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Appellant Case No.: 2015-002156

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

v.

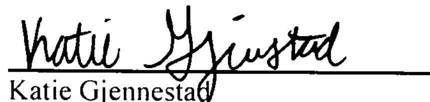
Blue Ox, LLC and J. Chris Lindgren, ... Defendants,

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

PROOF OF SERVICE

I, Katie Gjennestad, with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Respondent-Appellant, do hereby certify that on this 12th day of February, 2018, I served the **Notice of Appearance, Respondent/Appellant's Petition for Rehearing and Respondent/Appellant's Memorandum in Support of its Petition for Rehearing** 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
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412



February 12, 2018
Columbia, SC

Katie Gjennestad

BRUNER, POWELL, WALL & MULLINS, LLC
ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

WARREN C. POWELL, JR., P.A.**
HENRY P. WALL
E. WADE MULLINS III, P.A.
BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

** Also Admitted in District of Columbia

JAMES L. BRUNER, P.A.
OF COUNSEL

ANN F. ALLISON
CAITLIN C. HEYWARD
CHELSEA J. CLARK

AUTHOR'S E-MAIL: KGJENNESTAD@BRUNERPOWELL.COM

February 12, 2018

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SC Court of Appeals

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: **First Citizens Bank and Trust Company, Inc. v. Blue Ox, LLC, and J. Chris Lindgren**
Appellate Case No.: 2015-002156
Our File No.: 8-2545-116

Dear Ms. Kitchings:

Enclosed for filing with your office please find the original and seven (7) copies of the Respondent/Appellant's Petition for Rehearing, Respondent/Appellant's Memorandum in Support of its Petition for Rehearing and a check for $25.00 to cover the filing fee.

You will also find an original and one copy of the Notice of Appearance and Proof of Service. Please file the original and return the clocked in copies to our courier who will be waiting. If you have any questions, please do not hesitate to call me. Thank you for your assistance in this matter.

With my highest regards, I am,

Sincerely,

Katie Gjennestad

CJC/kg
Enclosures
Cc: Keating L. Simons, III, Esq. (Via U.S. Mail w/copy of Encl.)