THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Curtis G. Clark, Master-in-Equity

Case No.: 2009-CP-24-01272

Appellate Case No.: 2016-001972

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

vs.

Dorn Properties, Inc. and Henry A. Dorn.....Respondents.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

I. WHETHER THE MASTER-IN-EQUITY ERRED IN DETERMINING THAT A DEBTOR'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ACCOUNTS ARE NOT SUBJECT TO EXECUTION BY A CREDITOR, WHERE THE DEBTOR, HAVING FULL KNOWLEDGE OF THE JUDGMENT AGAINST HIM AND CLAIMING TO HAVE NO ASSETS WHICH COULD BE APPLIED TO THE JUDGMENT, CONTRIBUTED MORE THAN $68,000.00 TO HIS INDIVIDUAL RETIREMENT ACCOUNTS AFTER THE JUDGMENTS WERE FILED?

STATEMENT OF THE CASE

On August 3, 2010, Appellant, First Citizens Bank and Trust Company, Inc. ("Appellant" or "First Citizens"), obtained a deficiency judgment in the amount of $149,665.92 against Respondents, Dorn Properties, Inc. ("DPI") and Henry A. Dorn ("Dorn") (Dorn Properties, Inc. and Henry A. Dorn are collectively referred to hereinafter as "Respondents"). (R. p. 10). To date, Respondents have made no payments towards the judgment. (R. p. 23). A supplemental proceedings hearing was held on March 24, 2015. (R. p. 63). Based upon testimony at the hearing and through discovery, First Citizens discovered that, in spite of owing First Citizens in excess of $149,665.92, Dorn had, individually and through his employer, a business of which he is an owner, contributed $71,626.54 to Individual Retirement Account number 2691-3891 at Stifel, Nicolaus & Co., Inc. (the "IRA") after the judgment in favor of First Citizens was filed. (R. p. 19). $3,516,48 of the $71,626.54 was rolled over from an IRA at Park Sterling Bank. (R. p. 20). Thus, Dorn voluntarily contributed $68,110.06 to his IRA account after the judgment held by First Citizen was filed against him. (*Id.*).

At the supplemental proceedings hearing, First Citizens moved to set aside Dorn's post judgment contributions to his IRA. (R. p. 104-106). The Court declined to rule on the issue during the hearing and requested that the parties submit briefs. (R. pp. 106-107). On June 2,

2016, First Citizens filed a Motion to Set Aside and Execute on Post-Judgment Contributions by Henry A. Dorn to IRA Accounts along with a memorandum in support of its motion. (R. p. 17). Thereafter, Dorn filed a memorandum in opposition to First Citizen's motion. (R. p. 47). On July 19, 2016, the parties again appeared before the Honorable Curtis G. Clark for a hearing on First Citizen's motions to execute on Dorn's post judgment contributions to his IRA account. (R. p. 02). Upon hearing the arguments of counsel, the Master-In-Equity denied First Citizen's motion. (R. pp. 05-06). The Court issued an order denying the motion on September 9, 2016. (R. p. 02). First Citizens filed its Notice of Appeal challenging Judge Clark's ruling on September 21, 2016.

STATEMENT OF FACTS

On August 3, 2010, Appellant, First Citizens Bank and Trust Company, Inc. ("Appellant" or "First Citizens"), obtained a deficiency judgment in the amount of $149,665.92 against Respondents. (R. p. 10). Respondents have made no payments towards the judgment. On March 24, 2015, a supplemental proceedings hearing was held before the Honorable Curtis G. Clark. During the hearing, Dorn testified that he held an IRA with Stifel, Nicolaus & Co., Inc. Dorn testified that he believed the balance of the IRA to be approximately $162,000.00 at the time of the hearing. (R. p. 71). Through testimony and discovery, it was discovered that Dorn made minimal contributions to his IRA in 2010 and 2015. (R. p. 03). However, from 2011 to 2014, Dorn made a substantial contribution to his IRA each year. (*Id.*). In 2011, Dorn contributed slightly less than the maximum amount allowed by law to his IRA. (*Id.*). From 2012 to 2014, Dorn testified that he had contributed the maximum amount allowed by law to his IRA. (*Id.*). In total, Dorn and/or his employer, contributed more than $68,000.00 to his IRA after the judgment

was filed against him.[1] (*Id.*). During that same period, Dorn made no payments towards the judgment in favor of First Citizens. (R. p. 23).

Following the supplemental proceedings hearing and after the exchange of discovery, First Citizens filed a Motion to Set Aside and Execute on Post-Judgment Contributions by Henry A. Dorn to his IRA Accounts. (R. p. 17). Both sides submitted briefs to the Court addressing the issue. (R. pp. 19; 47). On July 19, 2016, the parties appeared before the Honorable Curtis G. Clark for a hearing on First Citizen's motion. (R. p. 02). The hearing was consolidated with another matter involving the same legal question—whether voluntary, post-judgment contributions to an IRA by a judgment debtor are exempt from the creditor process?[2] (*Id.*) The Court heard arguments from both parties and denied First Citizens' motion from the bench. (R. pp. 154-156). In the Order denying the motion, Judge Clark ruled that South Carolina provides broad protection to IRAs from judgment creditors. (R. pp. 05-06). Judge Clark further ruled that contributions to an IRA by a judgment debtor should only be set aside when the debtor contributes more than the maximum amount allowed by law or where a debtor contributes a non-exempt asset into an IRA in order to preclude that assets from execution by a judgment creditor. (*Id.*). This appeal follows.

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).

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[1] It should be noted that Dorn is self-employed. (R. p. 19). In 2010, Dorn co-founded Dorn, Dempsey & Associates, Inc. (R. p. 33). As a co-owner of the business, Dorn has significant control over the amount it contributes to his individual IRA each year.

[2] The other matter is *First Citizens Bank and Trust Company, Inc. v. KSD, Inc., et al.*, Civil Action No. 2009-CP-24-1019. The only difference in the two cases is the amount contributed to the IRA by the respective debtors. (R. p. 126-127).

ARGUMENTS

First Citizens requests that this Court reverse the Master-in-Equity's holding that Dorn's voluntary, post-judgment contributions to his IRAs are not 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 ERRED IN DETERMINING THAT DORN'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO HIS IRA ACCOUNTS ARE NOT 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, 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 to determine what exemptions and the amount of each exemption a debtor is entitled to is well established. When a debtor files for bankruptcy, a bankruptcy estate is created that 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.

"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 recognized 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 exempt 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 applying to 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 make contributions to an IRA throughout the bankruptcy process. Allowing a debtor to continue to make contributions during bankruptcy would frustrate the entire purpose of filing. 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 Dorn'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 contributing to an IRA 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 erred in determining that Dempsey's voluntary, post-judgment contributions to his IRAs are not 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 look to S.C. Code 27-23-10 (hereinafter referred to as "the Statute of Elizabeth") and related case law. 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. *See Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d, 406, 408 (Ct. App. 1995). Rather, First Citizens must only show that (1) Dorn was indebted to First Citizens at the time of the contributions at issue; (2) Dorn's

contributions were voluntary, i.e., based upon no consideration or upon nominal consideration; and (3) Dorn 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 Dorn's IRAs after the judgment was entered against him on August 3, 2010. As such, it is undisputed that Dorn was indebted to First Citizens at the time of the contributions at issue. As to the second element in *Mathis*, there was no consideration for the transfer of the money from Dorn 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, Dorn 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. Dorn was in the exact same position before and after the transfers to his IRAs. His assets were simply in a different account.

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—Dorn. 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 Dorn. Dorn introduced no evidence demonstrating the contributions to his IRA were based upon consideration.

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 easily established by the fact that Dorn has not paid a single dollar towards the judgment. Regardless of whether Dorn is unable to the pay the judgments or he has simply chosen not to pay the judgment, the fact remains that First Citizens has not been paid the debt they are rightfully owed. Accordingly, because the evidence shows that (1) Dorn was indebted to First Citizens at the time of the contributions at issue; (2) the contributions were "voluntary", i.e., not supported by valuable consideration; and (3) Dorn has failed to retain sufficient funds to satisfy the judgments, the Master-In-Equity erred in determining that Dorn's post-judgment transfers to his IRAs are not subject to execution.

If this Court finds that the post-judgment contributions were supported by consideration, Dorn'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. As discussed above, it is undisputed that Dorn 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 Dorn is both the grantor and the grantee. Therefore, if this Court finds that there was

consideration for the transfers, 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*

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, South Carolina 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 Dorn's post-judgment contributions to his IRAs meet at least six of the nine badges of fraud listed above.[3] "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, Dorn (1) was indebted to First Citizens at the time of the contributions; (2)

[3] 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.

transferred the funds to himself, the person with whom he clearly has the closest relationship, (3) made the contributions while First Citizens was actively pursuing the judgment, (4) reserved the benefit of the funds to himself, and (5) retained possession of the funds. The presence of these badges of fraud surrounding Dorn's post-judgment contributions reveals Dorn's actual intent to hinder, delay, or defraud First Citizens from collecting the judgments.

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."). After the judgments were filed, Dorn took deliberate action designed to put his assets beyond the reach of First Citizens. The law does not condone such action. Once the judgment was filed, the homestead exemption no longer exempts contributions made to Dorn's IRA. Dorn's post-judgment contributions were fraudulent conveyances designed to hinder, delay and defraud First Citizens. Therefore, the Master-In-Equity's holding that Dorn's post-judgment contributions to his IRA are not subject to execution should be reversed.

II. BECAUSE AN INTERPRETATION OF S.C. CODE § 15-41-30(A)(13) WHICH PROTECTS ONLY 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 ERRED IN DETERMINING THAT LINDGREN'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO HIS IRA ACCOUNTS ARE NOT 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 money set aside for retirement; 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 contribute 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

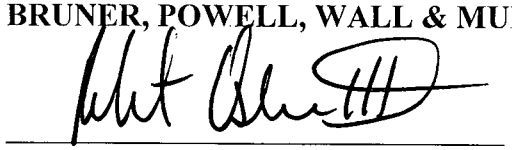
courts around the country recognize the need to strike a balance between protecting debtors and allowing creditors to collect judgments.

"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 $68,000.00 for retirement all the while claiming that he has no assets to satisfy the judgment against him. Again, First Citizens only seeks to execute on the funds which Dorn contributed to his IRA after the judgment was filed against him. First Citizens recognizes that it is sound policy to exempt certain funds from creditors. However, under Dorn's interpretation of the homestead exemption, debtors, even those in no danger of becoming destitute, can not only protect past retirement savings but also continue to set aside additional funds. All the while, the debtor claims that they have no assets to satisfy a judgment 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 thereon, adequately protects the rights of both debtors and creditors. It also comports with the language of the homestead exemption which only exempts a debtor's current interest in an IRA. *See* S.C. Code § 15-41-30(A)(13). There is no mention of the exemption applying to future contributions. *See id.* Rather, the statute's reference to section 522(d)(12) makes clear that the homestead exemption only protects retirement "funds to the extent that those funds are in a fund or account...." 11 U.S.C § 522(d)(12); s*ee id.* An interpretation which allows a debtor to ignore his creditors while continuing to increase his retirement savings is in direct conflict with the law and the ideals of justice and fairness.

CONCLUSION

For the reasons set forth above, First Citizens respectfully requests that this Court reverse the Master-In-Equity's decision finding Dorn's post-judgment contributions to his IRAs not subject to execution.

BRUNER, POWELL, WALL & MULLINS, LLC



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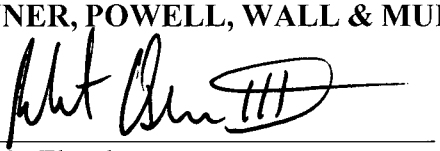
CERTIFICATE OF COUNSEL

I, Robert C. Osborne III, Esquire, do hereby certify that the Brief of Appellant First Citizens Bank and Trust Company, Inc. complies with Rule 221(b), SCACR.

BRUNER, POWELL, WALL & MULLINS, LLC



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