

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas**

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

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MAY 11 2018

Civil Action Nos.: 2011-CP-07-128 and 2011-CP-07-129 **S.C. SUPREME COURT**

Appellate Case No.: 2015-002156

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

v.

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

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

**APPENDIX TO FIRST CITIZEN'S
PETITION FOR WRIT OF CERTIORARI**

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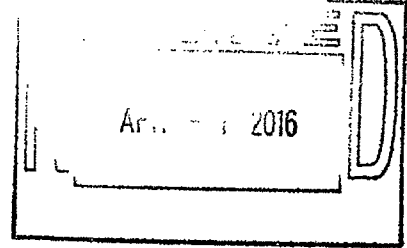
Record on Appeal

SIMONS & DEAN
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March 30, 2016



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, Defendants of Whom J. Chris Lindgren is the Appellant/Respondent
Civil Action Nos.: 2011-CP-07-128 and 2011-CP-07-129
Appellate Case No. 2015-002156

Dear Ms. Kitchings:

In connection with the above referenced, please find enclosed fourteen (14) bound copies of the Record on Appeal and one (1) unbound copy of the Record on Appeal together with an original and one copy of the Proof of Service. Upon filing, please return to our office a clocked-in copy in enclosed self addressed and stamped envelope.

With best regards, I am

Your very truly,

James D. Floyd

JDF/dc

Enclosures

cc: Joey Randell Floyd, Esquire (w/enclosures)
Robert Crum Osborne, III, Esquire (w/enclosures)

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.

PROOF OF SERVICE

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 Record on Appeal upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

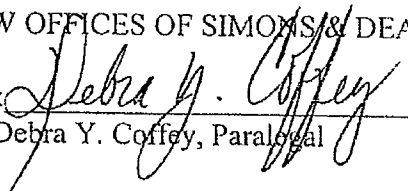
Joey Randell Floyd, Esquire
BRUNER, POWELL, WALL & MULLINS, LLC
P.O. Box 61110
Columbia, SC 29260

Robert Crum Osborne, III, Esquire
BRUNER, POWELL, WALL & MULLINS, LLC
P.O. Box 61110
Columbia, SC 29260

This 30th day of March, 2016.

LAW OFFICES OF SIMONS & DEAN

BY:


Debra Y. Coffey, Paralegal

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

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Respondent/Appellant,

v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
First Citizens Bank and Trust	)	
Company, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
	)	
Respondents.	)	
	)	

ORDER OF REFERENCE
 (Case No.: 2011-CP-07-128)

2014 JUL 11 PM 4:12
 CLERK OF COURT S.C.

Judgment having been rendered, an Execution issued, a *Nulla Bona* Return made to said Execution, the Petitioner having moved for an examination of the Respondents pursuant to the provisions of §15-39-310, *et seq.*, as amended; it is therefore,

ORDERED that this action be and the same hereby is referred to The Honorable Martin H. Dukes III, Master-in-Equity, to take the testimony arising under the pleadings and to rule upon all motions necessary to dispose of this matter, to include but not limited to, motions to dismiss, motions to appoint Receiver, motions to continue the matter, and motions to sell all or certain property of judgment debtor in satisfaction of the Petitioner's debt and has authority to enter a Final Order. Any appeal from the Master-In-Equity is directly to the Supreme Court.

AND IT IS SO ORDERED.

Beaufort, South Carolina

7-11, 2014

8 / M. S. Scream
 Presiding Circuit Court Judge, Beaufort County

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
First Citizens Bank and Trust)
Company, Inc.,)
Petitioner,)
v.)
Blue Ox, LLC and J. Chris Lindgren,)
Respondents.)

IN THE COURT OF COMMON PLEAS

ORDER OF REFERENCE

(Case No.: 2011-CP-07-129)

2014 JUL 11 PM 4:12
JENNIFER M. BERNARD
CLERK OF COURT
BEAUFORT COUNTY, S.C.

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AND IT IS SO ORDERED.

Beaufort, South Carolina

7-11, 2014

S. H. K. [Signature]
Presiding Circuit Court Judge, Beaufort County

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
First Citizens Bank and Trust	)	
Company, Inc.,	)	<u>RULE TO SHOW CAUSE</u>
	)	(Case No.: 2011-CP-07-128)
Petitioner,	)	
	)	
v.	)	
	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
	)	
Respondents.	)	
	)	

Judgment having been rendered, an Execution issued, a *Nulla Bona* return made to said Execution, the Circuit Court having Ordered this matter to be referred to the Master-In-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure; it is therefore,

ORDERED that **an Authorized Representative for Blue Ox, LLC and J. Chris Lindgren**, DO APPEAR before **Beaufort County Master-in-Equity, The Honorable Marvin H. Dukes III, Beaufort County Courthouse, 102 Ribaut Road, Room 212, Beaufort, South Carolina**, on the 2nd day of September, 2014, at 9:30 a.m., to be examined under oath concerning assets of Respondents; TO SHOW CAUSE why the above-named Respondents' property should not be applied towards satisfaction of the Judgment set out in the Petition; and TO SHOW CAUSE why a Receiver of the Respondents' property should not be appointed, pursuant to the provisions of § 15-39-430, et seq. South Carolina Code Ann. (Law. Co-op. 1976);

IT IS FURTHER ORDERED that the Respondents are hereby restrained and enjoined from making any transaction or transfer or other disposition of property belonging to him/it which is not exempt from execution pending further Order of this Court.

YOU ARE FURTHER ORDERED TO BRING WITH YOU TO THE HEARING

copies of the following:

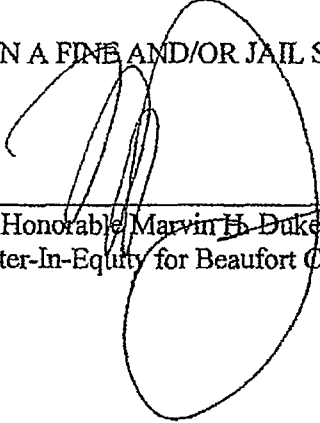
1. Bank statements for all bank accounts owned in whole or in part by Defendants for the past year.
2. Pay stubs for the past five (5) years.
3. Federal and State Tax returns for the past five (5) years.
4. Insurance Policies [home, automobile, real estate, etc...].
5. Records of any real estate owned, either in whole or in part.
6. Records of vehicles and boats.
7. Any inventories of personal property.
8. Copies of any contracts entitling you to payment of money.
9. Any personal financial statements prepared for any reasons either by your self or by any independent sources, with any applicable notes attached thereto from the past five (5) years and, if not reflected in such statements, a complete description of any and all contingent liabilities, including guarantees, by you.
10. Any and all year-end financial statements of any corporation, partnership, trust, or other business entity in which you hold directly or indirectly a 10% interest (balance sheet statements and statement of income and expenses) audited and unaudited for the last three years of the respective entities with any applicable notes attached thereto and any subsequently prepared financial reports or statements prepared by the entity or on its behalf for any reason.
11. Any and all documents and financial records that relate to, refer to, or describe, recount, or are in any way related to any transfer of or pledge, hypothecation, gift, assignment, or granting of a security interest in assets owned or controlled by him, made by him, or on his behalf in excess of One Hundred Dollars (\$100) in any single transaction from the past five (5) years to the present, and any and all documents and financial records that relate to, refer to, to describe the disposition of proceeds, promissory notes, or other evidence of indebtedness or consideration

received from such transfers, pledges, etc.

12. Any and all documents and financial records that relate to, refer to, or describe any and all transactions between him and members of his family.
13. Any and all documents and financial records, including appraisals which relate to, refer to, or describe or substantiate any valuation of assets disclosed in your financial statements/records produced under paragraph 11 above, and the manner of valuation or fixing of value of such assets, prepared either by you or by any third party or entity relating to these assets.
14. Any and all documents which relate to, or recount or describe any pending or potential claim against you or against any entity referenced in paragraph 10 above, whether or not currently in litigation, together with any and all documents which relate to, recount, or describe any judgments held against you or any entity referenced in paragraph 10.
15. Any and all documents which relate to, refer to, or describe any trust in which you are a beneficiary, including any financial statements of the aforesaid trust and the dispositive provisions of the trust as relates to you and members of your family.

IF YOU DO NOT APPEAR IT MAY RESULT IN THE APPOINTMENT OF A RECEIVER AND AWARDING THE PLAINTIFF/PETITIONER SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUESTED. YOU MAY ALSO BE HELD IN CONTEMPT OF COURT, WHICH COULD RESULT IN A FINE AND/OR JAIL SENTENCE.

AND IT IS SO ORDERED.


 The Honorable Marvin H. Dukes III
 Master-In-Equity for Beaufort County

Beaufort, South Carolina

7/17, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
First Citizens Bank and Trust	)	
Company, Inc.,	)	<u>RULE TO SHOW CAUSE</u>
	)	(Case No.: 2011-CP-07-129)
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	)	
v.	)	
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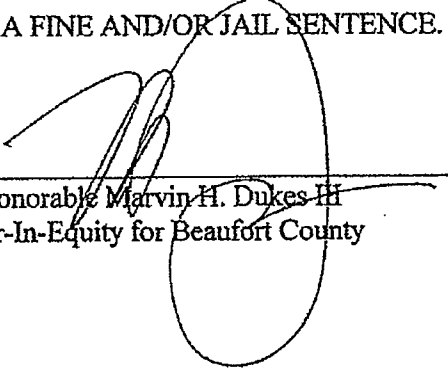
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4. Insurance Policies [home, automobile, real estate, etc...].
5. Records of any real estate owned, either in whole or in part.
6. Records of vehicles and boats.
7. Any inventories of personal property.
8. Copies of any contracts entitling you to payment of money.
9. Any personal financial statements prepared for any reasons either by your self or by any independent sources, with any applicable notes attached thereto from the past five (5) years and, if not reflected in such statements, a complete description of any and all contingent liabilities, including guarantees, by you.
10. Any and all year-end financial statements of any corporation, partnership, trust, or other business entity in which you hold directly or indirectly a 10% interest (balance sheet statements and statement of income and expenses) audited and unaudited for the last three years of the respective entities with any applicable notes attached thereto and any subsequently prepared financial reports or statements prepared by the entity or on its behalf for any reason.
11. Any and all documents and financial records that relate to, refer to, or describe, recount, or are in any way related to any transfer of or pledge, hypothecation, gift, assignment, or granting of a security interest in assets owned or controlled by him, made by him, or on his behalf in excess of One Hundred Dollars (\$100) in any single transaction from the past five (5) years to the present, and any and all documents and financial records that relate to, refer to, to describe the disposition of proceeds, promissory notes, or other evidence of indebtedness or consideration

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AND IT IS SO ORDERED.


 The Honorable Marvin H. Dukes III
 Master-In-Equity for Beaufort County

Beaufort, South Carolina

7 / 14 , 2014

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER IN EQUITY	
	)		
COUNTY OF BEAUFORT	)	Case Nos.: 2011-CP-07-128 and 2011-CP-07-129	
	)		
First Citizens Bank and Trust	)		
Company, Inc.,	)		
	)		
Plaintiff/Petitioner,	)	<u>ORDER</u>	
	)		
v.	)		
	)		
Blue Ox, LLC and J. Chris Lindgren,	)		
	)		
Defendants/Respondents,	)		
	)		
	)		

2014 JUN 11 PM 4:00

INTRODUCTION

This matter came before me, the Beaufort County Master-In-Equity, on September 2, 2014, for a Supplemental Proceedings hearing. The Defendant, J. Chris Lindgren ("Lindgren") appeared, with Counsel, and was examined by Counsel for the Plaintiff/Petitioner to see if the Defendants had assets that were subject to execution and levy to be applied towards the Judgments that First Citizens holds against the Defendants/Respondents. During the Supplemental Proceedings hearing, Counsel for the Plaintiff/Petitioner discovered certain assets (in particular, Lindgren's voluntary post-judgment contributions to his 401k, IRAs and an education account) and moved to execute on the voluntary post-judgment contributions to the 401k and the IRA(s) during the hearing on September 2, 2014 hearing. Further discovery was conducted by Counsel for the Plaintiff/Petitioner after the September 2, 2014 hearing and this matter was set for a Continuation of the Supplemental Proceedings on November 3, 2014.¹ But, prior to the hearing scheduled for November 3, 2014, the parties agreed to submit briefs to the

¹ The Defendants/Respondents obtained a new attorney after the September 2, 2014 hearing and before the scheduled November 3, 2014 hearing.

1 of 9

Beaufort County Master In Equity on the Plaintiff's Motion to Execute on the debtor's post-judgment voluntary contributions to his 401(k), IRA accounts and Education account.

FACTS

The debtors Blue Ox, LLC and J. Chris Lindgren executed Confessions of Judgment on May 13, 2010, both of which were filed with the Beaufort County Clerk of Court on January 6, 2011.² During the September 2, 2014 Supplemental Proceedings hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. (p.7-8, lines 24-1). Rockmoor, Inc. ("Rockmoor") has a 401(k) that is a profit sharing plan that is funded through "employee deferrals." (p.14, lines 5-24). Lindgren testified that he is no longer an employee of Rockmoor (p.27, lines 22-23). Lindgren testified that he has formed 38 LLCs at serve as "investment vehicles." (p.22, lines 2-6). Lindgren owns a membership interest in various LLCs (some of which are single member LLCs and some of which are multiple member LLCs) and the various LLCs own a number of real properties. Rockmoor is Lindgren's company that he uses as a management company to manage payroll and operations for the various LLCs.

Lindgren testified during the hearing that he had an IRA at Fidelity, which he estimated to have approximately \$25,000.00 in the IRA at the time of the hearing. (p.18, lines 1-11). After the hearing on September 2, 2014, the parties engaged in the exchange of documents and some post-judgment discovery. The parties stipulated to the following facts regarding Lindgren's contributions to his 401(k), the IRA accounts and the Education account:

Mass Mutual f/k/a The Hartford 401(k) (Account No.: 2812622) → \$45,366.67 in contributions since 2011

Fidelity IRA (Acct. No.: 197-778290) → \$18,500.00 in contributions since 2011

Fidelity Roth IRA (Acct. No.: 218-395517) → \$6,500.00 in contributions in 2014

² C/A No.: 11-CP-07-128 (\$100,000.00) and C/A No.: 11-CP-07-129 (\$13,702.24).

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Fidelity Education Account (Acct. No.: 618-670855) → \$22,000.00 contributed in 2012

In summary, Lindgren has voluntarily contributed a total of \$92,366.67 to his 401(k), IRA accounts and an Education Account.³ For the reasons set forth herein, I find that the Plaintiff/Petitioner is entitled to execute on the debtor J. Chris Lindgren's voluntary contributions to the IRA accounts.

HOLDING

A Judgment Creditor is entitled to execute on the assets of a debtor, with limited exceptions as provided in S.C. Code Ann. § 15-41-30. The exemption found at S.C. Code § 15-41-30(A)(13), provides, in relevant part:

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, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. (emphasis mine).

South Carolina's prohibition on fraudulent transfers/fraudulent conveyances, *i.e.*, the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

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

³ As of the time of the hearing, the education account no longer contained funds sufficient for the Plaintiff to pursue.

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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 mine).

In *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Cl. App. 1995), the South Carolina Court of Appeals held that:

For existing creditors, 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. *Mathis* at 264-65 (citations omitted)

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." See *In re Goldschein*, 241 B.R. 370 (Bkry. D.Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *Id.* at 379 (emphasis mine).

Notwithstanding this fact, this Court notes that Lindgren has submitted an Affidavit in an effort to show/establish a "pattern" of contributing to his retirement account for a number of years. Having carefully reviewed and considered Lindgren's Affidavit, this Court finds that the

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voluntary post-judgment transfers to the 401k are not subject to execution by First Citizens Bank.

However, for the reasons set forth in this Order, the voluntary post-judgment contributions to the IRAs are subject to execution. In this instance, there was no consideration for the transfer of the money into the IRA accounts. The attempted movement of a non-exempt asset (i.e. cash) into the IRA accounts, a purportedly exempt account cannot be a transfer supported by consideration because the transfer was nothing more than Lindgren moving money from one pocket to another pocket in an effort to protect cash from his judgment creditors. Lindgren was indebted to First Citizens at the time of all of the voluntary contributions to his IRA accounts and education account and Lindgren has failed to retain sufficient property/assets to pay First Citizens. Therefore, these transfers should be set aside.

Even if this Court were to assume that there was consideration, as a matter of equity these transfers should be set aside. It is undisputed that Lindgren voluntarily elected to contribute \$25,000.00 to his IRA accounts, all the while knowing that he owed First Citizens in excess of \$110,000.00. All contributions by Lindgren were voluntary and made with full knowledge of the Judgments that First Citizens held against him. Between 2011 and 2014, Lindgren made no effort to pay First Citizens' Judgments. In spite of Lindgren's voluntary contributions to his IRA accounts and Education account, along with his 38 investment vehicles, Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him. 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) to put the money beyond the reach of his judgment creditors. To the extent that this Court might be required to find this as a fraudulent intent, this Court finds that that the post-judgment voluntary contributions by

s JG

Lindgren to his IRAs and the education account were all contributions made with an intent to delay, hinder and defraud his creditors.

Marjorie A. Shields has provided some helpful insight on this issue in an article. In particular, the article provides that when a judgment debtor moves money into retirement accounts, the fact that the money is moved into an apparent "exempt" account, the Courts can, and should, set aside those transfers as fraudulent transfers.

In *Gilchinsky v. National Westminster Bank N.J.*, 159 N.J. 463, 732 A.2d 482, 23 Employee Benefits Cas. (BNA) 1382 (1999), the Supreme Court of New Jersey recognized that a judgment debtor's individual retirement account (IRA) enjoys qualified immunity from attachment by creditors under N.J. Stat. Ann. § 25:2-1, however, under the Fraudulent Transfer Act, N.J. Stat. Ann. §§ 25:2-20 to 25:2-34, such funds may be attached if deposited as a fraudulent conveyance by a debtor. The court stated that the purpose behind the expansive protection afforded to IRAs is to prevent creditors from attaching money earmarked for retirement. That immunity, however, the court said, is not absolute; creditors can attach funds transferred into an IRA in "preference" of other creditors, as a "fraudulent conveyance," or if the money is subject to a support order. In exempting fraudulent conveyances from the otherwise broad-based immunity, the court said, the legislature clearly intended to prevent debtors from using New Jersey law to shield their assets from creditors. The court recognized a similar exception to the exemption of IRAs for fraudulent conveyances under New York law, N.Y. C.P.L.R. 5205(c)5. The court stated that, although New York law generally exempts individual retirement account (IRA) funds from attachment by creditors seeking to enforce money judgments, that exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment.

Marjorie A. Shields, *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487 (Originally published in 2003).

While South Carolina's Homestead Exemption Act does offer debtors protection in limited situations and circumstances, the Homestead Exemption Act, along with the Statute of Elizabeth protects judgment creditors when a judgment debtor takes assets that are subject to

6/2/99

execution (i.e. cash) and attempts to place those assets beyond the reach of his creditors by moving the cash into IRA accounts and education accounts in an effort to cloak the cash with an exemption.

While First Citizens is not obligated to prove fraud, intent or attempted fraud, it is apparent to this Court that Lindgren had full knowledge of the fact that he owed First Citizens a substantial amount of money by way of the Confessions of Judgment. In spite of that fact, Lindgren was aggressively moving money into his IRAs and an education account – all of which might have some limited protections under the Homestead Exemption statutes. Notwithstanding that fact, our case law holds as follows:

No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. "The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud." *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139, 146 (1932) (quotations and citations omitted).

Based on the case law of South Carolina, there is no requirement that a judgment creditor prove "actual fraud" or a "fraudulent intent." While it is not necessary for the Judgment creditor to prove "fraud" or fraudulent intent, I find that Lindgren did move cash into his IRAs and the education account with intent to avoid paying the Plaintiff. Even if he did not have fraudulent intent, I find that the case law of this state clearly prohibits the transfers of non-exempt assets

7 JG m

into "exempt assets" to the detriment of Judgment creditors. I find that Lindgren's transfers to his IRA accounts should be treated as fraudulent transfers.

Based on the facts of this case, this Court holds that all of Lindgren's past judgment conveyances into his IRA accounts are subject to execution. Lindgren's contributions to these various accounts are fraudulent transfers/fraudulent conveyances and First Citizens is entitled to this money such that said proceeds can be applied towards the First Citizens' 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).

With regards to the 401(k), I find that the statute, SC Code 15-41-30(14) precludes execution on the 401(k) plan. SC Code 15-41-30(A)(14) provides that the debtor has an exemption in: "The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974." Since the 401(k) is an ERISA plan, I find the proceeds in the 401(k) exempt from execution.

ORDER

For the reasons set forth herein, this court hereby sets aside Lindgren's voluntary post-judgment contributions to his IRA accounts as fraudulent transfers/fraudulent conveyances. First Citizens shall be entitled to serve this Order on Fidelity and upon service of this Order upon Fidelity, said entities are hereby ORDERED to issue payments (bank wires or checks), made payable to First Citizens Bank, to Counsel for First Citizens Bank, within fifteen (15) days of being served with a copy of this Order, in the following amounts:

8 349 n

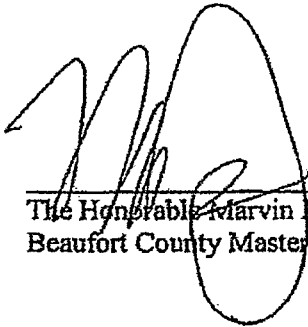
Fidelity IRA (Acct. No.: 197-778290) → \$18,500.00

Fidelity Roth IRA (Acct. No.: 218-395517) → \$6,500.00

To the extent that there are any tax ramifications and/or penalties relating to these payments by Fidelity, Lindgren shall be responsible for the payment of said taxes and/or penalties.

IT IS SO ORDERED.

March 6/10, 2015
Beaufort, South Carolina


The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity

992

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE APPENDIX 0025

CASE NO. 2011 CP-07-00128

FIRST CITIZENS BANK AND TRUST COMPANY INC.

BLUE OX LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY	Attorney for : ☐ Plaintiff ☐ Defendant
	or
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAME BEFORE ME ON DEFENDANT J. CHRIS LINDGREN'S MOTION TO RECONSIDER AND FOR STAY OF EXECUTION OF JUDGMENT, FILED 6/26/2015. AFTER HEARING FROM PARTIES AND FURTHER REVIEW OF THE FILE I HEREBY DENY THE MOTION.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

APPENDIX 0026

Circuit Court Judge

3069

Judge Code

Date

10/6/15

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

THOMAS WARING

JOEY R. FLOYD

KEATING L. SIMONS III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-00129

FIRST CITIZENS BANK AND TRUST COMPANY INC.

BLUE OX LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAME BEFORE ME ON DEFENDANT J. CHRIS LINDGREN'S MOTION TO RECONSIDER AND FOR STAY OF EXECUTION OF JUDGMENT, FILED 6/26/2015. AFTER HEARING FROM PARTIES AND FURTHER REVIEW OF THE FILE I HEREBY DENY THE MOTION.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. APPENDIX 0028

Circuit Court Judge

3069

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

THOMAS WARING

JOEY R. FLOYD

ATTORNEY(S) FOR THE PLAINTIFF(S)

KEATING L. SIMONS III

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

11/6/15

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER IN EQUITY
COUNTY OF BEAUFORT	)	Case Nos.: 2011-CP-07-128 and 2011-CP-07-129
First Citizens Bank and Trust Company, Inc.,	)	
Plaintiff/Petitioner,	)	
v.	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
Defendants/Respondents.	)	

CONSENT ORDER
FOR STAY OF EXECUTION

2015 NOV -6 PM 12:46
CLERK OF COURT
SOUTH CAROLINA
J. CLIP

THIS MATTER comes before the court by way of consent of the parties hereto. The Defendant/Respondent J. Chris Lindgren has filed a Notice of Appeal to appeal this Court's Orders filed on June 11, 2015 and October 7, 2015 (referred to herein as "the Orders") in the above-referenced matters. In summary, the subject matter of the Orders relates to this Court's granting of Plaintiff's Motion to Execute on certain accounts held by Fidelity Investments ("Fidelity"), which are owned by J. Chris Lindgren.

Upon receipt of the October 7, 2015 Orders denying the Defendant's J. Chris Lindgren's Motion to Reconsider and For Stay of Execution of Judgment, Counsel for the Plaintiff served the October 7, 2015 Orders denying J. Chris Lindgren's Motion to Reconsider upon Fidelity.

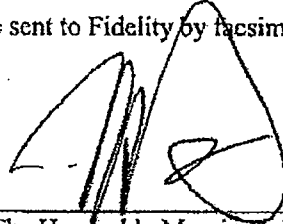
Upon receipt of the Orders, Fidelity has represented to Counsel for Plaintiff and Counsel for Defendant, J. Chris Lindgren, that Fidelity liquidated certain investments in preparation for payment to the Plaintiff. Prior to payment to Plaintiff, Counsel for Plaintiff and Counsel for the Defendant, J. Chris Lindgren, reached an agreement to preserve the status quo and prevent the parties hereto from posting bonds in accordance with Rule 241, SCACR.

WHEREAS Counsel for Plaintiff and Counsel for the Defendant, J. Chris Lindgren, have agreed that Fidelity shall hold the amounts it liquidated in cash in the Fidelity account(s) and said amount(s) shall not be withdrawn, reinvested or otherwise manipulated during the pendency of this appeal. The parties agree that Fidelity shall hold the proceeds in trust until the appeal of the Orders has concluded.

IT IS HEREBY ORDERED, by the Consent of the Parties hereto, Fidelity shall hold

the amounts liquidated in cash in the Fidelity accounts until the appeal of the Orders has concluded. Fidelity shall not make any disbursements or do anything with the liquidated amounts until the appeal of the Orders has concluded.

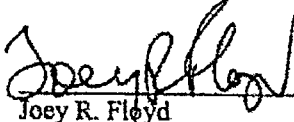
IT IS FURTHER ORDERED that this order be sent to Fidelity by facsimile.
AND IT IS SO ORDERED.

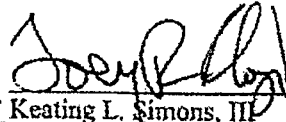


The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity

November 7, 2015
Beaufort, South Carolina

We So Move and Consent:

 Date: 11/2/15
Joey R. Floyd
Bruner Powell Wall & Mullins, LLC
1735 St. Julian Place, Ste 200 (29204)
P.O. Box 61110
Columbia, South Carolina 29260-1110
(803)252-7693
Attorneys for Plaintiff
First Citizens Bank and Trust Company, Inc.

 Date: 11/2/15
Keating L. Simons, III
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for the Defendants
Blue Ox, LLC and J. Chris Lindgren

With the
express
agreement
of

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO.: 2011-CP-07-129
	)	
First Citizens Bank and Trust Company,	)	
Inc.,	)	
	)	
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
	)	
Defendants.	)	

I, Annie Rich, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Plaintiff, do hereby certify that on the 15th day of December, 2015, I served the pleadings/documents set forth below on the person(s) identified below, by depositing copies thereof in the U.S. Mail, postage-paid, in an envelope securely sealed, and addressed to the following.

Pleadings/Documents Served:

Consent Order For Stay of Execution

Person(s) Served:

Keating L. Simons, III, Esquire
 Simons & Dean
 147 Wappoo Creek Drive, Suite 604
 Charleston, SC 29412

Annie Rich

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) COURT FILE NO 2011-CP-07-128

FIRST CITIZENS BANK AND TRUST,
COMPANY, INC.

Plaintiff,

vs.

BLUE OX, LLC and J. CHRIS LINDGREN,

Defendants.

11 JAN -6 PM 3:50
JERAMIA ROSEBLOU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

CONFESSION OF JUDGMENT

We, the undersigned, BLUE OX, LLC ("Blue Ox") and J. CHRIS LINDGREN ("Lindgren") (Blue Ox and Lindgren referred to collectively as the "Debtors") do hereby confess judgment in this action in favor of FIRST CITIZENS BANK AND TRUST COMPANY, INC. (the "Creditor") as follows: for judgment against us for the sum of One Hundred Thousand and 00/100 (\$100,000.00) Dollars plus interest and costs as hereafter provided.

THIS CONFESSION OF JUDGMENT (this "Confession") is for money justly due the Creditor arising upon the following facts:

1. Creditor is a corporation organized and existing under the laws of the State of South Carolina and doing business in Beaufort County, South Carolina.
2. Blue Ox, LLC is a South Carolina limited liability company doing business in Beaufort County, South Carolina, and J. Chris Lindgren is a resident of Beaufort County, South Carolina.
3. Blue Ox is in debt to Creditor by virtue of that certain Promissory Note dated September 2, 2005, in the original principal amount of One Million One Hundred Thousand and 00/100 (\$1,100,000.00) Dollars with interest thereon as provided therein, (as amended, the "Note") dated September 2, 2005.

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COPY

4. Lindgren is in debt to Creditor by virtue of that certain Unlimited Guaranty Agreement (the "Guaranty") pursuant to which Lindgren guaranteed the payment of the Note.

5. Debtors are now in default under the terms of the Note and the Guaranty with a principal balance due and owing thereon in the amount of One Million Two Thousand One Hundred Eighty Five and 16/100 (\$1,002,185.16) Dollars, together with interest thereon at the rate provided in the Note from December 4, 2009.

6. Blue Ox has this date deeded the property (the "Property") described in the Mortgage securing the Note, and Creditor has received proceeds and credited the sum of \$836,297.96 against the balance due on the Note.

7. Blue Ox executed and delivered a Promissory Note (the "Deficiency Note") dated the date hereof in favor of Creditor in the original principal amount of One Hundred Thousand and 00/100 (\$100,000.00) Dollars together with interest thereon as set forth in the Deficiency Note. The Deficiency Note is in the amount of a portion of the agreed upon reduced balance due on the Note after the conveyance of the Property and the application of the proceeds received by Creditor from the sale.

8. Lindgren, on the same date, executed and delivered an Unlimited Guaranty (the "Deficiency Guaranty") whereby he guaranteed the payment of the Deficiency Note.

9. In the event of an Event of Default (as defined in the Deficiency Note) under the terms of the Deficiency Note, and only after all applicable notice and cure periods under the terms of the Deficiency Note have expired, Debtors hereby authorize the entry of judgment against them in favor of Creditor in an amount equal to the entire outstanding amount on in the Deficiency Note through the filing and recording of this Confession.

10. Any payments made by Debtors and/or other moneys collected by Creditor as payment under the Deficiency Note shall be subject to offset and credit against the Deficiency Note and this Confession.

11. This Confession may be filed in the office of the Clerk of Court for the Beaufort County

CHARLESTON/MC9913v1

Court of Common Pleas, in Beaufort, South Carolina, and any other county or state in which the Debtors may be found, provided, however that any such multiple filings shall constitute only one debt in the aggregated amount of One Hundred Thousand (\$100,000.00) Dollars, plus applicable interest and additional attorneys' fees and costs, less any payments that have been tendered by Debtors to Creditor.

That the facts stated herein are true of Debtors' knowledge.

WHEREFORE, Debtors confess judgment in favor of Creditor as follows:

1. For judgment under the Deficiency Note and Deficiency Guaranty against the Debtors, Blue Ox, LLC and J. Chris Lindgren, in the sum of One Hundred Thousand and 00/100 (\$100,000.00) Dollars, together with interest thereon at the contract rate of 3.0% from the date hereof and attorneys fees and costs, until the filing of this document in the Office of the Clerk of Court for Beaufort County and thereafter, at the legal rate on the judgment from the date of such filing, until paid.

The facts stated herein are true of Debtors own knowledge.

AND FURTHER, the undersigned Affiants sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren
Its Member

J. Chris Lindgren

(L.S.)

(L.S.)

CERTIFIED TRUE COPY
Jawicki
5/29/13 SIGNED
DATED

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

The Debtors, Blue Ox, LLC, by J. Chris Lindgren, its Member and J. Chris Lindgren, individually, being duly sworn say that the above statement and Confession of Judgment, and the facts therein mentioned are true to their own knowledge, and further sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren

Its: Member

J. Chris Lindgren

(L.S.)

J. CHRIS LINDGREN
CLERK OF COURT
BEAUFORT COUNTY, S.C.

11 JAN -6 PM 3:50

SWORN to before me this

13 day of Nov, 2010.

Notary Public for South Carolina

My Commission Expires: _____

Bret Pruett
My Commission Expires
March 16, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	COURT FILE NO. <u>1111-CP-07-129</u>
FIRST CITIZENS BANK AND TRUST, COMPANY, INC.	)	
Plaintiff,	)	
vs.	)	
BLUE OX, LLC and J. CHRIS LINDGREN,	)	
Defendants.	)	

11 JAN -6 PM 3:50
CLERK OF COURT
BEAUFORT COUNTY, SC

CONFESSION OF JUDGMENT

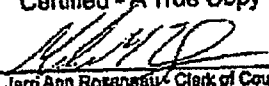
We, the undersigned, BLUE OX, LLC ("Blue Ox") and J. CHRIS LINDGREN ("Lindgren") (Blue Ox and Lindgren referred to collectively as the "Debtors") do hereby confess judgment in this action in favor of FIRST CITIZENS BANK AND TRUST COMPANY, INC. (the "Creditor") as follows: for judgment against us for the sum of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars plus interest and costs as hereafter provided.

THIS CONFESSION OF JUDGMENT (this "Confession") is for money justly due the Creditor arising upon the following facts:

1. Creditor is a corporation organized and existing under the laws of the State of South Carolina and doing business in Beaufort County, South Carolina.
2. Blue Ox, LLC is a South Carolina limited liability company doing business in Beaufort County, South Carolina, and J. Chris Lindgren is a resident of Beaufort County, South Carolina.
3. Blue Ox is in debt to Creditor by virtue of that certain Promissory Note dated September 2, 2005, in the original principal amount of One Million One Hundred Thousand and 00/100 (\$1,100,000.00) Dollars with interest thereon as provided therein, (as amended, the "Note") dated September 2, 2005.

CHARLESTON 109224v1

Certified - A True Copy


Jerri Ann Rotensky, Clerk of Court
Beaufort County, SC - Melissa Kibby

4. Lindgren is in debt to Creditor by virtue of that certain Unlimited Guaranty Agreement (the "Guaranty") pursuant to which Lindgren guaranteed the payment of the Note.

5. Debtors are now in default under the terms of the Note and the Guaranty with a principal balance due and owing thereon in the amount of One Million Two Thousand One Hundred Eighty Five and 16/100 (\$1,002,185.16) Dollars, together with interest thereon at the rate provided in the Note from December 4, 2009.

6. Blue Ox has this date deeded the property (the "Property") described in the Mortgage securing the Note, and Creditor has received proceeds and credited the sum of \$836,297.96 against the balance due on the Note.

7. Blue Ox executed and delivered a Promissory Note (the "Deficiency Note") dated the date hereof in favor of Creditor in the original principal amount of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars together with interest thereon as set forth in the Deficiency Note. The Deficiency Note is in the amount of a portion of the agreed upon reduced balance due on the Note after the conveyance of the Property and the application of the proceeds received by Creditor from the sale.

8. Lindgren, on the same date, executed and delivered an Unlimited Guaranty (the "Deficiency Guaranty") whereby he guaranteed the payment of the Deficiency Note.

9. Pursuant to the terms of the Deficiency Note, Debtors shall be in default ("Default") under the Deficiency Note upon their failure to pay the Deficiency Note in full on or before November 13, 2010.

10. In the event of a Default under the terms of the Deficiency Note, and only after all applicable notice and cure periods under the terms of the Deficiency Note have expired, Debtors hereby authorize the entry of judgment against them in favor of Creditor in an amount equal to the entire outstanding amount on in the Deficiency Note through the filing and recording of this Confession.

11. Any payments made by Debtors and/or other moneys collected by Creditor as payment under the Deficiency Note shall be subject to offset and credit against the Deficiency Note and this Confession.

12. This Confession may be filed in the office of the Clerk of Court for the Beaufort County Court of Common Pleas, in Beaufort, South Carolina, and any other county or state in which the Debtors may be found, provided, however that any such multiple filings shall constitute only one debt in the aggregated amount of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars, plus applicable interest and additional attorneys' fees and costs, less any payments that have been tendered by Debtors to Creditor.

That the facts stated herein are true of Debtors' knowledge.

WHEREFORE, Debtors confess judgment in favor of Creditor as follows:

1. For judgment under the Deficiency Note and Deficiency Guaranty against the Debtors, Blue Ox, LLC and J. Chris Lindgren, in the sum of Thirteen Thousand Seven Hundred Two and 04/100 (\$13,702.04) Dollars, together with interest thereon at the contract rate as provided in the Deficiency Note from the date hereof and attorneys fees and costs, until the filing of this document in the Office of the Clerk of Court for Beaufort County and thereafter, at the legal rate on the judgment from the date of such filing, until paid.

The facts stated herein are true of Debtors own knowledge.

AND FURTHER, the undersigned Affiants sayeth naught.

Blue Ox, LLC

By: J. Chris Lindgren

Its: Member

J. Chris Lindgren

(L.S.)

(L.S.)

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

The Debtors, Blue Ox, LLC, by J. Chris Lindgren, its Member and J. Chris Lindgren, individually, being duly sworn say that the above statement and Confession of Judgment, and the facts therein mentioned are true to their own knowledge, and further sayeth naught.

Blue Ox, L.L.Z.
By: J. Chris Lindgren (L.S.)
Its: Member
J. Chris Lindgren (L.S.)

SWORN to before me this
18 day of May, 2010.
Bret P. G.
 Notary Public for South Carolina
 My Commission Expires: _____

11 JAN -6 PM 3:50
RECEIVED
CLERK OF COURT

Bret Pruehs
My Commission Expires
March 16, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
First Citizens Bank and Trust	)	
Company, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
	)	
Respondents.	)	
	)	

**VERIFIED PETITION FOR
SUPPLEMENTAL PROCEEDINGS**
(Case No.: 2011-CP-07-128)

2014 JUL 11 PM 4:12
CLERK OF COURT
BEAUFORT COUNTY S.C.

PETITIONER WOULD RESPECTFULLY SHOW:

1. That heretofore Petitioner recovered and recorded judgment against Respondents Blue Ox, LLC and J. Chris Lindgren ("Respondents") as hereinafter set forth; and that there is still due and owing on said judgment the sum indicated, Respondents having failed and refused to satisfy same:

JUDGMENT ENTERED: January 6, 2011
JUDGMENT ROLL # : 2011-CP-07-128
AMOUNT DUE : \$100,000.00, plus interest

2. That execution thereafter was duly issued to the Sheriff of Beaufort County against Respondents and said Sheriff has returned same NULLA BONA.

3. That upon information and belief, the Respondents have assets in the County not exempt from levy which Respondents unjustly refuse to apply toward satisfaction of said judgment.

4. That Petitioner is informed and believes that it is entitled under the law and statutes to have an examination of Respondents in supplementary proceedings and to ascertain and discover any and all property and assets, real, personal, or mixed, and wheresoever situated,

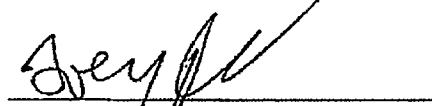
belonging to Respondents; or in which Respondents could claim any interest, solely or in conjunction with any person, firm, or corporation or entity, and any or all of which is or should be made applicable by the Court to the payment of said debt.

5. In addition, Petitioner is entitled to the appointment of a receiver of Respondents for any and all of the aforesaid property, assets, or effects which are so discovered or revealed in order to carry said judgment into effect.

WHEREFORE Petitioner prays that this court do inquire into the matters hereinabove alleged and that it issue such order or orders granting relief to which Petitioner believes it is entitled, for all expended and statutory costs allowable for this proceeding, and for such other and further relief and remedies as may be allowable and which the Court may deem proper.

And further Petitioner requests this matter be referred to the Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure with authority to enter a final order with any appeal being directly to the South Carolina Supreme Court.

BRUNER, POWELL, WALL & MULLINS, LLC

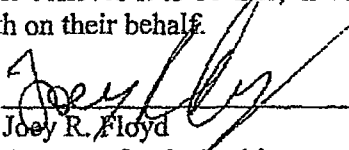


Joey R. Floyd
P.O. Box 61110
Columbia, South Carolina 29260-1110
(803) 252-7693
Attorneys for Petitioner
First Citizens Bank and Trust Company, Inc.

June 17, 2014

VERIFICATION

PERSONALLY appears Joey R. Floyd, who first being duly sworn, deposes and says that he is the attorney for the Petitioning judgment creditor and that he has read the foregoing Petition and knows the contents thereof and the same are true of his own knowledge except to matters alleged therein on information and belief, and as to these, he believes it to be true, that he is the attorney for the Petitioner and is authorized to make this oath on their behalf.


Joey R. Floyd
Attorney for the Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 10 DAY OF June, 2014


Notary Public for South Carolina

My Commission Expires: 01-11-2018

2014 JUL 11 PM 4:12
CLERK OF COURT
SOUTH CAROLINA
COUNTY OF S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
First Citizens Bank and Trust	)	
Company, Inc.,	)	
	)	VERIFIED PETITION FOR
Petitioner,	)	SUPPLEMENTAL PROCEEDINGS
	)	(Case No.: 2011-CP-07-129)
v.	)	
	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
	)	
Respondents.	)	

2014 JUL 11 PM 4:11
 CLERK OF COURT
 BEAUFORT COUNTY, S.C.

PETITIONER WOULD RESPECTFULLY SHOW:

1. That heretofore Petitioner recovered and recorded judgment against Respondents Blue Ox, LLC and J. Chris Lindgren ("Respondents") as hereinafter set forth; and that there is still due and owing on said judgment the sum indicated, Respondents having failed and refused to satisfy same:

JUDGMENT ENTERED: January 6, 2011
 JUDGMENT ROLL # : 2011-CP-07-129
 AMOUNT DUE : \$13,702.04, plus interest

2. That execution thereafter was duly issued to the Sheriff of Beaufort County against Respondents and said Sheriff has returned same NULLA BONA.

3. That upon information and belief, the Respondents have assets in the County not exempt from levy which Respondents unjustly refuse to apply toward satisfaction of said judgment.

4. That Petitioner is informed and believes that it is entitled under the law and statutes to have an examination of Respondents in supplementary proceedings and to ascertain and discover any and all property and assets, real, personal, or mixed, and wheresoever situated,

belonging to Respondents; or in which Respondents could claim any interest, solely or in conjunction with any person, firm, or corporation or entity, and any or all of which is or should be made applicable by the Court to the payment of said debt.

5. In addition, Petitioner is entitled to the appointment of a receiver of Respondents for any and all of the aforesaid property, assets, or effects which are so discovered or revealed in order to carry said judgment into effect.

WHEREFORE Petitioner prays that this court do inquire into the matters hereinabove alleged and that it issue such order or orders granting relief to which Petitioner believes it is entitled, for all expended and statutory costs allowable for this proceeding, and for such other and further relief and remedies as may be allowable and which the Court may deem proper.

And further Petitioner requests this matter be referred to the Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure with authority to enter a final order with any appeal being directly to the South Carolina Supreme Court.

BRUNER, POWELL, WALL & MULLINS, LLC

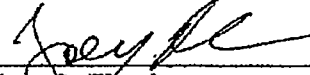


Joey R. Floyd
P.O. Box 61110
Columbia, South Carolina 29260-1110
(803) 252-7693
Attorneys for Petitioner
First Citizens Bank and Trust Company, Inc.

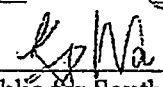
June 17, 2014

VERIFICATION

PERSONALLY appears Joey R. Floyd, who first being duly sworn, deposes and says that he is the attorney for the Petitioning judgment creditor and that he has read the foregoing Petition and knows the contents thereof and the same are true of his own knowledge except to matters alleged therein on information and belief, and as to these, he believes it to be true, that he is the attorney for the Petitioner and is authorized to make this oath on their behalf.


 Joey R. Floyd
 Attorney for the Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME
 THIS 10 DAY OF June, 2014


 Notary Public for South Carolina

My Commission Expires: 01-22-2018

2014 JUL 11 PM 4:12
 JOSEPH H. JOSEPH
 CLERK OF COURT
 HANCOCK COUNTY, S.C.

STATE OF SOUTH CAROLINA
2015 JUN 26 PM 3:47COUNTY OF BEAUFORT
BEAUFORT COUNTY, S.C.
CLERK OF COURTFirst Citizens Bank and Trust Company,
Inc.,

Plaintiff,

vs.

Blue Ox, LLC and J. Chris Lindgren,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07- 128 and 129**J. CHRIS LINDGREN'S
MOTION TO RECONSIDER AND FOR
STAY OF EXECUTION OF JUDGMENT**

PLEASE TAKE NOTICE that Defendant J. Chris Lindgren ("Lindgren") will and does hereby move before The Honorable Marvin J. Dukes, Master-In-Equity for Beaufort County, to be heard at such place and time as the court may appoint, for an order reconsidering, altering and/or amending the Order entered on June 11, 2015 pursuant to Rules 59 and 60, SCRCP, for an order amending findings of fact, making additional findings of fact and specially finding and separately stating findings of fact pursuant to Rule 52, SCRCP, and staying enforcement of the order pending resolution of the within motion and of any appeal thereafter taken, in respect of the following matters and on the following grounds:

1. The Order erroneously states that the parties stipulated to certain facts. The record contains no stipulation meeting the requirements of Rule 43(k). The parties agreed that the record consists of the hearing transcript, Lindgren's affidavit and a summary of Lindgren's plan contributions submitted by Plaintiff.

2. The Order references the Affidavit of J. Christopher Lindgren but fails to make any findings of fact in light of that evidence. Lindgren requests that the Court expressly find as

fact that Lindgren made contributions as described in paragraphs 8 and 9 of the affidavit, and that in making said contributions Lindgren was not motivated by any intent to evade claims of Plaintiff or any other creditor. The undisputed evidence showing Lindgren's history of past IRA contributions is a relevant fact tending to establish an absence of fraudulent intent on his part. *In re Channon*, 424 B.R. 895 (Bkrtcy. D.N.M. 2010). That his behavior did not deviate from his historical conduct is likewise supportive of a finding that the contributions in question were not fraudulent. *In re Beaudin*, No. 0935557-EEB (Bkrtcy. D.CO. 2010).¹

3. The undisputed evidence shows that Lindgren has contributed funds to his Fidelity IRAs to be held and invested by Fidelity. The court erroneously finds as a matter of fact that there was no consideration for the payments by Lindgren to Fidelity. Lindgren received valuable consideration. With respect to the traditional IRA he received: 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 after retirement, with earnings, and be taxed thereon at a potentially lower marginal rate. With respect to the Roth IRA he received: 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.

4. The Order recites 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." There is no evidentiary support for these "findings" in the record and they should be stricken.

5. The court has erroneously concluded that even in the absence of proof of fraudulent intent South Carolina law "prohibits the transfer of non-exempt assets into 'exempt

¹ Copies of these cases are attached as exhibits hereto.

assets' to the detriment of Judgment creditors." There are no South Carolina cases to this effect and settled law elsewhere is to the contrary. *See, e.g., Forsberg v. Security State Bank*, 15 F.2d 499 (8th Cir.1926); *In re Addison*, 540 F.3d 805 (8th Cir. 2008); *In re Koehler*, 2012 WL 719744 (Bkrcty. E.D.N.C. 2012); *In re Duncan*, No. S-06-00025-5-AP (Bkrcty. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrcty. E.D.N.C. Jun. 18, 2007); *In re Channon*, 424 B.R. 895 (Bkrcty. D.N.M. 2010); *In re Beaudin*, No. 0935557-EEB (Bkrcty. D.CO. 2010). The court has failed to consider cases requiring extrinsic proof of fraud and holding that it is not fraudulent for an insolvent individual to convert non-exempt property into exempt property for the purpose of claiming exemptions and thereby placing his property out of the reach of his creditors.

6. The court has also failed to consider the reference to federal bankruptcy law in South Carolina's Homestead statute, §15-41-30(A)(13). 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."² 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 subject to a monetary limit provided for in 11 U.S. Code §

² Sections 408 and 408A provide for traditional IRAs and Roth IRAs, respectively.

522(n).³

In 2012, §15-41-30(A)(13) was amended to delete “, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” at the end of the first sentence, and added the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans.⁴ Adding the reference to federal bankruptcy law to the exemption statute not only substituted a specific monetary limit instead of a need-based test for exempting IRA accounts on a case-by-case basis, it also effectively incorporated by reference the federal substantive standard for evaluating fraudulent transfer claims in the context of retirement plan contributions.⁵ Under the amended statute individual retirement accounts are exempt except to the extent they are inflated as a result of contributions made “with actual intent to hinder, delay, or defraud.” And as discussed above, courts applying this standard require extrinsic evidence of fraud beyond the mere fact of the transfer itself before finding a debtor intended to defraud a creditor.

7. The court’s findings concerning fraudulent intent on the part of Lindgren are erroneous because they are unsupported by the evidence and/or are influenced or controlled by

³ As of April 1, 2013, debtors could protect IRA account balances up to \$1,245,475.00. This number is indicative of the strong public policy in favor of protecting debtors’ retirement assets.

⁴ 2012 Act No. 153, § 1, eff May 14, 2012, was enacted “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.”

⁵ The Statute of Elizabeth by its terms applies only to interests in lands and came into being centuries before such things as individual retirement accounts were ever conceived. Modernizing the law with respect to allegedly fraudulent transfers into IRAs would be a legitimate objective of the General Assembly.

errors of law. The court: ignored evidence that Lindgren has historically contributed to his IRAs on a regular, recurring basis; ignored evidence that the contributions were not made in response to or in anticipation of Plaintiff's judgments; failed to require proof of any facts or circumstances extrinsic to the mere facts of conversion of assets from nonexempt to exempt indicative of fraudulent purpose on the part of Lindgren; failed to require a clear and convincing standard of proof on the issue of fraudulent intent; and, failed to consider the strong public policy, both state and federal, of protecting and encouraging retirement savings.

8. The Order includes a finding that "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," and another "finding" that "Lindgren was aggressively moving money into his IRAs ..." These "findings" are erroneous and should be stricken because they are unsupported by the evidence and/or influenced or controlled by errors of law. What the court refers to as the maximum amount possible relates to the maximum contribution for which a tax deduction may be taken. The law taxes, but does not prohibit, contributions in excess of those amounts. The court's misapprehension of the law, coupled with its ignoring evidence establishing Lindgren's historical contributions, lead it to erroneously describe Lindgren's post-judgment contributions as "aggressive." As a matter of tax law, Lindgren could have contributed sums substantially in excess of the annual contributions he did in fact make. Had he done so those excess contributions perhaps could be characterized as "aggressive" and "fraudulent" within the meaning of South Carolina's Homestead statute, S.C. Code §15-41-30(A)(13).

9. The court's order requires that funds from Lindgren's IRA and Roth IRA accounts

be paid to Plaintiff by the financial institution at which those accounts are established. That event would render moot any further consideration of this matter by this court or by the court of appeals. Lindren requests that the court enter an order staying enforcement of its directives in this matter pending entry of a final, non-appealable order.

CONCLUSION

A motion to reconsider is often made merely for issue preservation purposes as a precursor to an appeal. Lindgren respectfully submits, however, that this is a case that cries out for the court to truly reconsider its decision. Plaintiff has proceeded from a faulty premise - that it is unlawful for a judgment debtor to convert non-exempt assets to exempt assets to take advantage of exemptions otherwise available to him - and thereby led the court to a faulty conclusion - that the retirement plan contributions in this case are fraudulent transfers regardless of whether Lindgren harbored fraudulent intent or not. There can be no question but that public policy, both state and federal, strongly encourages individuals to save for their retirement. Not only does this enhance the general welfare of the public, it also reduces the extent to which retirees become charges of the state. This public policy is made plain by the favorable tax treatment accorded to retirement plan contributions and by the statutory exemptions from creditor claims accorded to retirement plan assets. The existence of this public policy explains why courts require extrinsic evidence of fraud in cases of this nature. There must be something about a questioned transaction beyond the mere conversion of assets to exempt status for a court to find a fraudulent transfer. The order submitted by Plaintiff ignores the cases cited by Lindgren to this effect. If upheld, the position staked out in Plaintiff's order means that no debtor with unsatisfied judgments against him could put aside even a nickel toward retirement. Plaintiff has not cited any

decision of any court anywhere in the country reaching such a conclusion. And again, Lindgren, for his part, has cited case after case upholding the right of debtors to take advantage of exemptions by converting assets from non-exempt to exempt. Provided this is done reasonably, without fraudulent intent, creditors have no legal basis for complaint.

The Order purports to hold that the subject transactions should be set aside "as a matter of equity." However, equity follows the law and in this case the law is squarely on Lindgren's side. This Court should reverse itself and enter an order upholding the application of the homestead exemption to Lindgren's IRA accounts.

Respectfully submitted



Keating L. Simons, III, Esq.
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
Telephone: (843) 762-9132
Fax: (843) 406-9913
E-mail: klsimons@simonsanddean.com

Attorneys for J. Christopher Lindgren

June 22, 2015
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
First Citizens Bank and Trust)
Company, Inc.,)
Plaintiff/Petitioner,)
v.)
Blue Ox, LLC and J. Chris Lindgren,)
Defendants/Respondents.)

BEFORE THE MASTER IN EQUITY

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

PLAINTIFF'S REPLY MEMORANDUM
TO DEFENDANT'S MOTION
FOR RECONSIDERATION

Plaintiff, First Citizens Bank and Trust Company, Inc. ("First Citizens"), hereby submits this Reply to Defendant's Motion to Reconsider the Order setting aside as fraudulent transfers/fraudulent conveyances voluntary post-judgment contributions to individual retirement accounts made by J. Chris Lindgren ("Lindgren").

Under South Carolina's Homestead Exemption Act, funds in an individual retirement account (IRA) are exempt from attachment and levy unless they result from a fraudulent conveyance. S.C. Code Ann. § 15-41-30(A)(13). In his motion to reconsider, Lindgren reads the Homestead statute's reference to federal bankruptcy law, § 522(d), to apply the federal bankruptcy standard found in 11 U.S.C. § 548(a)(1)(A) to the Homestead statute's fraudulent conveyance exception. To qualify as a fraudulent conveyance, Section 548(a)(1)(A) requires a debtor under federal bankruptcy law to make the transfer "with actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. § 548(a)(1)(A). Assuming Lindgren is correct in his application of the federal bankruptcy law standard to the Homestead statute's fraudulent conveyance exception,

Lindgren nevertheless acted “with actual intent to hinder, delay, or defraud” First Citizens when he made voluntary post-judgment contributions to his individual retirement accounts.

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, courts often evaluate the particular circumstances of the transfer for “badges of fraud.” *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.”); *see also In re Addison*, 540 F.3d 805, 811-12 (8th Cir. 2008). South Carolina courts have generally recognized the following as badges of fraud:

[I]nsolvency 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*; *see also In re Jones*, 397 B.R. 765, 770 (Bankr. D.S.C. 2008); *In re Ducate*, 369 B.R. 251, 264 (Bankr. D.S.C. 2007).

The circumstances of Lindgren’s voluntary post-judgments contributions into his IRAs meet at least five of these nine badges of fraud. “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 (N.J. 1999). Lindgren (1) was indebted to First Citizens at the time of the post-judgment transfers, (2) did not receive any consideration for the transfer, as he simply transferred his money from one account to another, (3) transferred the funds to himself, the person with whom he clearly has the closest relationship, (4) reserved the benefit of the funds to himself, and (5) retained possession of the funds. The presence of these

five badges of fraud surrounding these post-judgment contributions reveals Lindgren's "actual intent to hinder, delay, or defraud" First Citizens from obtaining the debt Lindgren owed to them.

Lindgren argues that his history of IRA contributions precludes a finding of fraudulent intent. However, even though his behavior did not change, his intent in making those contributions necessarily shifted at the time the debt was incurred. "A defendant rarely will acknowledge that she transferred funds to place them beyond the reach of creditors. Actual intent often must be established through inferential reasoning, deduced from the circumstances surrounding the allegedly fraudulent act." *Gilchensky* at 490. The circumstances surrounding the IRA contributions changed significantly after the Confessions of Judgment were filed on January 6, 2011, acknowledging a debt to First Citizens. The post-judgment contributions were made with the knowledge of the First Citizens Judgment, and changing the nature of nonexempt funds to exempt IRA funds while subject to the First Citizens Judgment reveals an "actual intent to hinder, delay, or defraud" First Citizens. That Lindgren's contribution behavior did not change is irrelevant; that he made those contributions after the fundamental change in circumstances reveals an actual intent to deprive First Citizens of its chance to execute on the judgment.

Lindgren asserts that the transfer itself is not enough to prove a fraudulent conveyance in the context of transferring nonexempt assets into exempt assets. He claims that there must also be extrinsic evidence of fraudulent intent to justify employing the fraudulent conveyance exception to South Carolina's Homestead statute. The precedent that Lindgren relies on, however, is inapplicable to the instant situation. Every case that Lindgren cites in his Motion to Reconsider to support this assertion involved pre-bankruptcy planning, and in all but one case a section of state or federal bankruptcy law other than Section 548(a)(1)(A) governed the

fraudulent conveyance.¹ Lindgren has made no indication that he intends to file a bankruptcy petition, so these post-judgment contributions cannot be considered pre-bankruptcy planning. These post-judgment contributions were not made in anticipation of bankruptcy and are not subject to eve-of-bankruptcy protections.

Of the cases cited in Lindgren's Motion to Reconsider, only the court in *Koehler* evaluated the standard that Lindgren suggests applies to the South Carolina Homestead exemption for IRAs: 11 U.S.C. § 548(a)(1)(A).² *In re Koehler*, No. 11-00999-8-JRL, 2012 WL 719744 (Bkrtcy. E.D.N.C. March 5, 2012). This section reads:

[t]he trustee may avoid any transfer . . . of an interest of the debtor in property, . . . that was made or incurred within 2 years before the date of filing of the petition if the debtor . . . made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted (emphasis added). 11 U.S.C. § 548(a)(1)(A).

Section 548(a)(1)(A) of federal bankruptcy law, which Lindgren claims should apply in the instant case, applies specifically in the context of bankruptcy petitions. Even if "judgment" could be substituted for "petition," this section is still inapplicable to Lindgren's post-judgment contributions because this section applies only *before* the filing. Thus, the standard of Section 548(a)(1)(A), that the debtor must have acted "with actual intent to hinder, delay, or defraud" a creditor, is inapplicable in this situation where the transfers were made after the judgment was filed and where there has been no bankruptcy petition.

¹ Some of the cases discussed 11 U.S.C. § 522(o), which does not apply to Section 522(d). Others discussed prepetition exemptions in state law outside of South Carolina. 11 U.S.C. § 727(a)(2), which governs discharge of debt after a prepetition transfer, is not applicable in the instant case.

² The court in *In re Addison* discussed Section 548(a)(1)(A) but only in reference to Section 522(o). *In re Addison*, 540 F.3d 805 (8th Cir. 2008).

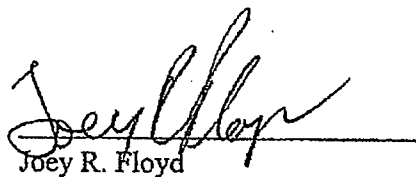
Because the exception to the South Carolina Homestead statute provided by federal bankruptcy law does not apply in the instant case, the term "fraudulent conveyance" as found in Section 15-41-30(A)(13) of the South Carolina Code must be governed by the Statute of Elizabeth, S.C. Code Ann. § 27-23-10. In *Mathis v. Burton*, the South Carolina Court of Appeals held that:

[A]s 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. *Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d 406, 408 (Ct. App. 1995).

When no consideration accompanies a transfer, as in the instance case, extrinsic evidence of fraudulent intent is not required to prove a fraudulent conveyance under the Statute of Elizabeth. Because all three elements of the above standard are met, Lindgren's voluntary post-judgment contributions to his IRA accounts are fraudulent conveyances and should be set aside.

South Carolina courts have not yet addressed post-judgment transfers of nonexempt assets into exempt assets outside of the realm of bankruptcy. When a judgment has been filed against an individual, and the individual has not filed a petition for bankruptcy, that individual should not be permitted to use the South Carolina Homestead Exception Act to evade payment of the judgment. Such an allowance would undermine the authority of judgments and provide a method of sanctioned nonpayment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joey R. Floyd", written over a horizontal line.

Joey R. Floyd

Bruner Powell Wall & Mullins, LLC

1735 St. Julian Place, Ste 200

P.O. Box 61110

Columbia, South Carolina 29260-1110

(803)252-7693

Attorneys for Plaintiff

First Citizens Bank and Trust Company, Inc.

Columbia, South Carolina

July 15, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 First Citizens Bank and Trust)
 Company, Inc.,)
)
 Plaintiff/Petitioner,)
)
 v.)
)
 Blue Ox, LLC and J. Chris Lindgren,)
)
 Defendants/Respondents.)
)
 _____)

BEFORE THE MASTER IN EQUITY

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

CERTIFICATE OF SERVICE

2015 JUL 20 PM 3:50
 JERRI ANN ROSENBAU
 CLERK OF COURT
 BEAUFORT COUNTY, S.C.

I, Kim Warnock, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Plaintiff, do hereby certify that on the 15th day of July, 2015, I served the pleadings/documents set forth below on the person(s) identified below, by depositing copies thereof in the U.S. Mail, postage-paid, in an envelope securely sealed, and addressed to the following.

Pleadings/Documents Served:

Plaintiff's Reply Memorandum to Defendant's Motion for Reconsideration

Person(s) Served:

Keating L. Simons III, Esquire
 Simons & Dean
 147 Wappoo Creek Drive, Suite 604
 Charleston, SC 29412

Kim Warnock

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER IN EQUITY
COUNTY OF BEAUFORT	)	Case Nos.: 2011-CP-07-128 and 2011-CP-07-129
First Citizens Bank and Trust Company, Inc.,	)	
Plaintiff/Petitioner,	)	<u>MEMORANDUM IN SUPPORT OF MOTION</u>
v.	)	<u>TO SET ASIDE AND EXECUTE ON</u>
Blue Ox, LLC and J. Chris Lindgren,	)	<u>VOLUNTARY POST-JUDGMENT</u>
Defendants/Respondents.	)	<u>CONTRIBUTIONS BY J. CHRIS LINDGREN</u>
	)	<u>TO 401(k), IRA ACCOUNTS AND AN</u>
	)	<u>EDUCATION ACCOUNT</u>

2014 NOV -3 PM 2:25
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Plaintiff, First Citizens Bank and Trust Company, Inc. ("First Citizens"), hereby submits this memorandum in support of its Motion to Set Aside and Execute on the voluntary post-Judgment contributions by J. Chris Lindgren ("Lindgren") to his 401(k), IRA accounts and Education Account.

PROCEDURAL POSTURE OF THE CASE

The debtors Blue Ox, LLC and J. Chris Lindgren executed Confessions of Judgment on May 13, 2010, both of which were ultimately filed with the Beaufort County Clerk of Court on January 6, 2011.¹ A Supplemental Proceedings hearing for these matters was held on September 2, 2014, before the Beaufort County Master-in-Equity. This matter was ultimately set for a Continuation of the Supplemental Proceedings before the Beaufort County Master-In-Equity on November 3, 2014, 1:30 p.m. Prior to the hearing scheduled for November 3, 2014, the parties agreed to submit briefs to the Beaufort County Master In Equity on the Plaintiff's Motion to Execute on the debtor's post-judgment voluntary contributions to his 401(k), IRA accounts and Education account.

¹ C/A No.: 11-CP-07-128 (\$100,000.00) and C/A No.: 11-CP-07-129 (\$13,702.24).

FACTS

During the September 3, 2014 Supplemental Proceedings hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. (p.7-8, lines 24-1). Rockmoor, Inc. has a 401(k) that is a profit sharing plan that is funded through employee deferrals. (p.14, lines 5-24). Lindgren testified that he is no longer an employee of Rockmoor, Inc. (p.27, lines 22-23). Lindgren also testified that he has formed 38 LLCs as "investment vehicles." (p.22, lines 2-6). Rockmoor, Inc. is a management company that manages payroll and operations; primarily Lindgren's LLCs. (p.26, lines 18-20 and p.30, lines 9-21).

During the hearing, Lindgren testified that he had an IRA at Fidelity, which he estimated to have approximately \$25,000.00 in the IRA at the time of the hearing. (p.18, lines 1-11). After the hearing on September 2, 2014, the parties engaged in the exchange of documents and some post-judgment discovery. The parties have agreed to stipulate to the following facts regarding Lindgren's contributions to his 401(k), the IRA accounts and the Education account:

Mass Mutual f/k/a The Hartford 401(k) (Account No.: 2812622) → \$45,366.67 in
contributions since 2011

Fidelity IRA (Acct. No.: 197-778290) → \$18,500.00 in contributions since 2011

Fidelity Roth IRA (Acct. No.: 218-395517) → \$6,500.00 in contributions in 2014

Fidelity Education Account (Acct. No.: 618-670855) → \$22,000.00 contributed in 2012

Lindgren has voluntarily contributed a total of \$92,366.67 to his 401(k), IRA accounts and an Education Account.² During the hearing on September 2, 2014, Counsel for First Citizens moved to execute on the contributions to the 401(k) and the IRA(s). (p.58-62).

² A summary of contributions to the 401(k), IRA accounts and Education account is attached hereto as Exhibit 1. The parties have agreed and stipulated that Exhibit 1 is an accurate summary of Lindgren's contributions to these various accounts.

ARGUMENT

A Judgment Creditor is entitled to execute on the assets of a debtor, with limited exceptions as provided in S.C. Code Ann. § 15-41-30. The exemption found at S.C. Code § 15-41-30(A)(13), provides, in relevant part:

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, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. (emphasis mine).

South Carolina's prohibition on fraudulent transfers/fraudulent conveyances, *i.e.*, the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

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 mine).

In *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995), the South Carolina Court of Appeals held that:

For existing creditors, 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. *Mathis* at 264-65 (citations omitted)

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." See *In re Goldschein*, 241 B.R. 370 (Bkry. D.Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *Id.* at 379.

In this instance, there was no consideration for the transfer of the money from Lindgren to himself. The attempted movement of a non-exempt asset (i.e. cash) into IRA accounts and a 401(k) account, an exempt account cannot be a transfer supported by consideration because the transfer was nothing more than Lindgren moving money from one pocket to another pocket in an effort to protect cash from his judgment creditors. Lindgren was indebted to First Citizens at the time of his voluntary contributions to his 401(k), IRA accounts and education account and Lindgren has failed to retain sufficient property/assets to pay First Citizens. Therefore, these transfers should be set aside.

Even if we assumed that there was consideration, which First Citizens denies, as a matter of equity these transfers should be set aside. It is undisputed that Lindgren voluntarily elected to

contribute in excess of \$70,000.00 towards his 401(k) and IRA accounts. All contributions by Lindgren were made with full knowledge that First Citizens held Judgments against Lindgren in excess of \$113,000.00 – Lindgren executed Confessions of Judgment in favor of First Citizens. In addition to the 401(k) and IRA contributions, Lindgren contributed \$22,000.00 towards an education account(s) with Fidelity. Between 2011 and 2014, Lindgren made no efforts to payoff First Citizens' Judgments. In spite of Lindgren's voluntary contributions to his 401(k), IRA accounts and Education account, along with his 38 investment vehicles, Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him. Lindgren is using his 401(k) and IRA accounts as his personal "offshore bank accounts," funneling, in a number of instances, the maximum amount of money possible on an annual basis (as allowed by the IRS) to put the money beyond the reach of his judgment creditors. During the Supplemental Proceedings hearing, Lindgren's counsel objected to First Citizens' motion to execute on these funds, effectively confirming that Lindgren takes the position that the funds in the 401(k) and the IRA accounts are "exempt" and beyond the reach of a Judgment creditor.

Marjorie A. Shields has provided some helpful insight on this issue in an article, with supporting case law, that demonstrates when a judgment debtor moves money into retirement accounts, the fact that the money is moved into an apparent "exempt" account, the Courts can, and should, set aside those transfers as fraudulent transfers.

In Gilchinsky v. National Westminster Bank N.J., 159 N.J. 463, 732 A.2d 482, 23 Employee Benefits Cas. (BNA) 1382 (1999), the Supreme Court of New Jersey recognized that a judgment debtor's individual retirement account (IRA) enjoys qualified immunity from attachment by creditors under N.J. Stat. Ann. § 25:2-1, however, under the Fraudulent Transfer Act, N.J. Stat. Ann. §§ 25:2-20 to 25:2-34, such funds may be attached if deposited as a fraudulent conveyance by a debtor. The court stated that the purpose behind the expansive protection afforded to IRAs is to prevent creditors from attaching money earmarked for retirement.

That immunity, however, the court said, is not absolute; creditors can attach funds transferred into an IRA in "preference" of other creditors, as a "fraudulent conveyance," or if the money is subject to a support order. In exempting fraudulent conveyances from the otherwise broad-based immunity, the court said, the legislature clearly intended to prevent debtors from using New Jersey law to shield their assets from creditors. The court recognized a similar exception to the exemption of IRAs for fraudulent conveyances under New York law, N.Y. C.P.L.R. 5205(c)5. The court stated that, although New York law generally exempts individual retirement account (IRA) funds from attachment by creditors seeking to enforce money judgments, that exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment.

Marjorie A. Shields, *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487 (Originally published in 2003); *Accord, Baker v. Dorfman*, 2000 WL 1010285 (S.D. N.Y. 2000), *aff'd on other grounds*, 232 F.3d 121 (2d Cir. 2000) (holding plaintiff entitled to have the balance of defendant's IRA turned over to satisfy the judgment where all deposits to the IRA were made after complaint was filed against defendant).

While South Carolina's Homestead Exemption Act does offer debtors protection in limited situations and circumstances, the Homestead Exemption Act also protects judgment creditors when a judgment debtor takes assets that are subject to execution (i.e. cash) and attempts to place those assets beyond the reach of a creditor by depositing the cash into a 401(k) IRA accounts and education accounts to disguise the cash as being exempt. Based on facts of this case, this Court should set aside all of Lindgren's conveyances into his 401(k), IRA accounts and Education account, in the amount of \$92,366.67, which represents the contributions that Lindgren has made to these various accounts because such transfers are fraudulent transfers/fraudulent conveyances that should be set aside and paid to the Petitioner, to be applied towards the satisfaction of First Citizens' 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 is not obligated to prove fraud, intent or attempted fraud. In fact, our case law holds to the contrary.

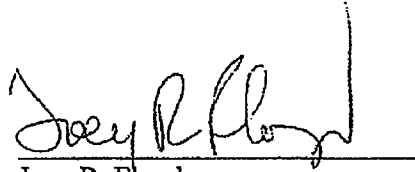
No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. "The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud." *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139, 146 (1932) (quotations and citations omitted).

Based on the case law of South Carolina, there is no requirement that a judgment creditor prove actual fraud or a fraudulent intent.

CONCLUSION

For the reasons set forth herein, this court should set aside Lindgren's voluntary post-judgment contributions to his 401(k), IRA accounts and the education account as fraudulent fraudulent transfers/fraudulent conveyances, thereby allowing First Citizens to execute on the funds in the 401(k) account, IRA accounts and the Education account to apply said proceeds towards the Judgment debts that are owed to First Citizens. First Citizens seeks an Order directing Fidelity and Mass Mutual to pay, to First Citizens, the amounts Lindgren voluntarily contributed to Mass Mutual f/k/a The Hartford (401(k) account) and Fidelity (IRA accounts and education account), to be applied towards First Citizens' Judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joey R. Floyd", written over a horizontal line.

Joey R. Floyd
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Attorneys for Plaintiff
First Citizens Bank and Trust Company, Inc.

Columbia, South Carolina
October 31, 2014

EXHIBIT 1

**J. Chris Lindgren Contributions
401k, IRA's, and Education Accounts, 2011-2014**

**John Chris Lindgren Contributions to 401k
Account # - 2812622**

2011 Sum*	\$0.00
2012 Sum*	\$20,450.00
2013 Sum	\$23,000.00
2014 YTD Sum	\$1,916.67
Sum	\$45,366.67

Contributions to Fidelity IRA

Plan # - 197-778290

2011 Sum	\$6,000.00
2012 Sum	\$6,000.00
2013 Sum	\$6,500.00
2014 YTD Sum	
Sum	\$18,500.00

Contributions to Fidelity Education Account

Plan # - 618-670855

2011 Sum	
2012 Sum	\$22,000.00
2013 Sum	
2014 YTD Sum	
Sum	\$22,000.00

Contributions to Fidelity Roth IRA

Plan # - 218-395517

2014 YTD Sum	\$6,500.00
Sum	\$6,500.00

Grand Sum

401K	\$45,366.37
Fidelity Traditional IRA	\$18,500.00
Fidelity Education Acct	\$22,000.00
Fidelity Roth IRA	\$6,500.00
Grand Sum	\$92,366.37

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER IN EQUITY
	)	
COUNTY OF BEAUFORT	)	Case Nos.: 2011-CP-07-128 and 2011-CP-07-129
	)	
First Citizens Bank and Trust Company, Inc.,	)	<u>CERTIFICATE OF SERVICE</u>
	)	
Plaintiff/Petitioner,	)	
	)	
v.	)	
	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
	)	
Defendants/Respondents.	)	
	)	
	)	

I, Annie Rich, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for the Plaintiff/Petitioner, First Citizens Bank and Trust Company, Inc., do hereby certify that on October 31, 2014, I served a copy of the documents listed below on counsel of record by depositing a copy of same in the U.S. Mail, first-class, postage prepaid and addressed as follows:

Pleading(s) served:

Memorandum in Support of Motion to Set Aside and Execute on Voluntary Post-Judgment Contributions by J. Chris Lindgren to 401(k), IRA Accounts and an Education Account

Counsel served:

Keating L. Simons, III
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412

Attorneys for the Defendants/Respondents

Annie Rich

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
First Citizens Bank and Trust Company,)
Inc.,)

Plaintiff,)

vs.)

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

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07- 128 and 129

**MEMORANDUM OF
J. CHRISTOPHER LINDGREN
IN OPPOSITION TO PLAINTIFF'S
MOTION TO SET ASIDE AND EXECUTE**

Defendant J. Chris Lindgren ("Mr. Lindgren") respectfully submits the within memorandum in opposition to Plaintiff's motion to set aside and execute.

Plaintiff alleges that deposits made into various accounts established by or for Mr. Lindgren are voidable as fraudulent transfers under South Carolina's Statute of Elizabeth, S.C. Code §27-23-10(A). The accounts in question include an Individual Retirement Account ("IRA"), a Roth IRA, a 401(k) Plan and a 529 Plan. These accounts have differing characteristics and will be addressed separately.

CONTRIBUTIONS TO IRA AND ROTH IRA ACCOUNTS

It is undisputed that Mr. Lindgren has made regular, annual contributions to individual retirement accounts since 1986. [Lindgren Aff. ¶ 8] With one exception, in each year Mr. Lindgren has contributed the exact amount permitted by federal law.¹ Plaintiff asks the court to hold that Mr. Lindgren's contributions made in 2011, 2012, 2013 and 2014 were fraudulent transfers and that Plaintiff can recover these amounts directly from Fidelity, where the accounts

¹ In 2010, Mr. Lindgren made no contribution to his IRA and a substantially reduced contribution to the 401(k) Plan. [Lindgren Aff. ¶¶ 6, 8]

transfers and that Plaintiff can recover these amounts directly from Fidelity, where the accounts are held.²

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.

The exemption established by the statute "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." *Id.* Plaintiff argues that all contributions made after entry of its judgment against Mr. Lindgren must be set aside as fraudulent transfers. This is because, according to Plaintiff, Mr. Lindgren attempted to convert a "non-exempt asset (i.e. cash)" into exempt IRA accounts. Plaintiff claims that Mr. Lindgren may not lawfully move "money from one pocket to another pocket in an effort to protect cash from

² No orders should be directed to the financial institutions inasmuch as they are not parties to this proceeding. The court need not reach this point because Plaintiff's claims fail on the merits.

his judgment creditor." Plaintiff is simply wrong on the law. No court has adopted a *per se* rule that any IRA contributions made by a judgment creditor are *ipso facto* fraudulent transfers.

"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 facts of *Forsberg* are worth noting since they illustrate the point so nicely. 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. As noted, the farmer prevailed.

The holding of *Forsberg* - requiring creditors to make a showing of extrinsic evidence of fraud - 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); *First Texas Savings Association v. Reed*, 700 F.2d 986 (5th Cir. 1983); *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10th Cir. 1991); and, *In re Jones*, 397 B.R. 765 (Bkrcty. D.S.C. 2008).

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.³

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 (Bkrcty. 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'

³ Bankruptcy cases are relevant here. Not only does the issue at hand most often arise in that context, under bankruptcy law a debtor may lose his exemption or be denied discharge if found to have transferred property with intent to hinder, delay, or defraud a creditor. 11 U.S. Code § 548(a)(1)(A) and § 727(a)(2)(A). This is substantively identical to the language of South Carolina's Statute of Elizabeth. S.C. Code § 27-23-10(A) ("intent or purpose to delay, hinder, or defraud creditors").

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.

In contrast, cases disallowing debtors’ efforts to benefit from exemption statutes involve extraordinary or unusual transactions. For example, in *Gilchinsky v. National Westminster Bank*, 732 A.2d 482 (N.J. 1999), the debtor withdrew funds from a New York profit-sharing account and transferred them to an IRS 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.

In re Zouhar, 10 B.R. 154 (Bankr. N.M.1981) involved a similarly aggressive scheme. There 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. The debtor 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 encumbered stock or the exempt annuity contract. And at the end of the day 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).

In *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985) 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.

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 case before this court presents none of the aggressive or excessive features of the fraudulent transfers described above. None of the subject transactions - in this case Mr. Lindgren's retirement contributions - was made in response to or in anticipation of Plaintiff's judgment. To the contrary, as the undisputed evidence makes plain, Mr. Lindgren's 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; Mr. Lindgren's retirement contributions were no less and no more than permitted by applicable law. The

retirement contributions were “not excessive,” rather they were “consistent with the debtor’s legitimate attempts to provide for [his] retirement.” *In re Duncan, supra*.

Plaintiff cites *Baker v. Dorfman*, 2000 WL 1010285 (S.D. N.Y. 2000), *aff’d on other grounds*, 232 F.3d 121 (2d Cir. 2000), as a case Plaintiff describes as “holding plaintiff entitled to have the balance of defendant’s IRA turned over to satisfy the judgment where all deposits to the IRA were made after complaint was filed against defendant.” [Pl. Mem. at 6] Plaintiff’s description is incomplete and misleading. As pointed out in the ALR article cited by Plaintiff, the result in *Baker v. Dorfman* was required under a New York statute that “exempts individual retirement accounts (IRAs) from application to the satisfaction of a judgment except where additions to such accounts are made after the date that is 90 days before the interposition of the claim on which such judgment was entered.” *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487, at page 13. There is no such statute in South Carolina. And *Baker v. Dorman* provides no support for the extreme position Plaintiff takes in this case: that any retirement contribution made post-judgment is necessarily fraudulent.

Plaintiff’s suggestion that it need not prove fraudulent intent in this case is unsupported and without merit. Statute of Elizabeth jurisprudence is not applicable to Mr. Lindgren’s IRA contributions. 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 1986.⁴ 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 subject to a monetary limit provided for in 11 U.S. Code § 522(n).⁵

In 2012, §15-41-30(A)(13) was amended to delete “, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” at the end of the first sentence, and added the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans.⁶ Adding the reference to federal bankruptcy law to the exemption statute not only substituted a specific monetary limit instead of a need-based test for exempting IRA accounts on a case-by-case basis, it also effectively incorporated by reference the federal substantive standard for evaluating fraudulent transfer claims in the context of retirement plan contributions.⁷ Under the amended statute individual retirement accounts are exempt except to the extent they are inflated as a result of contributions made “with actual intent to hinder, delay, or defraud.” And as discussed above, courts applying

⁴ Sections 408 and 408A provide for traditional IRAs and Roth IRAs, respectively.

⁵ As of April 1, 2013, debtors could protect IRA account balances up to \$1,245,475.00. This number is indicative of the strong public policy in favor of protecting debtors’ retirement assets.

⁶ 2012 Act No. 153, § 1, eff May 14, 2012, was enacted “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.”

⁷ The Statute of Elizabeth by its terms applies only to interests in lands and came into being centuries before such things as individual retirement accounts were ever conceived. Modernizing the law with respect to allegedly fraudulent transfers into IRAs would be a legitimate objective of the General Assembly.

this standard require extrinsic evidence of fraud beyond the mere fact of the transfer itself before finding a debtor intended to defraud a creditor.

In any case, Statute of Elizabeth jurisprudence, properly understood, is not inconsistent with the substantive standard applied in bankruptcy cases and also requires proof of fraudulent intent in the circumstances of this case. Plaintiff argues proof of fraud is not necessary and cites for this proposition, *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139 (1932). That case, however, involved what the court treated as a gift, a conveyance of lands from a husband to wife without consideration, and the holding was unremarkable. As explained in more recent cases, 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). In this case Mr. Lindgren did not, in the words quoted by Plaintiff, "give his property away." To the contrary, he received valuable consideration: 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 be taxed at a potentially lower marginal rate. 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). Plaintiff must prove fraudulent intent on Mr. Lindgren's part and in doing so must meet a clear and convincing evidentiary standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012) ("A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth.")

Plaintiff emphasizes the voluntary nature of Mr. Lindgren's contributions to his retirement accounts. This is not disputed. Of course, Mr. Lindgren voluntarily engaged in the challenged transactions. When he contributed to his retirement plans Mr. Lindgren did exactly what the law expressly permits, indeed encourages, him to do. The favorable treatment accorded to contributions to qualifying retirement plans under state and federal tax laws⁸ make 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 a portion of the debtor's 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). South Carolina's Homestead statute explicitly exempts from creditors' claims the very retirement plans to which federal and state tax laws encourage all citizens to contribute.⁹ There are situations in which a debtor could seek to abuse or take advantage of the system - some examples have been provided above - and in such cases a creditor should obtain relief. But here Mr. Lindgren has done no more and no less than the law permits and encourages him to do. Equally 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). That the challenged contributions were

⁸ It is common knowledge and the court may take judicial notice that contributions to IRA and 401(k) accounts are made with pre-tax dollars, that plan earnings are not taxed as such and no income taxes are paid until funds are withdrawn. Contributions to a Roth IRA are made with after-tax dollars but withdrawals are tax-free.

⁹ A reading of the exemption statute that says, in effect: South Carolina residents can protect over a million dollars in an IRA once they get there, but if they have creditors they cannot put any money into the account to try to build such a nest egg, obviously makes no sense.

made by Mr. Lindgren after the entry of judgments against him is, without more, of no consequence. 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).

If Plaintiff's argument in this case were to be accepted it would mean that judgment debtors, even individuals who had merely been sued or threatened with suit, could no longer engage in reasonable, prudent retirement planning. Plaintiff has offered no authority in support of such an extreme position.

Plaintiff has failed to meet its burden of coming forth with extrinsic evidence to make a clear and convincing case of fraudulent intent on the part of Mr. Lindgren and its motion should be denied with respect to the IRA and Roth IRA accounts.

THE 401(K) PLAN

The 401(k) Plan established by Mr. Lindgren's employer is a qualified ERISA retirement plan. [Lindgren Aff. ¶ 3]¹⁰ As such, it is exempt from creditors' claims under federal law. 11 U.S. Code §§ 522(b)(3)(A) and 522(d)(12); *See Patterson v. Shumate*, 504 U.S. 753, 119 L.Ed.2d 519, 112 S.Ct. 2242 (1992). It is also exempt under South Carolina's Homestead exemption statute:

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:

¹⁰ Once the IRS issues the determination letter attached as an exhibit to Lindgren's affidavit the funds in the account are presumed to be exempt. 11 U.S. Code §§ 522(b)(4)(A).

... The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code § 15-41-30(A)(14).

Importantly, unlike §15-41-30(A)(13) (dealing with individual retirement accounts), the above-quoted code section exempting ERISA plans has no fraudulent transfer qualification or limitation. A 401(k) Plan is different from an IRA. Contributions to a 401(k) Plan are made by the taxpayer's employer rather than by the taxpayer himself. The employer withholds wages and pays these funds directly to the Plan. The employee never has possession of the funds until they are withdrawn from the Plan. Wages are not subject to garnishment in South Carolina. The 401(k) Plan contributions - consisting of the employee's withheld wages - are exempt from levy or execution while in the hands of the employer and remain so after payment to the Plan. When an employer pays to the 401(k) Plan wages withheld from its employee, there is no conversion of exempt cash to non-exempt retirement plan assets.

The undersigned has been unable to find any cases involving a creditor's challenge to 401(k) Plan employer contributions. There are cases, however, dealing with debtors' repayment of loans taken from 401(k) Plans. See *In re Hoetmer*, 2012 WL 4482387 (Bkrtcy.S.D.Ind., Slip Copy, Sept. 26, 2012) and *In re Dunbar*, 313 B.R. 430, 436 (Bankr.C.D.Ill.2004). The loan repayment was set aside in *Hoetmer* but not in *Dunbar*. The former case involved actual fraud; the latter constructive fraud. But in any event these cases are distinguishable and not relevant here because the money at issue in those cases was transferred from the debtors' own bank accounts to the 401(k) Plan. *Hoetmer* and *Dunbar* did not involve what we have here: payroll withholdings paid directly by Mr. Lindgren's employer to the 401(k) Plan.

In the circumstances of this case there has been no conversion of non-exempt cash to

exempt retirement plan assets and therefore no basis for finding any cognizable legal injury to Plaintiff or for finding any fraudulent transfer. In the absence of a transfer by Mr. Lindgren there can be no basis for application of the Statute of Elizabeth or the substantive fraudulent transfer jurisprudence of federal bankruptcy law, discussed above in respect to IRAs.

Even if the 401(k) Plan contributions are subjected to fraudulent transfer scrutiny, they pass muster. Plaintiff must prove intent to defraud as a matter of state law (because valuable consideration was received in the form of similar tax deferral and other benefits as with IRAs) or federal law (based on the authorities discussed extensively above). As was the case with the IRAs, Plaintiff has failed to show any extrinsic evidence of fraud. The mere fact that Mr. Lindgren's employer continued to make 401(k) Plan contributions - as it had done virtually without interruption since 1992 - is not evidence of fraudulent intent. To the contrary, based on the record herein Mr. Lindgren did not change his behavior in any way post-judgment; he simply continued a pattern of reasonable, prudent retirement planning. There is simply no evidentiary basis, much less one sufficient to meet a clear and convincing standard, to support a finding that the 401(k) Plan contributions were made "with intent to hinder, delay, or defraud a creditor."

529 PLAN CONTRIBUTIONS

A 529 Plan is a tax-advantaged investment account vehicle designed to encourage savings for college education. Mr. Lindgren has such a plan. At this time there is \$13.18 in the account.¹¹

In 2012, Mr. Lindgren paid \$22,000.00 into the account. Plaintiff seeks an order directing the financial institution holding the account, Fidelity Investments, to pay this sum to Plaintiff. However, the \$22,000.00 is no longer in the account. In 2012, Fidelity paid \$17,236.33 to the

¹¹ The figure provided is the balance as of June 30, 2014. No additional funds have been paid into the account. The figure provided may be off by a few pennies in accrued interest.

University of Colorado. Also in that year, \$5,020.00 was withdrawn and used to pay qualified housing expenses for Mr. Lindgren's daughter. [Lindgren Aff. ¶ 11] Again, the money is no longer there and Fidelity, who is not named as a party herein, could reasonably be expected to resist being ordered to send \$22,000.00 to Plaintiff.

On the merits, it is unclear whether 529 Plan assets are exempt from creditor claims. No specific provision of South Carolina's Homestead exemption statute seems applicable. However, a statute dealing with the South Carolina College Investment Program provides:

The SCCIP trust fund, contributions to the SCCIP trust fund, and the right of a person to a refund of contributions or any other right accrued or accruing to any person under the provisions of this chapter are exempt from attachment, garnishment, levy, and sale under any means or final process issued by any court or bankruptcy proceeding and are unassignable except as specifically otherwise provided in this chapter.

S.C. Code § 59-2-140.

Whether strictly speaking this statute applies to the 529 Account at issue here is not clear. However, it is clear that the public policy of this State favors protecting educational savings accounts from creditors' claims. In any case, the payments made into and out of the 529 Plan were all in the ordinary course of Mr. Lindgren's educating his youngest daughter. There is no evidence that these transactions were fraudulent in any way. Had the \$22,000.00 been paid directly to University of Colorado would Plaintiff be seeking to avoid the transfer for want of consideration and to recover the money from the university?

CONCLUSION

The point bears emphasis that the only evidence before the court is to the effect that Mr. Lindgren repeatedly made regular, annual contributions to various retirement plans over a period of decades, and that this practice continued after Plaintiff obtained its judgments against Mr. Lindgren. Plaintiff offers no evidence of fraudulent intent beyond the mere fact of the contributions themselves. Case after case has rejected Plaintiff's approach. Courts universally recognize that debtors may plan and manage their financial affairs to maximize their ability to benefit from homestead and other exemptions. When a debtor goes too far courts grant relief to creditors. That is simply not the case here. If Plaintiff prevails on the facts of this case, it means that no judgment debtor could reasonably plan and prepare for retirement or the future security of his family. Such an outcome flies in the face of the public policy underlying the Homestead exemptions and incentives established to promote retirement savings, all of which are intended to prevent debtors from becoming dependent upon the state for support. Plaintiff's argument for a *per se* rule that post-judgment retirement plan contributions are *ipso facto* fraudulent must be rejected.



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Attorneys for J. Christopher Lindgren

November 10, 2014
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
First Citizens Bank and Trust Company,)
Inc.,)
Plaintiff,)
vs.)
Blue Ox, LLC and J. Chris Lindgren,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07- 128 and 129

**AMENDED MEMORANDUM OF
J. CHRISTOPHER LINDGREN
IN OPPOSITION TO PLAINTIFF'S
MOTION TO SET ASIDE AND EXECUTE**

Defendant J. Chris Lindgren ("Mr. Lindgren") respectfully submits the within memorandum in opposition to Plaintiff's motion to set aside and execute.

Plaintiff alleges that deposits made into various accounts established by or for Mr. Lindgren are voidable as fraudulent transfers under South Carolina's Statute of Elizabeth, S.C. Code §27-23-10(A). The accounts in question include an Individual Retirement Account ("IRA"), a Roth IRA, a 401(k) Plan and a 529 Plan. These accounts have differing characteristics and will be addressed separately.

CONTRIBUTIONS TO IRA AND ROTH IRA ACCOUNTS

It is undisputed that Mr. Lindgren has made regular, annual contributions to individual retirement accounts since 1986. [Lindgren Aff. ¶ 8] With one exception, in each year Mr. Lindgren has contributed the exact amount permitted by federal law.¹ Plaintiff asks the court to hold that Mr. Lindgren's contributions made in 2011, 2012, 2013 and 2014 were fraudulent

¹ In 2010, Mr. Lindgren made no contribution to his IRA and a substantially reduced contribution to the 401(k) Plan. [Lindgren Aff. ¶¶ 6, 8]

transfers and that Plaintiff can recover these amounts directly from Fidelity, where the accounts are held.²

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.

The exemption established by the statute "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." *Id.* Plaintiff argues that all contributions made after entry of its judgment against Mr. Lindgren must be set aside as fraudulent transfers. This is because, according to Plaintiff, Mr. Lindgren attempted to convert a "non-exempt asset (i.e. cash)" into exempt IRA accounts. Plaintiff claims that Mr. Lindgren may

² No orders should be directed to the financial institutions inasmuch as they are not parties to this proceeding. The court need not reach this point because Plaintiff's claims fail on the merits.

not lawfully move "money from one pocket to another pocket in an effort to protect cash from his judgment creditor." Plaintiff is simply wrong on the law. No court has adopted a *per se* rule that any IRA contributions made by a judgment debtor are *ipso facto* fraudulent transfers.

"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 facts of *Forsberg* are worth noting since they illustrate the point so nicely. 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. As noted, the farmer prevailed.

The holding of *Forsberg* - requiring creditors to make a showing of extrinsic evidence of fraud - 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); *First Texas Savings Association v. Reed*, 700 F.2d 986 (5th Cir. 1983); *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10th Cir. 1991); and, *In re Jones*, 397 B.R. 765 (Bkrtcy. D.S.C. 2008).

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.³

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

³ Bankruptcy cases are relevant here. Not only does the issue at hand most often arise in that context, under bankruptcy law a debtor may lose his exemption or be denied discharge if found to have transferred property with intent to hinder, delay, or defraud a creditor. 11 U.S. Code § 548(a)(1)(A) and § 727(a)(2)(A). This is substantively identical to the language of South Carolina's Statute of Elizabeth. S.C. Code § 27-23-10(A) ("intent or purpose to delay, hinder, or defraud creditors").

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 (Bkrcty. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrcty. E.D.N.C. Jun. 18, 2007) at page 6 of 8.

In contrast, cases disallowing debtors' efforts to benefit from exemption statutes involve extraordinary or unusual transactions. For example, in *Gilchinsky v. National Westminster Bank*, 732 A.2d 482 (N.J. 1999), 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.

In re Zouhar, 10 B.R. 154 (Bankr. N.M.1981) involved a similarly aggressive scheme. There 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. The debtor 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 encumbered stock or the exempt annuity contract. And at the end of the day 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).

In *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985) 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.

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 case before this court presents none of the aggressive or excessive features of the fraudulent transfers described above. None of the subject transactions - in this case Mr. Lindgren's retirement contributions - was made in response to or in anticipation of Plaintiff's judgment. To the contrary, as the undisputed evidence makes plain, Mr. Lindgren's 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; Mr. Lindgren's

retirement contributions were no less and no more than permitted by applicable law. The retirement contributions were “not excessive,” rather they were “consistent with the debtor’s legitimate attempts to provide for [his] retirement.” *In re Duncan, supra*.

Plaintiff cites *Baker v. Dorfman*, 2000 WL 1010285 (S.D. N.Y. 2000), *aff’d on other grounds*, 232 F.3d 121 (2d Cir. 2000), as a case Plaintiff describes as “holding plaintiff entitled to have the balance of defendant’s IRA turned over to satisfy the judgment where all deposits to the IRA were made after complaint was filed against defendant.” [Pl. Mem. at 6] Plaintiff’s description is incomplete and misleading. As pointed out in the ALR article cited by Plaintiff, the result in *Baker v. Dorfman* was required under a New York statute that “exempts individual retirement accounts (IRAs) from application to the satisfaction of a judgment except where additions to such accounts are made after the date that is 90 days before the interposition of the claim on which such judgment was entered.” *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487, at page 13. There is no such statute in South Carolina. And *Baker v. Dorman* provides no support for the extreme position Plaintiff takes in this case: that any retirement contribution made post-judgment is necessarily fraudulent.

Plaintiff’s suggestion that it need not prove fraudulent intent in this case is unsupported and without merit. Statute of Elizabeth jurisprudence is not applicable to Mr. Lindgren’s IRA contributions. 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.”⁴ 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 subject to a monetary limit provided for in 11 U.S. Code § 522(n).⁵

In 2012, §15-41-30(A)(13) was amended to delete “, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor” at the end of the first sentence, and added the last two sentences, including the specific reference to federal bankruptcy law as a limitation on the exemption provided for retirement plans.⁶ Adding the reference to federal bankruptcy law to the exemption statute not only substituted a specific monetary limit instead of a need-based test for exempting IRA accounts on a case-by-case basis, it also effectively incorporated by reference the federal substantive standard for evaluating fraudulent transfer claims in the context of retirement plan contributions.⁷ Under the amended statute individual retirement accounts are exempt except to the extent they are inflated as a result of contributions

⁴ Sections 408 and 408A provide for traditional IRAs and Roth IRAs, respectively.

⁵ As of April 1, 2013, debtors could protect IRA account balances up to \$1,245,475.00. This number is indicative of the strong public policy in favor of protecting debtors’ retirement assets.

⁶ 2012 Act No. 153, § 1, eff May 14, 2012, was enacted “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.”

⁷ The Statute of Elizabeth by its terms applies only to interests in lands and came into being centuries before such things as individual retirement accounts were ever conceived. Modernizing the law with respect to allegedly fraudulent transfers into IRAs would be a legitimate objective of the General Assembly.

made "with actual intent to hinder, delay, or defraud." And as discussed above, courts applying this standard require extrinsic evidence of fraud beyond the mere fact of the transfer itself before finding a debtor intended to defraud a creditor.

In any case, Statute of Elizabeth jurisprudence, properly understood, is not inconsistent with the substantive standard applied in bankruptcy cases and also requires proof of fraudulent intent in the circumstances of this case. Plaintiff argues proof of fraud is not necessary and cites for this proposition, *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139 (1932). That case, however, involved what the court treated as a gift, a conveyance of lands from a husband to wife without consideration, and the holding was unremarkable. As explained in more recent cases, 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). In this case Mr. Lindgren did not, in the words quoted by Plaintiff, "give his property away." To the contrary, he received valuable consideration: 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 be taxed at a potentially lower marginal rate. *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). Plaintiff must prove fraudulent intent on Mr. Lindgren's part and in doing so must meet a clear and convincing evidentiary standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012) ("A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute

of Elizabeth.”)

Plaintiff emphasizes the voluntary nature of Mr. Lindgren’s contributions to his retirement accounts. This is not disputed. Of course, Mr. Lindgren voluntarily engaged in the challenged transactions. When he contributed to his retirement plans Mr. Lindgren did exactly what the law expressly permits, indeed encourages, him to do. The favorable treatment accorded to contributions to qualifying retirement plans under state and federal tax laws⁸ make 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 a portion of the debtor’s 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). South Carolina’s Homestead statute explicitly exempts from creditors’ claims the very retirement plans to which federal and state tax laws encourage all citizens to contribute.⁹ There are situations in which a debtor could seek to abuse or take advantage of the system - some examples have been provided above - and in such cases a creditor should obtain relief. But here Mr. Lindgren has done no more and no less than the law permits and encourages him to do. Equally 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.*

⁸ It is common knowledge and the court may take judicial notice that contributions to IRA and 401(k) accounts are made with pre-tax dollars, that plan earnings are not taxed as such and no income taxes are paid until funds are withdrawn. Contributions to a Roth IRA are made with after-tax dollars but withdrawals are tax-free.

⁹ A reading of the exemption statute that says, in effect: South Carolina residents can protect over a million dollars in an IRA once they get there, but if they have creditors they cannot put any money into the account to try to build such a nest egg, obviously makes no sense.

Security State Bank, 15 F.2d 499, 501 (8th Cir.1926). That the challenged contributions were made by Mr. Lindgren after the entry of judgments against him is, without more, of no consequence. 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).

If Plaintiff's argument in this case were to be accepted it would mean that judgment debtors, even individuals who had merely been sued or threatened with suit, could no longer engage in reasonable, prudent retirement planning. Plaintiff has offered no authority in support of such an extreme position.

Plaintiff has failed to meet its burden of coming forth with extrinsic evidence to make a clear and convincing case of fraudulent intent on the part of Mr. Lindgren and its motion should be denied with respect to the IRA and Roth IRA accounts.

THE 401(K) PLAN

The 401(k) Plan established by Mr. Lindgren's employer is a qualified ERISA retirement plan. [Lindgren Aff. ¶ 3]¹⁰ As such, it is exempt from creditors' claims under federal law. 11 U.S. Code §§ 522(b)(3)(A) and 522(d)(12); *See Patterson v. Shumate*, 504 U.S. 753, 119 L.Ed.2d 519, 112 S.Ct. 2242 (1992). It is also exempt under South Carolina's Homestead exemption statute:

The following real and personal property of a debtor domiciled in

¹⁰ Once the IRS issues the determination letter attached as an exhibit to Lindgren's affidavit the funds in the account are presumed to be exempt. 11 U.S. Code §§ 522(b)(4)(A).

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 interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code § 15-41-30(A)(14).

Importantly, unlike §15-41-30(A)(13) (dealing with individual retirement accounts), the above-quoted code section exempting ERISA plans has no fraudulent transfer qualification or limitation. A 401(k) Plan is different from an IRA. Contributions to a 401(k) Plan are made by the taxpayer's employer rather by the taxpayer himself. The employer withholds wages and pays these funds directly to the Plan. The employee never has possession of the funds until they are withdrawn from the Plan. Wages are not subject to garnishment in South Carolina. The 401(k) Plan contributions - consisting of the employee's withheld wages - are exempt from levy or execution while in the hands of the employer and remain so after payment to the Plan. When an employer pays to the 401(k) Plan wages withheld from its employee, there is no conversion of non-exempt cash to exempt retirement plan assets.

The undersigned has been unable to find any cases involving a creditor's challenge to 401(k) Plan employer contributions. There are cases, however, dealing with debtors' repayment of loans taken from 401(k) Plans. See *In re Hoetmer*, 2012 WL 4482387 (Bkrcty.S.D.Ind., Slip Copy, Sept. 26, 2012) and *In re Dunbar*, 313 B.R. 430, 436 (Bankr.C.D.Ill.2004). The loan repayment was set aside in *Hoetmer* but not in *Dunbar*. The former case involved actual fraud; the latter constructive fraud. But in any event these cases are distinguishable and not relevant here because the money at issue in those cases was transferred from the debtors' own bank accounts to the 401(k) Plan. *Hoetmer* and *Dunbar* did not involve what we have here: payroll withholdings paid directly by Mr. Lindgren's employer to the 401(k) Plan.

In the circumstances of this case there has been no conversion of non-exempt cash to exempt retirement plan assets and therefore no basis for finding any cognizable legal injury to Plaintiff or for finding any fraudulent transfer. In the absence of a transfer by Mr. Lindgren there can be no basis for application of the Statute of Elizabeth or the substantive fraudulent transfer jurisprudence of federal bankruptcy law, discussed above in respect to IRAs.

Even if the 401(k) Plan contributions are subjected to fraudulent transfer scrutiny, they pass muster. Plaintiff must prove intent to defraud as a matter of state law (because valuable consideration was received in the form of similar tax deferral and other benefits as with IRAs) or federal law (based on the authorities discussed extensively above). As was the case with the IRAs, Plaintiff has failed to show any extrinsic evidence of fraud. The mere fact that Mr. Lindgren's employer continued to make 401(k) Plan contributions - as it had done virtually without interruption since 1992 - is not evidence of fraudulent intent. To the contrary, based on the record herein Mr. Lindgren did not change his behavior in any way post-judgment; he simply continued a pattern of reasonable, prudent retirement planning. There is simply no evidentiary basis, much less one sufficient to meet a clear and convincing standard, to support a finding that the 401(k) Plan contributions were made "with intent to hinder, delay, or defraud a creditor."

529 PLAN CONTRIBUTIONS

A 529 Plan is a tax-advantaged investment account vehicle designed to encourage savings for college education. Mr. Lindgren has such a plan. At this time there is \$13.18 in the account.¹¹

In 2012, Mr. Lindgren paid \$22,000.00 into the account. Plaintiff seeks an order directing the financial institution holding the account, Fidelity Investments, to pay this sum to Plaintiff.

¹¹ The figure provided is the balance as of June 30, 2014. No additional funds have been paid into the account. The figure provided may be off by a few pennies in accrued interest.

However, the \$22,000.00 is no longer in the account. In 2012, Fidelity paid \$17,236.33 to the University of Colorado. Also in that year, \$5,020.00 was withdrawn and used to pay qualified housing expenses for Mr. Lindgren's daughter. [Lindgren Aff. ¶ 11] Again, the money is no longer there and Fidelity, who is not named as a party herein, could reasonably be expected to resist being ordered to send \$22,000.00 to Plaintiff.

On the merits, it is unclear whether 529 Plan assets are exempt from creditor claims. No specific provision of South Carolina's Homestead exemption statute seems applicable. However, a statute dealing with the South Carolina College Investment Program provides:

The SCCIP trust fund, contributions to the SCCIP trust fund, and the right of a person to a refund of contributions or any other right accrued or accruing to any person under the provisions of this chapter are exempt from attachment, garnishment, levy, and sale under any means or final process issued by any court or bankruptcy proceeding and are unassignable except as specifically otherwise provided in this chapter.

S.C. Code § 59-2-140.

Whether strictly speaking this statute applies to the 529 Account at issue here is not clear. However, it is clear that the public policy of this State favors protecting educational savings accounts from creditors' claims. In any case, the payments made into and out of the 529 Plan were all in the ordinary course of Mr. Lindgren's educating his youngest daughter. There is no evidence that these transactions were fraudulent in any way. Had the \$22,000.00 been paid directly to University of Colorado would Plaintiff be seeking to avoid the transfer for want of consideration and to recover the money from the university?

CONCLUSION

The point bears emphasis that the only evidence before the court is to the effect that Mr. Lindgren repeatedly made regular, annual contributions to various retirement plans over a period of decades, and that this practice continued after Plaintiff obtained its judgments against Mr. Lindgren. Plaintiff offers no evidence of fraudulent intent beyond the mere fact of the contributions themselves. Case after case has rejected Plaintiff's approach. Courts universally recognize that debtors may plan and manage their financial affairs to maximize their ability to benefit from homestead and other exemptions. When a debtor goes too far courts grant relief to creditors. That is simply not the case here. If Plaintiff prevails on the facts of this case, it means that no judgment debtor could reasonably plan and prepare for retirement or the future security of his family. Such an outcome flies in the face of the public policy underlying the Homestead exemptions and incentives established to promote retirement savings, all of which are intended to prevent debtors from becoming dependent upon the state for support. Plaintiff's argument for a *per se* rule that post-judgment retirement plan contributions are *ipso facto* fraudulent must be rejected.



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Attorneys for J. Christopher Lindgren

January 19, 2015
Charleston, SC

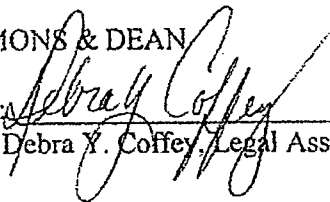
CERTIFICATE OF SERVICE

I, Debra Y. Coffey, a legal assistant with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Amended Memorandum of J. Christopher Lindgren in Opposition to Plaintiff's Motion to Set Aside and Execute upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

Joey R. Floyd, Esquire
BRUNER, POWELL, WALL & MULLINS, LLC
P.O. Box 61110
1735 St. Julian Place, Suite 200 (29204)
Columbia, SC 29260-1110

This 19 day of January, 2015.

SIMONS & DEAN

BY: 

Debra Y. Coffey, Legal Assistant

2015 JAN 22 PM 3:15
CLERK OF COURT
JANUARY 22 2015
CLERK OF COURT

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 BEAUFORT COUNTY
4 FIRST CITIZENS BANK AND TRUST COMPANY, INC.,
5 Petitioner(s),
6 vs. Case No.: 2011-CP-07-128
7 BLUE OX, LLC AND J. CHRIS LINDGREN,
8 Respondent(s).

9 SUPPLEMENTARY PROCEEDINGS
10 RULE TO SHOW CAUSE

11 DATE: SEPTEMBER 2, 2014
12 TIME: 9:30 a.m.
13 LOCATION: Beaufort County Courthouse
14 102 Ribaut Road, Room 212
15 Beaufort, South Carolina
16 BEFORE: Judge Marvin H. Dukes, III
17 REPORTED BY: JEFFREY M. THOMAS
18 Registered Professional Reporter
19
20 -----

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2

1 APPEARANCES:

2 ATTORNEYS FOR PETITIONERS:

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13 jim.scheider@vaux-marscher.com

14

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16 (INDEX AT REAR OF TRANSCRIPT)

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1 (Judge Dukes administered the oath to
2 J. Chris Lindgren.)

3 JUDGE DUKES: All right. Do you have
4 any questions before we begin?

5 THE WITNESS: No.

6 JUDGE DUKES: All right. Please
7 answer any questions Plaintiff's attorney may have.

8 MR. FLOYD: May it please the court,
9 Your Honor.

10 JUDGE DUKES: Yes, sir.

11 WHEREUPON:

12 CHRIS LINDGREN, being duly sworn and
13 cautioned to speak the truth, the whole truth and
14 nothing but the truth, testifies as follows:

15 DIRECT EXAMINATION

16 BY MR. FLOYD:

17 Q. Mr. Lindgren, we met just a few moments
18 ago. As you know, I represent First Citizens Bank
19 as we go through this process. Have you ever done
20 supplemental proceedings before?

21 A. I've done one.

22 Q. Have you?

23 A. Yes.

24 Q. Have you had your deposition taken?

25 A. Ever?

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4

1 Q. Sure.

2 A. Yes.

3 Q. Have you had your deposition taken by a
4 creditor?

5 A. No.

6 Q. Has Ron Anderson's lawyer tried to take
7 your deposition?

8 A. Yes.

9 Q. Did he end up taking your deposition?

10 A. Yes.

11 Q. And where did they take your deposition?

12 A. Hilton Head.

13 Q. Who has it? Do you have a copy of that
14 transcript?

15 A. I believe I do.

16 Q. Is it in your possession or is it in your
17 lawyer's possession or --

18 A. If I don't have it, my lawyer has it.

19 Q. Okay. Can you get a copy of it for me?

20 A. Sure.

21 Q. And was that deposition taken maybe in
22 January of this year?

23 A. It was this year. I'm not sure exactly
24 when.

25 Q. On that same note, have you settled up

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5

- 1 with Ronald Anderson?
- 2 A. No.
- 3 Q. Is Mr. Anderson a former partner of yours?
- 4 A. No.
- 5 Q. He is merely a creditor?
- 6 A. He is now. He was an investor.
- 7 Q. What was he an investor in?
- 8 A. Red Rocks, LLC.
- 9 Q. And I have noticed that it appears that
- 10 you have a number of LLCs here in South Carolina.
- 11 A. Yes.
- 12 Q. What was his role as an investor in Red
- 13 Rocks? What did he do?
- 14 A. He was an investor.
- 15 Q. Did he just dump some money in Red Rocks?
- 16 Is that what he did?
- 17 A. He didn't dump it. He loaned it.
- 18 Q. Loaned money to Red Rocks?
- 19 A. Uh-huh.
- 20 Q. Was there a security agreement of some
- 21 sort?
- 22 A. No.
- 23 Q. Just an unsecured loan?
- 24 A. Yes.
- 25 Q. How much did he loan?

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1 A. Over the course of seven years about
2 14 million.

3 Q. How did you know Ron Anderson?

4 A. A neighbor. Friend.

5 Q. Does he live in your neighborhood?

6 A. He did.

7 Q. Where does he live now?

8 A. To the best of my knowledge, Florida.

9 Q. Okay. That answers a few of my questions
10 that I had. As you know, this is supplemental
11 proceedings. And this is First Citizens Bank's
12 opportunity to try and find assets that may be
13 subject to execution. On that note, can you tell me
14 what sort of vehicle you drove here in today?

15 A. A BMW.

16 Q. Whose BMW is that?

17 A. It's owned by my wife, I believe.

18 Q. And your wife doesn't have any employment,
19 does she?

20 A. She's self-employed.

21 Q. Who is she employed by?

22 A. Herself.

23 Q. Okay. What does she do?

24 A. She's a consultant for skin care products.

25 Q. Is that Rodan + Fields?

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7

1 A. Yes.

2 Q. And what is her annual income, do you
3 know?

4 A. It varies. I think the tax return, you
5 have it, is 18,000.

6 Q. And what sort of BMW is it that she drives
7 -- that you are driving?

8 A. It's a 2007, 750.

9 Q. It was purchased new, right?

10 A. Yes.

11 Q. And was cash paid for that?

12 A. No.

13 Q. Was it financed?

14 A. No.

15 Q. All right. How was it -- if it wasn't
16 paid for with cash and it wasn't financed, how was
17 it paid for?

18 A. A trade-in.

19 Q. Trade-in. What did you trade? What was
20 traded to get that?

21 A. A Maserati.

22 Q. Whose Maserati was traded?

23 A. I believe it was owned by Rockmore, Inc.

24 Q. And you are the hundred percent owner of
25 Rockmore, Inc., right?

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8

1 A. Yes.

2 Q. Where did you buy the BMW from or where
3 was it obtained?

4 A. It was a dealership in Atlanta.

5 Q. The Atlanta BMW dealership?

6 A. There are several. I'm not sure which
7 one, what the name of it was.

8 Q. Do you have the documents relating to
9 purchase of the BMW and the trade-in?

10 A. I'm not sure. I can find out, but that
11 was, again, eight years ago.

12 Q. All right. What other vehicles do you
13 own?

14 A. None.

15 Q. Does your wife own any other vehicles?

16 A. Yes.

17 Q. What else does your wife own?

18 A. She owns a 2002 Yukon and a 2007 Range
19 Rover.

20 Q. Any other vehicles?

21 A. I'm not sure. She might also own our
22 daughter's car.

23 Q. What does the daughter drive?

24 A. She drives a -- I'm not very good with
25 cars. I think it's an Acura something. It's an SUV

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9

1 about three or four years old.

2 Q. Are there any vehicles titled in your
3 name?

4 A. No.

5 Q. Have you moved any vehicles out of your
6 name in the past four years?

7 A. I would have to check. I'm not sure.

8 Q. Have you or your wife sold any vehicles in
9 the past four years?

10 A. Not that I recall.

11 Q. You have a son and a daughter, right?

12 A. I have two daughters and a son.

13 Q. Two daughters and a son? Okay. Do your
14 other children drive vehicles?

15 A. They do.

16 Q. That are owned by you or your wife?

17 A. I don't believe so. I believe they both
18 own their own.

19 Q. Can you tell me your children's names?

20 A. My oldest daughter is Jennifer.

21 Q. Middle name?

22 A. Michelle.

23 Q. Lindgren?

24 A. Right.

25 Q. All right. Middle child?

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- 1 A. John Christopher Lindgren.
- 2 Q. He has the same name as you, right?
- 3 A. Yes.
- 4 Q. Is he a Junior?
- 5 A. We've never put Junior on his name so -- I
- 6 mean no.
- 7 Q. Same name?
- 8 A. Same name, yeah.
- 9 Q. All right. And your youngest daughter?
- 10 A. Jessica Mazo Lindgren.
- 11 Q. Is your wife's maiden name M-a-z-o?
- 12 A. Uh-huh.
- 13 Q. Mazo?
- 14 A. Yes. Sorry.
- 15 Q. Tell me their ages, if you will.
- 16 A. Jennifer is 27. The boy is 24. And
- 17 Jessica is 21.
- 18 Q. All right. So your youngest daughter
- 19 Jessica, is she still in school?
- 20 A. Yes.
- 21 Q. And where does she go to school?
- 22 A. University of Colorado.
- 23 Q. Does she have student loans?
- 24 A. She does.
- 25 Q. Did you pay for any of her college?

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- 1 A. Yes.
- 2 Q. How did you pay for her college?
- 3 A. From salaries.
- 4 Q. From salaries?
- 5 A. Yes.
- 6 Q. What bank account would you have used to
- 7 pay that tuition?
- 8 A. I believe it would be Coastal States.
- 9 Q. When was the last time you paid tuition?
- 10 A. It was probably -- I don't recall exactly.
- 11 I think maybe January of 2014.
- 12 Q. How much did you write a check for at
- 13 Coastal States Bank?
- 14 A. I'm not sure.
- 15 Q. Was it in the range of \$40,000?
- 16 A. No.
- 17 Q. Less than that?
- 18 A. Yes.
- 19 Q. More than 20?
- 20 A. I don't recall.
- 21 Q. Okay. Do you have records from Coastal
- 22 States Bank that would tell me how much you paid in
- 23 tuition there?
- 24 A. Yes. And, again, if it came out of that
- 25 account.

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1 Q. Would you have had another account that
2 you --

3 A. Well, there is also money left by my
4 mother's estate that has paid most of her college
5 education.

6 Q. And where is that money?

7 A. Well, there is none left, but it was in a
8 IRA BDA.

9 Q. One more time?

10 A. IRA BDA.

11 Q. IRA, I-R-A?

12 A. BDA.

13 Q. What is that?

14 A. IRA BDA.

15 Q. Does it stand for something?

16 A. It's a beneficiary IRA.

17 Q. Okay.

18 MR. SCHEIDER: Beneficiary designated
19 account, is it not?

20 THE WITNESS: Yes.

21 BY MR. FLOYD:

22 Q. And has that all been used up?

23 A. Yes.

24 Q. Where was that account held?

25 A. I believe it was TIAACREF.

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- 1 Q. In Charlotte?
- 2 A. I have no idea. Massachusetts, maybe.
- 3 Q. Does TIA --
- 4 A. I'm not sure at all.
- 5 Q. I'm sorry. I didn't mean to chop you off.
- 6 Does TIAACREF have -- and I think you spell that
- 7 T-I-A-A-C-R-E-F; is that right?
- 8 A. That's right. That is how they spell it.
- 9 Q. All right. Do you have any other accounts
- 10 at TIAACREF?
- 11 A. No.
- 12 Q. Whether they be IRAs, pension plans,
- 13 profit sharing?
- 14 A. No.
- 15 Q. Did you have some earlier this year?
- 16 A. Yeah.
- 17 Q. Do you remember completing a financial
- 18 statement for First Citizens?
- 19 A. Yes.
- 20 Q. And do you remember completing this in
- 21 March of 2014?
- 22 A. Yes.
- 23 Q. And do you recall putting in \$595,000?
- 24 A. I don't recall the number, but I do recall
- 25 595 or I do recall putting down a pension plan.

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14

1 Q. Right there?

2 A. Yes.

3 Q. Do you have a pension plan there?

4 A. No.

5 Q. Okay. Where is the pension plan?

6 A. At The Hartford. It's a -- to be clear,
7 it's a profit sharing plan.

8 Q. And where is the profit sharing plan
9 coming from?

10 A. What do you mean coming from?

11 MR. SCHEIDER: The sponsoring entity.

12 THE WITNESS: Oh. Rockmore, Inc.

13 MR. SCHEIDER: My apologies, Your
14 Honor.

15 JUDGE DUKES: That's fine with me.

16 MR. FLOYD: That is helpful. I
17 appreciate it.

18 BY MR. FLOYD:

19 Q. When did Rockmore, Inc., fund the pension,
20 profit sharing plan?

21 A. It's a 401-K.

22 Q. All right. Does it fund it every year?

23 A. It's a 401-K. It's funded through
24 employee deferrals.

25 Q. And it funds every year?

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15

- 1 A. It funds through payroll deferrals.
- 2 Q. Are you still on Rockmore's salary?
- 3 A. No.
- 4 Q. Okay. When was the last time money was
5 put in there?
- 6 A. Probably December 2013.
- 7 Q. Do you know how much you've put in there
8 every year? Do you have statements?
- 9 A. I can get on-line statements, yes.
- 10 Q. You can?
- 11 A. I don't have paper statements, but I can
12 get them.
- 13 Q. What is the maximum amount that you can
14 put in every year through Rockmore?
- 15 A. It's a 401-K. 23,000.
- 16 Q. \$23,000?
- 17 A. Yeah. That is with the 55-year-old
18 catch-up provision.
- 19 Q. I will admit that I am outgunned in taxes
20 when it comes to you. So I'm sorry that I'm asking
21 some of these questions that may frustrate you.
- 22 A. That's all right.
- 23 Q. I don't mean to frustrate you. And has it
24 contributed -- has Rockmore, Inc., contributed
25 \$23,000?

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1 A. No.

2 Q. How much has it contributed over the past
3 couple years?

4 A. Nothing.

5 Q. Okay. But you just said it contributed
6 some money in December of --

7 A. I contributed.

8 Q. You contribute personally?

9 A. Right.

10 Q. Through the --

11 A. It's a 401-K.

12 Q. Through the --

13 A. Payroll deferral.

14 Q. -- payroll deferral?

15 A. Right.

16 Q. Okay. Have you maxed out every year --

17 A. No.

18 Q. -- through that? All right. Do you have
19 an idea of how much you put in there in 2013?

20 A. 23,000.

21 Q. All right. How much did you put in in
22 2012?

23 A. I would have to check.

24 Q. Do you think it was the maximum amount?

25 A. I'm not sure. It would be approximated,

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- 1 but I'm not sure.
- 2 Q. You would have been over 55 in 2012?
- 3 A. Yes.
- 4 Q. So you would have had the ability to put
- 5 in?
- 6 A. The ability, yes.
- 7 Q. Were you over 55 in 2011?
- 8 A. I turned 55 in 2011.
- 9 Q. Would that mean that you would have the
- 10 ability to contribute the maximum amount --
- 11 A. Yes.
- 12 Q. -- in that year since you turned 55?
- 13 A. Yes.
- 14 Q. Do you think you contributed the maximum
- 15 amount that year?
- 16 A. I would have to check.
- 17 Q. And this is with The Hartford?
- 18 A. The plan is sponsored by The Hartford or
- 19 the plan is at The Hartford, sponsored by Rockmore,
- 20 Inc.
- 21 Q. All right. Have you had any other forms
- 22 of savings for retirement besides this 401-K?
- 23 A. I have an IRA.
- 24 Q. Where is the IRA?
- 25 A. It is at Fidelity.

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18

1 Q. Do you know what sort of IRA it is?

2 A. Yes.

3 Q. Can you tell me?

4 A. It's an IRA.

5 Q. It's a 408-K, is it?

6 A. It's just a -- it's just sort of a
7 straight IRA. It's not a Roth IRA.

8 Q. And how much money is in that IRA account?

9 A. That is a component of the number you just
10 showed me. And I'm going to guess it's in the
11 25,000 range.

12 Q. Do you have statements from Fidelity?

13 A. I do not, but I can get them.

14 Q. That is my question. Can you get
15 statements from Fidelity?

16 A. I can.

17 Q. When was the last time you would have
18 contributed money to Fidelity?

19 A. It would have been around April 15th of
20 2014.

21 Q. April 15th of 2014?

22 A. Uh-huh.

23 Q. How much did you contribute then?

24 A. I would have to check. I'm not sure.

25 Q. What is the maximum amount that you can

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- 1 put in in April?
- 2 A. 6,500.
- 3 Q. Is that Fidelity IRA -- is it just one IRA
- 4 that you have with Fidelity?
- 5 A. Yes.
- 6 Q. Does your wife also have a separate IRA?
- 7 A. She does.
- 8 Q. And was -- did she fund her IRA as well in
- 9 April of this year?
- 10 A. I would have to check.
- 11 Q. Okay. All right. So you think roughly
- 12 you would have, if I do the math, \$595,000. And if
- 13 I subtracted 25, that would put it at about \$570,000
- 14 in The Hartford plan. Does that sound right?
- 15 A. It's less than that.
- 16 Q. Okay. Was there another component besides
- 17 those two components?
- 18 A. No.
- 19 Q. Okay. Why is it less than that?
- 20 A. I took a distribution.
- 21 Q. When did you take a distribution?
- 22 A. I would have to check. Sometime since
- 23 March. I'm not sure. A few months ago.
- 24 Q. How much is there?
- 25 A. I beg your pardon?

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20

1 Q. How much is there now?

2 A. Where?

3 Q. In The Hartford plan.

4 A. I believe -- I'm not sure. I would have
5 to check. I haven't checked for awhile. I would
6 say in the 300,000 range.

7 Q. All right. Do you have any other IRAs?

8 A. No.

9 Q. Do you have any other --

10 A. Pardon me. I do have a Roth IRA.

11 Q. How much do you have in the Roth IRA?

12 A. I think it's like 3,000.

13 Q. Do you know when you deposited that money
14 in the Roth?

15 A. I would have to check.

16 Q. Would it have been in 2013?

17 A. I'm not sure. Well, it might have been --
18 I think it was with respect to 2013. I'm not sure.

19 Q. Would that mean that you were putting
20 money in in 2014?

21 A. I would have to check.

22 Q. Okay. But the most you think is there is
23 \$3,000?

24 A. Right.

25 Q. Where is that Roth IRA?

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21

1 A. At Fidelity.

2 Q. And you can get me statements of those as
3 well?

4 A. Sure.

5 Q. All right. Have you contributed any money
6 to any college savings plan?

7 A. Yes.

8 Q. Have you done it in the past three years?

9 A. I would have to check.

10 Q. Where would your college savings plan be?

11 A. They were with -- I'm not sure. I would
12 have to check.

13 Q. Was it with a company out of New Jersey?

14 A. It might be.

15 Q. Who did you use to handle your college
16 savings plans?

17 A. Nobody.

18 Q. You did it yourself?

19 A. Yes.

20 Q. How about the Unique College Savings Plan?
21 Have you ever heard of that?

22 A. That sounds right.

23 Q. Is that yours that you created?

24 A. I remember the name Unique College Savings
25 Plan, but I'm not sure who handled it or what

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22

1 vehicle that was invested through.

2 Q. Did you create any vehicles for savings
3 and investing -- investments?

4 A. Yes.

5 Q. What sort of vehicles did you create?

6 A. Well, I've formed 38 LLCs.

7 Q. What college savings plans is what I'm
8 talking about. I'm sorry.

9 A. That's all right. No.

10 Q. Was the Unique College Savings Plan
11 something that you merely invested money in?

12 A. Yes.

13 Q. Was it an entity that you created?

14 A. No.

15 Q. Where are your wife's -- where is your
16 wife's family from?

17 A. Savannah, Georgia.

18 Q. All right. Do you have any other IRAs,
19 401-Ks, besides the three that we've talked about?

20 A. No.

21 Q. Do you have any other pension plans or any
22 or vested retirement accounts?

23 A. No.

24 Q. What other banks do you currently bank
25 with?

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23

1 A. The only bank I bank with is Coastal
2 States.

3 Q. Do you bank with any foreign financial
4 institutions?

5 A. No.

6 Q. Have you ever banked with any foreign
7 financial institutions?

8 A. Personally?

9 Q. Or through your businesses.

10 A. Yes.

11 Q. What banks have you invested with with
12 foreign financial institutions?

13 A. I would have to check, but I believe
14 Chase.

15 Q. And where did you bank with Chase?

16 A. In the Virgin Islands. It wasn't me. It
17 was through an entity.

18 Q. Which entity was that?

19 A. John V. Brose, Inc., Foreign Sales
20 Corporation.

21 Q. An exporting company, right?

22 A. That was not an exporting company. It's a
23 foreign sales corporation.

24 Q. Foreign sales. Is there still a bank in
25 the Virgin Islands?

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24

1 A. There are lots of banks in the Virgin
2 Islands.

3 Q. That you banked with. I'm sorry.
4 Terrible question. I apologize.

5 MR. SCHEIDER: No.

6 THE WITNESS: No. And, again, I've
7 never banked personally, but through the entity I
8 did.

9 BY MR. FLOYD:

10 Q. Does the entity still have an account?

11 A. No.

12 Q. Any other offshore bank accounts? You
13 understand when I mean when I say an offshore bank
14 account?

15 A. Yes. No.

16 Q. Do you own any real property outside the
17 United States?

18 A. No.

19 Q. Have you ever owned any property outside
20 the United States?

21 A. Property?

22 Q. Uh-huh.

23 A. Yes.

24 Q. What have you owned outside the United
25 States?

9/2/2014

25

1 A. Bank accounts through entities.

2 Q. All right. And would that have all been
3 through Chase?

4 A. I would have to check.

5 Q. Have you ever owned any real property, any
6 land, outside the United States?

7 A. No.

8 Q. Do you or any entities in which you own an
9 interest in currently have any bank accounts outside
10 of the United States?

11 A. No.

12 Q. Do you have any cash at your house?

13 A. Yes.

14 Q. How much cash do you have at your house?

15 A. Probably about 30 bucks. A jar of coins.

16 Q. Okay. You don't keep any cash on hand in
17 a safe or anything like that?

18 A. No.

19 Q. All right. Do you have any securities,
20 stocks?

21 A. Personally?

22 Q. Uh-huh.

23 A. No.

24 Q. All right. Do any entities that you own
25 own any stock?

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26

- 1 A. Yes.
- 2 Q. Which one are those?
- 3 A. Which stocks do they own?
- 4 Q. Which entity owns stocks?
- 5 A. Rockmore, Inc., owns stock.
- 6 Q. What does Rockmore, Inc., own?
- 7 A. Stock in?
- 8 Q. Uh-huh.
- 9 A. Coastal States Bank.
- 10 Q. How much Coastal States Bank do they own?
- 11 A. I think it's 10,000 shares.
- 12 Q. What is the current stock value of Coastal
- 13 States Bank?
- 14 A. I'm not sure.
- 15 Q. You are the single shareholder of
- 16 Rockmore; is that right?
- 17 A. That's correct.
- 18 Q. What does Rockmore, Inc., do? What is its
- 19 purpose?
- 20 A. It's a management company.
- 21 Q. All right. What does it manage?
- 22 A. Payroll, operations.
- 23 Q. How many employees does Rockmore, Inc.,
- 24 have?
- 25 A. One.

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27

- 1 Q. Who is that?
- 2 A. Dee Heaton.
- 3 Q. Dee?
- 4 A. Heaton.
- 5 Q. Heaton. Where is he located?
- 6 A. She is located in Hilton Head.
- 7 Q. Where is Rockmore, Inc.'s, office?
- 8 A. When you say "office" you mean operations?
- 9 Q. All of the above. Does it have a
- 10 brick-and-mortar type office?
- 11 A. Yes.
- 12 Q. Where is that?
- 13 A. 5 Dunmore Court.
- 14 Q. Is that someone's house?
- 15 A. No.
- 16 Q. Is that Hilton Head Island?
- 17 A. Yes.
- 18 Q. Do you go to work there as well?
- 19 A. Yes.
- 20 Q. So do you not consider yourself an
- 21 employee?
- 22 A. As I told you, I don't -- I'm not an
- 23 employee of Rockmore anymore.
- 24 Q. You are not? Have you sold Rockmore?
- 25 A. No.

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28

1 Q. You just don't have -- you are just an
2 investor now?

3 A. No. I'm a shareholder.

4 Q. Do you have any input in the day-to-day
5 operations for Rockmore?

6 A. Yes.

7 Q. Do you also serve any other capacity
8 besides shareholder?

9 A. Yes.

10 Q. Do you also serve as president?

11 A. Yes.

12 Q. Do you also manage the day-to-day
13 operations?

14 A. Yes.

15 Q. Do you also write the checks?

16 A. Yes.

17 Q. Does Dee Heaton have the authority to
18 write checks?

19 A. No.

20 Q. What does Dee Heaton do? What are her job
21 responsibilities?

22 A. She is controller, manager, bookkeeper.

23 Q. The way you've described it is a person
24 who would manage the financial books of a company.
25 Is that an accurate description?

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29

- 1 A. Right.
- 2 Q. And at any given time she will tell you or
- 3 give you a report of how much money that particular
- 4 company may have, snapshots and that sort of stuff?
- 5 A. Correct. Yes.
- 6 Q. Does she also manage the bills, the
- 7 accounts payable, accounts receivable?
- 8 A. Which entity are you talking about?
- 9 Q. Rockmore.
- 10 A. No.
- 11 Q. Does it have any accounts payable?
- 12 A. Payroll.
- 13 Q. Just one person on payroll though, right?
- 14 A. Correct.
- 15 Q. And that is her?
- 16 A. Correct.
- 17 Q. So she manages her own payroll?
- 18 A. Right.
- 19 Q. All right.
- 20 A. No. No. She doesn't manage her payroll.
- 21 Q. She doesn't manage her payroll?
- 22 A. No.
- 23 Q. Who manages her payroll?
- 24 A. I do.
- 25 Q. How much do you pay her?

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1 A. I think her net bimonthly pay is about
2 after deferrals for 401-Ks and loan repayments and
3 that sort of thing is about \$1,600.

4 Q. A month?

5 A. Bimonthly.

6 Q. So her annual salary is in the range of 50
7 grand?

8 A. Probably 55.

9 Q. Tell me what the management company does.

10 A. I told you. It manages payroll and it
11 manages operations.

12 Q. Other people's payroll? Other companies'
13 payroll?

14 A. Other companies' operations.

15 Q. What other companies does it manage?

16 A. You can go through that list if you want
17 of the LLCs.

18 Q. Primarily your LLCs?

19 A. Yes.

20 Q. Okay.

21 A. Yes.

22 Q. Does it handle any other LLCs or any other
23 corporations?

24 A. Other than?

25 Q. The ones that you own an interest in.

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1 A. No.

2 Q. Okay. So the single purpose of that
3 entity is to kind of keep track of all of your LLCs?

4 A. Right.

5 Q. And the tax bills and all of that sort of
6 stuff because a number of your entities own real
7 estate, right?

8 A. Yes.

9 Q. Would that be the primary business model
10 of these LLCs?

11 A. What is that?

12 Q. Real estate ownership.

13 A. Generally, yes.

14 Q. Okay. What other areas would you consider
15 there to be business line beyond investment in real
16 property?

17 A. Well, there has been export trade.

18 Q. Are you still involved in that?

19 A. Yes.

20 Q. What does the export trading company do?

21 A. Export trades.

22 Q. Got to be more specific than that. I'm
23 not a very good businessman.

24 A. It exports products.

25 Q. Exports for other companies?

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1 A. It buys products for its own account and
2 exports those to overseas customers.

3 Q. Can you give me an example of something
4 that you've done recently to help me understand?

5 A. Say it buys a hundred faucets and then
6 sells a hundred faucets to a first chair wholesaler
7 in the Honduras.

8 Q. All right. And that would be something
9 that maybe John V. Brose would do?

10 A. Yes.

11 Q. Now, how did John V. Brose get that name?
12 Was there a guy named John V. Brose?

13 A. It was founded by a gentleman named John
14 V. Brose.

15 Q. And did you buy him out or --

16 A. I bought his stock in the company.

17 Q. When did you do that?

18 A. In November 1990.

19 Q. Is it still known as John V. Brose?

20 A. Yes.

21 Q. Is that an LLC or is it --

22 A. No.

23 Q. A corporation, right?

24 A. It's a C Corp.

25 Q. All right. Why don't we go through these

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1 LLCs and corporations and you tell me kind of their
2 purpose and all of that sort of stuff.

3 A. Sure.

4 Q. EM Security Services, Inc. Have you ever
5 heard of them?

6 A. I have.

7 Q. Is it still active?

8 A. I don't believe so.

9 Q. Okay.

10 A. I don't own it. You have a registered
11 agent list there.

12 Q. That's right. Do you own EM Security
13 Services, Inc.?

14 A. No.

15 Q. Who owns it?

16 A. If it's still in existence, it's owned by
17 Dick Estes and the Estate of Irwin Mazo.

18 Q. That would be your father-in-law?

19 A. Yes.

20 Q. And why were you serving as the registered
21 agent?

22 A. Because they needed one in South Carolina.

23 Q. Okay. How about HCC, LLC?

24 A. What is the question?

25 Q. Do you own it?

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1 A. I do.

2 Q. What does it do?

3 A. It developed Hospital Center Common on
4 Hilton Head.

5 Q. How many members?

6 A. One.

7 Q. Is it still an ongoing entity?

8 A. It doesn't own any of the development
9 anymore. And I'm not sure if the checking account
10 is still open or not.

11 Q. Who gets the rents for that?

12 A. HCC got the rents when it owned the
13 properties, but it doesn't own the properties
14 anymore.

15 Q. Who transferred the properties to another
16 entity?

17 A. No. It sold them to doctors and hospital
18 administrators and stockbrokers and that sort of
19 stuff.

20 Q. So for all intents and purposes you would
21 say that that HCC, LLC, is --

22 A. It's effectively dormant.

23 Q. How about Oak Ridge Park?

24 A. Oak Ridge Park --

25 Q. LLC.

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1 A. -- is an entity that owns half of a
2 trailer park in Ridgeland, South Carolina.

3 Q. How many members?

4 A. One.

5 Q. You?

6 A. No.

7 Q. Who is the member in that?

8 A. Red Rocks. Red Rocks, LLC.

9 Q. Who are the members in Red Rocks, LLC?

10 A. Me.

11 Q. Any other members?

12 A. No.

13 Q. And that particular LLC generates quite a
14 bit of rent, right?

15 A. How do you define quite a bit?

16 Q. Cash. Does it generate cash every month?

17 A. It's generally money orders.

18 Q. Money orders every month?

19 A. Yes.

20 Q. Okay. And what happens to those money
21 orders? Are they made out to Oak Ridge Park, LLC?

22 A. No.

23 Q. Who are those money orders made out to?

24 A. Las Flores, LLC.

25 Q. L-a-s Flores, F-l-o-r-e-s, LLC?

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- 1 A. Correct.
- 2 Q. Why is that?
- 3 A. Why is what?
- 4 Q. Why do they make their checks and monye
5 orders out to Las Flores, LLC?
- 6 A. Because that is now the landlord.
- 7 Q. The landlord is Las Flores, LLC?
- 8 A. That's correct.
- 9 Q. Are you the owner of that limited
10 liability company?
- 11 A. No.
- 12 Q. Are you the member of that limited
13 liability company?
- 14 A. No.
- 15 Q. Is Red Rocks, LLC?
- 16 A. Yes.
- 17 Q. Is Red Rocks, LLC, the single member of
18 that entity?
- 19 A. I believe so.
- 20 Q. Okay. What does Las Flores, LLC, do with
21 the money that it collects during the month? Does
22 it issue a check to Red Rocks, LLC?
- 23 A. It generally transfers money to Oak Ridge,
24 LLC.
- 25 Q. And then what does Oak Ridge -- Oak Ridge

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1 Park, is that what you are talking about? Not Oak
2 Ridge. There is not a separate one named Oak Ridge.

3 A. Oak Ridge Park, LLC. I think it's Oak
4 Ridge Park, LLC.

5 Q. And does Oak Ridge Park, LLC, pay a
6 management fee?

7 A. Generally the bulk of it goes to debt
8 service.

9 Q. What about the remaining portion?

10 A. Would go to operations.

11 Q. Which would be to the management company?

12 A. No, it would be -- Oak Ridge pays its own
13 bills; trash management, that sort of something.

14 Q. About those excess? Where does the excess
15 go?

16 A. That would be either a management fee or
17 go for other debt service to other investors.

18 Q. Were there other investors in that
19 particular company?

20 A. Yes.

21 Q. Who were the other investors in Oak Ridge
22 Park, LLC?

23 A. My father John Lindgren.

24 Q. But he's not a member of any LLCs, right?

25 A. No. He's an investor.

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- 1 Q. What is the difference between being a
2 member and being an investor?
- 3 A. A member owns a membership interest. An
4 investor invests money.
- 5 Q. Are there documents memorializing their
6 investments?
- 7 A. Yes.
- 8 Q. Would they be in the form of mortgages?
- 9 A. No. Promissory notes.
- 10 Q. Generally unsecured loans?
- 11 A. Yes.
- 12 Q. So your father-in-law would be an
13 investor?
- 14 A. No.
- 15 Q. No?
- 16 A. (Shook head.)
- 17 Q. Who was the investor?
- 18 A. My father.
- 19 Q. Your father?
- 20 A. (Nodded head.)
- 21 Q. Any other investors in there?
- 22 A. Yes.
- 23 Q. Who were the other investors?
- 24 A. Rob Reichel.
- 25 Q. Can you spell his last name?

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- 1 A. R-e-i-c-h-e-l.
- 2 Q. Any others?
- 3 A. Yes.
- 4 Q. Will you please tell me?
- 5 A. Lisa Lindgren.
- 6 Q. And who is Lisa Lindgren?
- 7 A. She is my sister.
- 8 Q. All right. Who else?
- 9 A. David Greenberg.
- 10 Q. What is his relationship?
- 11 A. Investor.
- 12 Q. Friend?
- 13 A. Yeah. Investor.
- 14 Q. Okay. Who else? Name all the investors
- 15 for me if you would.
- 16 A. I think that is it.
- 17 Q. And those are all investors in Oak Ridge
- 18 Park, LLC?
- 19 A. Yes.
- 20 Q. Will these investors show up as investors
- 21 in other LLCs as well?
- 22 A. No.
- 23 Q. Okay. Will any of those investors show up
- 24 as investors in other LLCs?
- 25 A. Isn't that the same question?

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1 MR. SCHEIDER: Asked and answered.

2 You said the same thing.

3 BY MR. FLOYD:

4 Q. Okay. I'm sorry.

5 A. The answer is still no.

6 Q. All right. Would these folks that you
7 just named as investors, would they appear as
8 investors in any of these other LLCs, not
9 necessarily altogether, but just perhaps your father
10 being an investor?

11 A. No.

12 Q. Okay. All right. Start Me Up, LLC?

13 A. Is --

14 Q. Tell me about that. Who is the member?

15 A. I'm the member.

16 Q. What does it do?

17 A. It doesn't do anything. It was formed to
18 do prospective business and has never done anything.

19 Q. Dormant LLC?

20 A. Well, it's got a checking account, but
21 hasn't done anything.

22 Q. Where do these LLCs bank?

23 A. Which ones?

24 Q. Do you bank at different banks with these
25 LLCs?

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1 A. Yes.

2 Q. All right. Where would you have banking
3 relationships with LLCs besides Coastal States Bank?

4 A. Oh, there are TD Bank, Sun Trust Bank,
5 South Carolina Bank and Trust.

6 Q. Which is now South Bank, right?

7 A. I believe so.

8 Q. I think that is right.

9 A. What is that?

10 Q. That is it?

11 A. I was asking what you said.

12 Q. I just said I think that is South Bank
13 now.

14 A. I believe so. Savannah Bank which is, I
15 think, also part of South Bank now.

16 Q. Okay.

17 A. Bank Meridian was HCC, but they've been
18 bought by somebody else or F.D.I.C. took them over.
19 I think that is it.

20 Q. All right. Would any of these entities
21 also bank at Coastal States Bank?

22 A. Yes.

23 Q. Who decides where these LLCs open up bank
24 accounts? Do you make that decision?

25 A. Yes.

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- 1 Q. How do you decide where a particular
2 entity will bank?
- 3 A. It depends on business variables.
- 4 Q. Your relationships and your needs, is
5 that --.
- 6 A. Right.
- 7 Q. All right. What is 5 Dunmore Court
8 Property Owners Association?
- 9 A. It's a horizontal property regime, C Corp.
- 10 Q. Who owns the 5 Dunmore Court property
11 where your business is located; Rockmore, Inc.?
- 12 A. Nobody. It's a horizontal property
13 regime.
- 14 Q. Okay. What is the name of the horizontal?
15 Is that the Property Owners Association that own
16 that property?
- 17 A. That is the horizontal property regime.
- 18 Q. Are there other businesses there at
19 Dunmore Court?
- 20 A. That are physically located there?
- 21 Q. Uh-huh.
- 22 A. Yes.
- 23 Q. Tell me.
- 24 A. Raymond James, Sodemann Architects, Tarbow
25 Properties, Red Rocks, Rockmore. In effect,

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1 anything that is operating or dormant now that
2 hasn't been dissolved is out of 5 Dunmore Court.

3 Q. Okay. And do those other entities or
4 other businesses that you aren't involved with, do
5 they pay rent?

6 A. Yes. Well, yes and no. One does and one
7 doesn't.

8 Q. Who is it that does?

9 A. Raymond James.

10 Q. And where does that money go?

11 A. Savannah Bank.

12 Q. Who is it made payable to?

13 A. Tarbow Properties.

14 Q. Why is that?

15 A. Because Tarbow owns the building.

16 Q. All right. And you own -- are you the
17 single member of Tarbow Properties, LLC?

18 A. No.

19 Q. Is Red Rocks, LLC, the --

20 A. No.

21 Q. Who is the single member of Tarbow
22 Properties?

23 A. There is not a single member.

24 Q. Who are the members of Tarbow Properties?

25 A. Two members; myself and Harold Yellen.

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- 1 Q. What is your relationship to Mr. Yellen?
- 2 A. Friend.
- 3 Q. Is he from Savannah?
- 4 A. Yes.
- 5 Q. Is he related to you by blood or marriage?
- 6 A. I think he's a second or third cousin to
- 7 my wife. I'm not sure.
- 8 Q. All right. What does he do?
- 9 A. Old Savannah family. He's a lawyer.
- 10 Q. What firm does he work with?
- 11 A. Hunter McClain.
- 12 Q. All right. Tell me about Double Play,
- 13 LLC.
- 14 A. It is a company that was formed to pay for
- 15 the Hilton Head High School baseball press box and
- 16 concession stand.
- 17 Q. And is it still operating and ongoing?
- 18 A. Its debt was paid off recently, so it's
- 19 effectively dormant.
- 20 Q. Dissolved?
- 21 A. I don't know if it's dissolved or not.
- 22 Q. Who was the member of Double Play, LLC?
- 23 A. Me.
- 24 Q. Individually?
- 25 A. Yes.

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1 Q. Okay. Fishburn Construction, LLC?

2 A. Was a contractor that built during a
3 period substantially most -- substantially all of my
4 developments.

5 Q. Were you the single member?

6 A. Yes.

7 Q. Individually?

8 A. Yes.

9 Q. Is it still an active and ongoing concern?

10 A. I'm not sure if it's been dissolved or
11 not, but it's not active.

12 Q. Would it have operated out of the 5
13 Dunmore Court?

14 A. No.

15 Q. Where would it have operated?

16 A. 89 Main Street.

17 Q. In Hilton Head?

18 A. Uh-huh. Yes.

19 Q. Was that the office location prior to your
20 relocation to 5 Dunmore Court?

21 A. Yes.

22 Q. And when did you relocate to 5 or locate
23 at 5 Dunmore Court?

24 A. I'm not sure. Approximately two years
25 ago.

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- 1 Q. All right. Riva Ridge, LLC?
- 2 A. Reva Ridge.
- 3 Q. Reva Ridge?
- 4 A. Right.
- 5 Q. Who are the members of Reva Ridge, LLC?
- 6 A. Herb King and myself.
- 7 Q. Who is Herb King?
- 8 A. Herb King was an erstwhile partner who
- 9 passed away.
- 10 Q. What does River Ridge, LLC, do?
- 11 A. Reva Ridge?
- 12 Q. Yeah.
- 13 A. It is an entity that owns a commercial
- 14 parcel -- currently owns a commercial parcel in
- 15 Bluffton, South Carolina.
- 16 Q. Is it for sale?
- 17 A. Always.
- 18 Q. Does it have anything on it at this time?
- 19 A. No.
- 20 Q. Is it drawing any rents or anything to
- 21 that effect?
- 22 A. No.
- 23 Q. Does it have any means of revenue?
- 24 A. No.
- 25 Q. Clear Creek Capital, LLC?

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1 A. Is an entity that hasn't done anything yet
2 like Start Me Up that was formed to do prospective
3 business.

4 Q. How about Flat Creek, LLC?

5 A. Is an entity that owns real estate in
6 Bluffton.

7 Q. Who are the members, I'm sorry, of Clear
8 Creek Capital, LLC?

9 A. Me.

10 Q. Individually?

11 A. Yes.

12 Q. Any other members?

13 A. I believe -- yes. I'm not sure. I'll
14 have to check, but I believe yes.

15 Q. Who are the other members?

16 A. I believe it's -- my wife is a member and
17 each of my children.

18 Q. And we are talking about Clear Creek now,
19 right?

20 A. Right.

21 Q. All right. How about Flat Creek, LLC, who
22 are the members?

23 A. Clear Creek.

24 Q. Flat Creek, LLC.

25 A. Clear Creek.

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- 1 Q. It's the same thing?
- 2 A. No. Clear Creek is the member of Flat
- 3 Creek.
- 4 Q. Okay. All right. Single member?
- 5 A. Yes.
- 6 Q. What does Flat Creek, LLC, do?
- 7 A. It owns real estate in Bluffton.
- 8 Q. How much real estate in Bluffton?
- 9 A. Thirty-five acres.
- 10 Q. Does it have any revenue sources?
- 11 A. Yes. There is a mobile home park on it.
- 12 Q. So that is the second mobile home park
- 13 that we've talked about?
- 14 A. Yes.
- 15 Q. Do you have other mobile home parks?
- 16 A. No.
- 17 Q. All right. Same sort of set-up? Do they
- 18 pay their rent to Las Flores, LLC?
- 19 A. No.
- 20 Q. Who do they pay their rent to?
- 21 A. Flat Creek.
- 22 Q. And then who does Flat Creek, LLC, pay any
- 23 excess to?
- 24 A. Coastal States Bank.
- 25 Q. That is the debt service, right?

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1 A. Yes.

2 Q. After the debt service is done?

3 A. It pays -- well, it pays operation
4 expenses.

5 Q. Of Flat Creek, LLC?

6 A. Right.

7 Q. Or would it be paying the management fee?

8 A. It also pays a management fee.

9 Q. To Rockmore?

10 A. To Rockmore and to -- I think just to
11 Rockmore, but I would have to check.

12 Q. All right. Black Diamond, LLC?

13 A. Is --

14 Q. Who are the members and tell me what it
15 does?

16 A. The members are currently David Brosnon --
17 no. I'm sorry. Yeah. David Brosnon and Red Rocks.

18 Q. What does it do?

19 A. Black Diamond owns real property in
20 Bluffton.

21 Q. Revenue generating?

22 A. Yes.

23 Q. Rentals and that sort of stuff?

24 A. Yes.

25 Q. Same sort of set-up? Pays the bank for

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1 debt service? Does it have debt service?

2 A. It does have debt service.

3 Q. And any excesses would be paid to the
4 management fee?

5 A. No. Well, yes, it pays a management fee
6 to it used to be called Bosely Asset Management.
7 Now it's called South State Management, I think.

8 Q. And they all ultimately pay a management
9 fee to Rockmore?

10 A. No.

11 Q. This particular entity doesn't?

12 A. No.

13 Q. All right. So who does it pay it's
14 management fee to? You said it used to be Bosely?

15 A. It used to be Bosely Asset Management.
16 And I believe it is now called I think South State
17 Management. And that is fairly recent.

18 Q. Is that an entity that you own?

19 A. No.

20 Q. Who owns South State Management?

21 A. I'm not sure.

22 Q. Why would it pay a management fee to South
23 State Management?

24 A. Because they manage the property.

25 Q. All right. What about any excesses?

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1 Where would the excesses go?

2 A. The bulk of the excess goes to the bank.

3 Q. All right. Where would the residual go,
4 if there is any?

5 A. To operating expenses.

6 Q. Which would be the management fee of
7 Rockmore?

8 A. No. I just told you there is no
9 management fee to Rockmore.

10 Q. All right. If any of these entities pay a
11 fee to Rockmore, Inc., would it be called a
12 management fee?

13 A. Generally, yes.

14 Q. Okay. Roaring Fork, LLC?

15 A. Roaring Fork owned a property in Sea Pines
16 Island, I think.

17 Q. Did it sell it?

18 A. No.

19 Q. Did it get foreclosed on?

20 A. Yes.

21 Q. Who foreclosed on that property, which
22 bank?

23 A. Wells Fargo.

24 Q. Was that the only asset of Roaring Fork,
25 LLC?

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1 A. Yes.

2 Q. Who were the members of Roaring Fork?

3 A. Me, I believe.

4 Q. All right. Core Creek, LLC, who were the
5 members? What was its purpose?

6 A. Core Creek, LLC, members were Larry Paige,
7 myself, and Rob Reichel.

8 Q. And what was its purpose?

9 A. It purchased property in Sea Pines on the
10 ocean and built a spec house.

11 Q. Did it sell?

12 A. Yes.

13 Q. And were the proceeds distributed amongst
14 the members?

15 A. Yes.

16 Q. When did that sale take place?

17 A. I would say four years ago.

18 Q. Were you a member individually in this
19 company or were you a member through another LLC?

20 A. Individually.

21 Q. Do you remember how you received the
22 proceeds from that sale? Would it have been payable
23 to J. Chris Lindgren, Chris Lindgren, or would it
24 have been through another LLC?

25 A. I imagine it was payable to me.

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1 Q. Does Core Creek own any other real estate?

2 A. No.

3 Q. Has it sold any other real estate?

4 A. No.

5 Q. How about The Plunge, LLC?

6 A. The Plunge was the predecessor name of
7 Black Diamond, LLC.

8 Q. I don't think we've talked -- I think we
9 may have briefly mentioned Black Diamond, but I
10 don't know that we've --

11 A. Black Diamond is the one you just asked me
12 about.

13 Q. That's right. David Brosnon and Red
14 Rocks, LLC?

15 A. Right.

16 Q. So The Plunge became Black Diamond, LLC?

17 A. Right. The banks didn't like the name.

18 Q. I can't imagine why. So The Plunge, LLC,
19 doesn't do business anymore. It does business as
20 Black Diamond?

21 A. It's the same entity, it's just the name
22 changed.

23 Q. Okay. Neptune Media, LLC?

24 A. Is an advertising company.

25 Q. Is it still operating?

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- 1 A. No.
- 2 Q. Who were the members?
- 3 A. Me.
- 4 Q. Individually?
- 5 A. Yes.
- 6 Q. Rebel Stoke, LLC?
- 7 A. Owned an apartment complex in Hardeeville,
8 South Carolina.
- 9 Q. Who were the members?
- 10 A. Just me.
- 11 Q. Individually?
- 12 A. Yes.
- 13 Q. When you say -- I think you said owned.
14 Does that mean the apartment -- it doesn't exist
15 anymore? It doesn't own?
- 16 A. It doesn't own. It was a deed in lieu to
17 Atlantic Community Bank was another bank we've used.
- 18 Q. Atlantic Community Bank?
- 19 A. Right.
- 20 Q. All right. Covered Bridge, LLC?
- 21 A. It is the management company for the
22 property in Colorado.
- 23 Q. That is the mountain house condo?
- 24 A. Right.
- 25 Q. Does -- who owns the mountain house condo

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1 in Vale, Colorado?

2 A. I do.

3 Q. Individually or do you own it with your
4 wife?

5 A. Individually.

6 Q. Is there still some litigation going on
7 about that?

8 A. Yes.

9 Q. Have you settled it?

10 A. No. There is still litigation going on.

11 Q. Have they foreclosed on it all the way?

12 A. No.

13 Q. Okay. Ron Anderson is still trying to
14 foreclose on it; is that right?

15 A. No.

16 Q. What is going on about it? Tell me about
17 the litigation.

18 A. It's -- he's a plaintiff in a case
19 asserting that certain deeds of trust were --
20 constitute fraudulent transactions.

21 Q. And did you almost settle that case?

22 A. Almost? I mean, hard to say.

23 MR. SCHEIDER: Object to the form of
24 the question.

25 BY MR. FLOYD:

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1 Q. All right. So it's still going?

2 MR. FLOYD: Yes.

3 THE WITNESS: Yes.

4 BY MR. FLOYD:

5 Q. All right. Does that property generate
6 rents?

7 A. Yes.

8 Q. And would Covered Bridge, LLC, get paid
9 the rents?

10 A. Yes. They did. Not now.

11 Q. Is it not rented now?

12 A. It's a short-term -- it's rented on a
13 short-term basis.

14 Q. Is it kind of like a hotel?

15 A. It's a condotel is what they call it.

16 Q. One-night rentals? One week, usually?

17 A. I think it's three-day minimum.

18 Q. And who handles those rentals for you?

19 A. The condotel association.

20 Q. And they pay the rental fee after they
21 take away their management fee to Covered Bridge
22 LLC?

23 A. Not now.

24 Q. Who do they pay that money to?

25 A. They are keeping it in escrow.

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1 Q. What is the company that is holding it in
2 escrow?

3 A. I believe Mountain House Condominium
4 Association. I'm not sure.

5 Q. All right. Are they under a court order
6 to do that?

7 A. No.

8 Q. Have you agreed to have that happen?

9 A. No.

10 Q. When people used to rent it, did they pay
11 Covered Bridge, LLC, or did they pay you
12 individually?

13 A. Neither.

14 Q. Who did they pay?

15 A. The condominium association.

16 Q. And then the condominium association would
17 pay you a check or would they pay Covered Bridge?

18 A. Covered Bridge.

19 Q. What is the typical rental for a week?

20 A. It depends on the season.

21 Q. High season. Wintertime, is that right,
22 high season?

23 A. I think Christmas is probably 12.

24 Q. Thousand dollars?

25 A. Uh-huh.

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1 Q. For the week of Christmas between
2 Christmas and New Years?

3 A. Right.

4 Q. All right. Ginmo, LLC?

5 A. Owned a commercial office building on
6 Hilton Head.

7 Q. Who are the members?

8 A. Other members were Red Rocks and Rob
9 Reichel.

10 Q. Does it own any other property?

11 A. No.

12 Q. Does it still own that property or --

13 A. No.

14 Q. Sold it?

15 A. No.

16 Q. Foreclosed?

17 A. No.

18 Q. Where did it go?

19 A. Deed in lieu.

20 JUDGE DUKES: Let me get you all
21 to -- go off the record one second.

22 (Recess 10:34 to 10:48.)

23 JUDGE DUKES: Back on the record.

24 MR. FLOYD: Judge, in the interest of
25 time my thought was to go ahead and move for some

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1 relief on the issues that I have found thus far.
2 And I think we are going to continue the examination
3 while you head off to your other responsibilities.

4 And if we happen to need you, we'll
5 certainly find you or we will wait on you. But as
6 of today Mr. Lindgren has testified that he has
7 contributed significant amounts to his retirement
8 plan back in '11, '12, and '13. And that was cash.
9 And that plan was at The Hartford.

10 And I would also like to see what his
11 investments were with the Fidelity I.R.A. I think
12 both of those would be transfers that should be set
13 aside as fraudulent transfers because these
14 judgments have been pending since 2011. One
15 judgment being entered in January, January 6th,
16 2011. And actually both of them were filed
17 January 6th, 2011.

18 And for that reason we would move to set
19 aside any contributions that have been made to his
20 Hartford plan, Fidelity plan, and any I.R.A. at this
21 time.

22 JUDGE DUKES: All right.

23 MR. SCHEIDER: Your Honor, the source
24 of all of those contributions was salary. That is
25 an exempt income. It is not subject to lien or

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1 attachment, not in South Carolina. He is free to
2 earn income. And that income may be transferred up
3 to the limitations he's outlined for you.

4 He has not gone beyond that. Had he done
5 so, had he funded an I.R.A. or his Roth or 401-K for
6 an amount greater than the statutory allowed amounts
7 you may have a case, but in the situation he has
8 not, sir. So I take the position that all of that
9 income, if you want to call it income, was salary.

10 MR. FLOYD: In response --

11 MR. SCHEIDER: Compensation for his
12 services. So I'm saying it's not as though somebody
13 wrote him a check. "Here, Chris Lindgren, \$400,000.
14 That was not the case.

15 THE WITNESS: It's all salary
16 deferral.

17 MR. FLOYD: In response, Judge --

18 THE WITNESS: It's on the W-2.

19 MR. FLOYD: In response, Judge, I
20 would say that for that matter all cash for most
21 people is at one time or another salary. It is
22 cash. It was subject to execution. And for that
23 reason I think it is subject to execution.

24 MR. SCHEIDER: But it was all based
25 upon salary. No single check.

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1 MR. FLOYD: I could garner wages.

2 I'm not trying to garner the wages.

3 MR. SCHEIDER: I understand.

4 MR. FLOYD: And I think that is what
5 is exempt in South Carolina. However, once you
6 deposit that money somewhere it's no different than
7 this being in a bank account. The difference here
8 is this money was moved into an account that is
9 otherwise sheltered by exemptions that prevents me
10 from executing on cash. Cash is subject to
11 execution.

12 MR. SCHEIDER: This is not cash I say
13 again for the record. This is salary deferral,
14 income paid to him for services rendered. Exempt.

15 JUDGE DUKES: Well, why don't we do
16 this. I'm sure somewhere there is a great case or
17 something on this exact same subject. So let me
18 withhold my judgment on this particular thing
19 because I know that you all have a lot more
20 questions and answers to go. And maybe there is
21 some lower hanging fruit that you will ask for in a
22 little while that we won't even have to reach this
23 point or, my preference, you all reach some
24 settlement.

25 So why don't you all talk and see what you

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1 can do. I've got to go do the sale. My
2 understanding is by consent you are going to
3 continue on without me.

4 MR. SCHEIDER: Right.

5 JUDGE DUKES: If we have further
6 motions, then if I need part of the transcript I'll
7 just get the transcript if you all can't agree on
8 what the question was, but I imagine you can.

9 And if I am gone by the time you finish,
10 if you all would just ask Heather to schedule a
11 conference call, you know, this week, next week, at
12 some point. And we will just see how we are going
13 and whether or not we need to --

14 MR. SCHEIDER: Let's do that for the
15 record. We'll set a conference call for --

16 JUDGE DUKES: Well, I'm not sure what
17 my schedule is.

18 MR. FLOYD: We'll check with Heather
19 before we leave.

20 MR. SCHEIDER: Yeah, for next week.
21 Let's don't do it this week, at which time we will
22 have provided to the court the bases or the support
23 documentation for our respective positions. May we
24 do that?

25 MR. FLOYD: Can you get me statements

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1 of his contributions from '11, '12, and '13?

2 MR. SCHEIDER: Yes.

3 MR. FLOYD: I think he has access.

4 That way we will know what he has contributed.

5 THE WITNESS: You are still coming to
6 review documents, right?

7 MR. FLOYD: Do you have statements
8 there?

9 THE WITNESS: Yes.

10 JUDGE DUKES: Well, anyway, next week
11 is fine. All right. We will let you all do that.
12 And, by the way, your other 9:30 did not appear.

13 MR. FLOYD: One other thing. Just
14 the restraining order would remain in place, that he
15 not --

16 JUDGE DUKES: Yeah. We are just
17 going to leave it open, so all orders not canceled
18 will remain in place. All right.

19 MR. SCHEIDER: Thank you, Your Honor.

20 JUDGE DUKES: Thank you all.

21 MR. FLOYD: Thank you, Judge.

22 (Recess 10:52 to 10:55.)

23 BY MR. FLOYD:

24 Q. Now, we are back on the record. We were
25 at Ginmo, LLC. I think we talked about that being

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- 1 Red Rocks, LLC, and you?
- 2 A. No. And Rob Reichel.
- 3 Q. Rob. And that was a single purpose entity
- 4 that owned some real estate?
- 5 A. Right.
- 6 Q. That was foreclosed on or deed in lieu was
- 7 given?
- 8 A. Deed in lieu.
- 9 Q. Okay. Tell me about Timberline 2, LLC.
- 10 A. An entity that owned commercial real
- 11 property on Hilton Head.
- 12 Q. Does it still own commercial?
- 13 A. No.
- 14 Q. What happened to that property?
- 15 A. Deed in lieu.
- 16 Q. Who were the members?
- 17 A. I believe Red Rocks and I think that was
- 18 it.
- 19 Q. Single member do you think?
- 20 A. I think so.
- 21 Q. Have there ever been any other members of
- 22 Red Rocks, LLC?
- 23 A. I don't believe so.
- 24 Q. It's been primarily you?
- 25 A. Only me.

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1 Q. I guess that would be only you. All
2 right. We talked about Covered Bridge, LLC. We've
3 talked about Ginmo, LLC. How about Norvy,
4 N-o-r-v-y, LLC?

5 A. It was an entity that did export trading.

6 Q. Does it still operate?

7 A. No.

8 Q. Who were the members of Norvy?

9 A. Me.

10 Q. And when you say "me" for purposes of --

11 A. Me personally.

12 Q. It will be you individually?

13 A. Right.

14 Q. If there is an LLC that is member, will
15 you tell me if there was an LLC member?

16 A. Yes.

17 Q. When did that company stop doing business;
18 Norvy, LLC?

19 A. I would have to go back and look.

20 Q. More than five years ago?

21 A. Probably.

22 Q. Stellar Trading, LLC?

23 A. Also an export trading company.

24 Q. Who were the members?

25 A. Me personally.

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- 1 Q. Is it still in business?
- 2 A. No.
- 3 Q. When did it stop doing business?
- 4 A. I'm not sure.
- 5 Q. More than five years?
- 6 A. Probably.
- 7 Q. Bailey's Loop, LLC?
- 8 A. Owned real property in Jasper County.
- 9 Q. Who were the members?
- 10 A. Me personally.
- 11 Q. Does it still own any property?
- 12 A. No.
- 13 Q. Blue Ox, LLC. Let me back up. I'm sorry.
- 14 Bailey's Loop, LLC, what happened to that property?
- 15 A. Foreclosure.
- 16 Q. Who did the foreclosure?
- 17 A. I believe South Carolina Bank and Trust.
- 18 Q. Fair enough. Blue Ox, LLC?
- 19 A. Blue Ox is your judgment debtor.
- 20 Q. Who were the members of Blue Ox, LLC?
- 21 A. I believe Red Rocks.
- 22 Q. Any other members?
- 23 A. I don't believe so.
- 24 Q. What does Blue Ox, LLC, have by way of
- 25 assets?

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1 A. Nothing.

2 Q. Does it have a checking account?

3 A. No.

4 Q. What was Blue Ox, LLC's, purpose?

5 A. It owned a commercial property on Hilton
6 Head.

7 Q. And was that part of a foreclosure?

8 A. It was with First Citizens. And I don't
9 recall if it was a foreclosure or deed in lieu.

10 Q. Okay. All right. Gateway Properties,
11 Exit 8, LLC. Who were the members?

12 A. Red Rocks, LLC, and Herald Yellen.

13 Q. All right. What was its purpose?

14 A. It owned real property in the Town of
15 Hardeeville.

16 Q. Does it own any property anymore?

17 A. No.

18 Q. What happened to the property?

19 A. Foreclosure.

20 Q. Do you remember what bank?

21 A. That was Bank Meridian.

22 Q. No assets now in Gateway Properties?

23 A. No.

24 Q. RFTB, LLC?

25 A. That was an entity that guaranteed a loan

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- 1 on real property in Sun City.
- 2 Q. Who were the members?
- 3 A. Myself and Herb King.
- 4 Q. Was Mr. King a guarantor as well?
- 5 A. RFTB was the guarantor.
- 6 Q. Does it own any assets?
- 7 A. No.
- 8 Q. Is it still doing business?
- 9 A. No.
- 10 Q. Inactive? Dormant?
- 11 A. I think it's dissolved.
- 12 Q. Dissolved? Okay. Rockmore, Inc. I think
- 13 we've talked about this. This is the one where you
- 14 are the single shareholder, right?
- 15 A. Right.
- 16 Q. And it is a management company, right?
- 17 A. Right.
- 18 Q. All right. Are there any investors in
- 19 Rockmore, Inc.?
- 20 A. No.
- 21 Q. Dry Creek, LLC?
- 22 A. Owned a shopping center on Hilton Head.
- 23 Q. Who were the members?
- 24 A. Red Rocks, LLC.
- 25 Q. What happened to that shopping center?

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1 A. Deed in lieu.

2 Q. Coastal States Insurance, LLC. Who were
3 the members?

4 A. I believe me. And it was formed to do
5 captive insurance business.

6 Q. Did it do business?

7 A. No, not yet. Haven't had the time.

8 Q. Do you plan to do business with that?

9 A. Yes.

10 Q. Do you have an insurance background?

11 A. Yes.

12 Q. What is your insurance background?

13 A. General counsel for reinsurance companies
14 based in Bermuda.

15 Q. What was the name of that company?

16 A. Several. One was Forum Reinsurance.

17 Q. I'm sorry. You've got to say that a
18 little louder.

19 A. Forum Reinsurance.

20 Q. Is that where you started your career?

21 A. No.

22 Q. Did you live in Bermuda as well?

23 A. I went there. I lived in Boston and went
24 there every couple days.

25 Q. Was that the only law job that you did?

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- 1 A. No.
- 2 Q. What other law jobs did you have?
- 3 A. I was an attorney at Hunter McClain Ashley
- 4 & Dunn.
- 5 Q. At where?
- 6 A. Hunter McClain.
- 7 Q. Where at?
- 8 A. In Savannah.
- 9 Q. Any other law jobs besides that?
- 10 A. Yes.
- 11 Q. What other law jobs?
- 12 A. Between law school and my LLM I worked for
- 13 Johns Manville.
- 14 Q. I'm sure you never say any litigation with
- 15 that crowd, did you?
- 16 A. Saw all the litigation I need to see.
- 17 Q. And how long did you work there?
- 18 A. It was a summer job. Three months.
- 19 Q. Okay. And then you graduated for the LLM,
- 20 and you started in the reinsurance business?
- 21 A. No. I went to Hunter McClain.
- 22 Q. Hunter McClain. For a couple years? How
- 23 many years?
- 24 A. Three years.
- 25 Q. And then you did the general counsel?

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1 A. Right.

2 Q. About how many years were you general
3 counsel?

4 A. Three years.

5 Q. And then what did you do?

6 A. I bought the export trading company.

7 Q. So that would put us about 1990. And you
8 winter into business for yourself?

9 A. Right.

10 Q. And that is when the law jobs -- the
11 formal law jobs stopped?

12 A. Right.

13 Q. And you became a business entrepreneur
14 kind of guy?

15 A. Right.

16 Q. All right. Bear Tree, LLC. Who were the
17 members?

18 A. Red Rocks, LLC.

19 Q. What is its purpose?

20 A. It was formed to purchase -- had an option
21 on real property in Ridgeland, South Carolina.

22 Q. Did the Bear Tree, LLC, exercise the
23 option?

24 A. It tried to, but was unsuccessful. It
25 went to litigation.

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1 Q. Was that the single purpose that that
2 entity was created for?

3 A. Selling that property, yes.

4 Q. Did it ever ultimately own the property?

5 A. No. They couldn't exercise the option.

6 Q. Okay. I see what you are saying. Was
7 Bear Tree, LLC, sued for specific performance?

8 A. No. It was the plaintiff.

9 Q. Bear Tree, LLC, was the plaintiff?

10 A. Right.

11 Q. Was a settlement reached of some sort?

12 A. Yes.

13 Q. Some sort of monetary settlement to pay
14 Red Rocks?

15 A. I don't recall who got paid, but it was a
16 nominal amount.

17 Q. Heritage Plaza -- excuse me. Is Bear
18 Tree, LLC, still operating?

19 A. No.

20 Q. Inactive?

21 A. Yes.

22 Q. All right. Heritage Plaza Horizontal
23 Property Regime?

24 A. That is a horizontal property regime for
25 Heritage Plaza.

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1 Q. All right. What is Heritage Plaza? Where
2 is that?

3 A. It's a shopping center on the south end of
4 Hilton Head.

5 Q. Who owns the dirt?

6 A. I believe Blanchard Calhoun.

7 Q. Are you still active with this particular
8 H.O.A.?

9 A. No.

10 Q. No?

11 A. No.

12 Q. You are just the registered agent for
13 them?

14 A. No. I formed it and owned Heritage Plaza,
15 but I don't now.

16 Q. When did you cease being the owner of it?

17 A. When Dry Creek -- this was the property
18 Dry Creek owned that went in the deed in lieu.

19 Q. Okay. All right. Island Gateway, LLC.
20 Who were the members?

21 A. That was Herald Yellen and Red Rocks.

22 Q. And what is its purpose?

23 A. It was to develop 23 acres at Exit 8 in
24 the Town of Hardeeville.

25 Q. And did that happen?

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1 A. No.

2 Q. What caused it not to happen?

3 A. The foreclosure I mentioned earlier.

4 Q. Is that entity still active and ongoing?

5 A. No.

6 Q. 1188 Center -- 1188 Center Owners
7 Association, Inc.?

8 A. Is another H.P.R.

9 Q. What is the nature -- is that a horizontal
10 property regime? That is what you are telling me?

11 A. H.P.R. is a horizontal property regime.

12 Q. Okay. Is it still active and ongoing?

13 A. Yes.

14 Q. What does it -- what association -- what
15 property is that the H.O.A. for?

16 A. It is property that currently has a Golden
17 Coral and Advance Auto, a Tire Kingdom, a Wild Wing
18 Restaurant, and a shell building and other parcels.

19 Q. On owns the dirt there, the land?

20 A. Black Diamond owned it all and sold off
21 parcels and retains ownership of a portion of it.

22 Q. What portion does it still own?

23 A. A shell building at 1188 Center -- excuse
24 me. 1188 Fording Island Road and commercial
25 parcels.

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1 Q. Is there any rent being generated off of
2 those?

3 A. No.

4 Q. Are they just empty? Vacant?

5 A. Shell.

6 Q. Shell buildings. What does that mean?
7 It's ready for a tenant?

8 A. It's a shell. It has no upfit so it's not
9 ready for a tenant.

10 Q. You are hoping a tenant will come along to
11 upfit it kind of thing?

12 A. Yes.

13 Q. Does it have dirt floors in it and that
14 sort of stuff?

15 A. Yes.

16 Q. But no rents are being generated through
17 that property?

18 A. No.

19 Q. All right. In 2011 -- I think this is a
20 copy of your 2011 tax return, or at least the front
21 page, the 1040. US individual tax return. Did you
22 contribute \$21,000 to a pension of some sort?

23 A. It looks like -- it says 27,000.

24 Q. All right.

25 A. Hold on a second. That is the taxable

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1 amount of the pension, not deduction.

2 Q. What does that mean?

3 A. What does it mean? It's a taxable
4 distribution. It's income, not expense.

5 Q. Okay. So, in other words, that tells me
6 that you took \$27,000 through a distribution?

7 A. I would have to go back and check to see
8 what it was.

9 Q. Or a pension of some sort?

10 A. That is in the income section so --

11 MR. SCHEIDER: It's not money going
12 in.

13 THE WITNESS: It connotes a
14 distribution, not a contribution.

15 MR. SCHEIDER: Right.

16 BY MR. FLOYD:

17 Q. Forgive this question. Why is there a
18 taxable amount only \$7,747 if you took a pension of
19 27,000?

20 A. Again, I would have look at what the
21 details of it are.

22 Q. Okay. Would the details be somewhere
23 else?

24 A. Well, yeah. I mean, it's not on the face
25 of the return.

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1 Q. All right.

2 A. And I don't have any of the details or any
3 of the --

4 Q. Would that be a worksheet or a schedule?

5 A. But I'm sure that it's a function of -- I
6 don't know. I would have to find out. There are
7 different reasons it could be that.

8 Q. Okay. All right. Here is I think also a
9 part of your 2011 tax return. And I think this is a
10 supplemental income and loss, a Schedule E. Do you
11 see that?

12 A. It's a Schedule E, yes.

13 Q. And I think you had to complete multiple
14 Schedule Es to fit the number of properties that you
15 owned. Does that sound right?

16 A. Yes.

17 Q. Because there are only three properties
18 per page?

19 A. That's correct.

20 Q. In 2011 does this reflect that you
21 collected about a million dollars -- a little over a
22 million dollars in rents from the various
23 properties?

24 A. 23T says 1,300,000.

25 Q. Would that be the total of all rents from

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1 your properties?

2 A. 23G is a total of all amounts reported on
3 Line 20 for all properties.

4 Q. So I am reading that correctly, right,
5 that you did get over 1.3 million?

6 A. Well --

7 Q. Before expenses?

8 A. This is tax accounting. It's not
9 financial accounting.

10 Q. Okay. Tell me what you mean by that. I'm
11 telling you I don't know much about tax.

12 A. Well, it would take a semester to tell you
13 the difference between tax and financial accounting.

14 Q. All right. Can you do it in two
15 sentences?

16 A. No.

17 Q. All right. What does that mean;
18 1.3 million? Does that mean before expenses?

19 A. That means it's the sum of all Line 20s on
20 all the Schedule Es.

21 Q. Well, Line 20 would be the expenses,
22 right? Right?

23 A. I would have to look at it.

24 Q. All right.

25 A. Yes.

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1 Q. So that would be the expenses that you had
2 in renting those, right?

3 A. Right.

4 Q. So the amounts reported for the rentals
5 would be 1,098,000; is that right?

6 A. Yes.

7 Q. All right. Who generally gets commissions
8 off of these rentals?

9 A. Which rentals?

10 Q. There are some rentals on here that
11 reflect commissions.

12 A. Well, you would have to specify the
13 property.

14 Q. Okay. For example, the Oak Ridge,
15 Ridgeland, South Carolina, shows commissions of
16 about \$4,200.

17 A. Commissions or management fees?

18 Q. It appears as commissions on that one, I
19 think.

20 A. All right. That was probably paid to the
21 property manager.

22 Q. All right. Would the management fees be
23 the fees that would be payable to Rockmore?

24 A. It depends on the entity. And I would
25 have to go back and check. There were management

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1 fees paid to different entities.

2 Q. Okay. Is it fair to say that Red Rocks,
3 LLC, is the parent LLC?

4 A. Of?

5 Q. Multiple LLCs?

6 A. It is a member LLC.

7 Q. Red Rocks seem to be a common element in a
8 number of these LLCs?

9 A. It is for several of the LLCs. As we
10 discussed, it is a member.

11 MR. SCHEIDER: Let's stop a minute
12 and go off the record.

13 (Discussion off the record.)

14 MR. FLOYD: Back on.

15 BY MR. FLOYD:

16 Q. Do each of these entities have their own
17 checking accounts as well?

18 A. Name an entity and I'll tell you if it
19 does or not.

20 Q. All right. For the ones that I see on the
21 supplemental income and loss on your tax returns
22 such as Oak Ridge?

23 A. Oak Ridge has its own.

24 Q. Flat Creek?

25 A. Has its own checking account.

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1 Q. Hospital Center Common, Hilton Head
2 Island?

3 A. Had. I don't think it does anymore.

4 Q. Okay. If an entity that would have
5 received rent doesn't have a checking account, who
6 would pay the taxes or what entity would pay the
7 taxes?

8 A. Well, I don't believe that any entity that
9 paid taxes doesn't have a checking account.

10 Q. If an entity received rent it would have
11 had a checking account. Is that a fair statement?

12 A. I think that is a fair statement.

13 Q. All right. And in lieu of me going
14 through each and every one of these -- I could go
15 through each one of these if you want me to and ask
16 you which property owns which LLC. I think we've
17 probably gone through that, but if I have additional
18 questions would you be willing to supplement those
19 answers?

20 A. No properties own any LLCs.

21 Q. LLCs own the property?

22 A. Right. Correct.

23 Q. I think we've gone through a number of
24 that, but I don't know that I necessarily have them
25 matched up by address such as 89 Main Street. What

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1 I'm asking you is if I have questions, will you be
2 willing to supplement questions that I ask of you?

3 A. Yes.

4 MR. SCHEIDER: Absolutely.

5 MR. FLOYD: Instead of going through
6 all of this. There are certain questions that I
7 have.

8 MR. SCHEIDER: Yes.

9 BY MR. FLOYD:

10 Q. In 2012 I think you said you took a
11 distribution of some sort recently?

12 A. In 2014.

13 Q. In 2014. Did you also take a distribution
14 in 2012?

15 A. I would have to go back and check.

16 Q. All right. I'm going to let you look at
17 this. This may help you. This is your 2012 US
18 individual tax return.

19 A. Yes. What about it?

20 Q. It has the word "rollover" right here?

21 A. Right.

22 Q. Can you tell me what that is all about?

23 A. What a rollover is?

24 Q. Why it's shown on here as a pension and
25 annuity as part of your income, but it also has a

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1 rollover -- the word "rollover" over there. Did you
2 roll over some money into that or --

3 A. Apparently. I would have to go back and
4 look.

5 Q. Okay. Would you have records to show what
6 money was rolled over and that sort of stuff?

7 A. Sure. And you realize a rollover is from
8 a qualified plan, right?

9 Q. No, I don't, but explain to me what you
10 are saying.

11 A. A rollover is from one qualified plan to
12 another qualified plan.

13 Q. Do you remember this specific rollover,
14 the details of this transaction?

15 A. No. I would have to go back and look at
16 it.

17 Q. You have the LLM in the room, not me.
18 Have you filed your 2013 tax returns?

19 A. I have.

20 Q. When did you file the 2013 tax returns?

21 A. I would have to check, but I think
22 somewhere around the beginning of August.

23 Q. Do you have those at your office?

24 A. Yes.

25 Q. All right. I may want to get those from

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1 you. I see in 2012 it appears that the amount of
2 rentals that you received went down ever so
3 slightly. Does that sound accurate?

4 A. I would have to check.

5 Q. You don't keep track of it that closely?

6 A. As you can see, there are a lot of moving
7 parts.

8 Q. I agree with that. What bank account do
9 you use to service your home debt?

10 A. None.

11 Q. Who services the home debt?

12 A. Nobody.

13 Q. It's not being paid?

14 A. No.

15 Q. When was the last payment that was made?

16 A. I would have to check.

17 Q. Is your house currently in foreclosure?

18 A. Yes.

19 Q. Do you owe about \$2.2 million on your
20 home?

21 A. Yes.

22 Q. I probably just asked you this, but I'm
23 going to ask you again. Did you tell me what bank
24 it was that was foreclosing?

25 A. I did not.

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1 Q. Did I ask you that question?

2 A. No.

3 Q. All right. What bank is it that is
4 foreclosing?

5 A. Wells Fargo.

6 Q. And are you defending that foreclosure
7 action?

8 A. I'm working on a modification.

9 Q. Are you in the midst of doing the
10 modification program and that sort of thing?

11 A. Working on it.

12 Q. Are your children still in school?

13 A. One is.

14 Q. Is it the youngest daughter that is still
15 in school?

16 A. Yes.

17 Q. And she goes to Boulder, Colorado, right?

18 A. Right.

19 Q. Is this her last year?

20 A. We hope so.

21 Q. What do you have at CIAACREF?

22 A. Nothing.

23 Q. When was the last time you had something
24 there, money there?

25 A. Remember, this was an issue we discussed

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1 earlier?

2 Q. Okay. I don't remember that. I'm sorry.
3 Did you close out all accounts that you may have
4 had?

5 A. Yes.

6 Q. All right. Did that happen in 2011, '12?

7 A. I would have to check.

8 Q. Okay. And earlier you testified, as your
9 tax returns show as well -- I'll let you look at
10 this also if you want to look at it, but it appears
11 to me that you contributed \$6,000 to a regular
12 I.R.A. contribution. Does that sound right?

13 A. It appears so.

14 Q. And your wife also contributed \$6,000?

15 A. It appears so.

16 Q. Were there any other retirement vehicles
17 that you would have invested or deposited money in?

18 A. No.

19 Q. Besides the 401-K and your Roth I.R. A.
20 and your Fidelity Simple I.R.A., right?

21 A. Right.

22 Q. Okay. Do you own a Chevrolet Tahoe?

23 A. No.

24 Q. Have you ever owned a Chevrolet Tahoe?

25 A. No.

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1 Q. Does your wife own a Chevrolet Tahoe?

2 A. Yes. I think I told you earlier it was a
3 Yukon, but I guess it's a Tahoe.

4 Q. Okay. How about a Boston Whaler? Who
5 owns the Boston Whaler?

6 A. My son owns a Boston Whaler.

7 Q. Is it kept at your house?

8 A. Yes.

9 Q. Is it tied up at the end of your dock most
10 of the time?

11 A. It is usually at our dock, yes.

12 Q. And does he also own the Mercury outboard?

13 A. Yes.

14 Q. Is that part of the Boston Whaler?

15 A. It's attached to the Boston Whaler.

16 Q. When did your son buy the Boston Whaler?

17 A. I would have to check.

18 Q. Did you assist him in buying the Boston
19 Whaler?

20 A. How do you mean?

21 Q. Did you give him any financial assistance
22 to buy the Boston Whaler?

23 A. No.

24 Q. Did you or any company you own provide him
25 with any money to buy that boat?

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- 1 A. No.
- 2 Q. Do you own any other boats?
- 3 A. No.
- 4 Q. Have you ever heard of a 2006 Bombardier?
- 5 A. Yes.
- 6 Q. Is that a jet ski?
- 7 A. Yes.
- 8 Q. Or is it a boat, a watercraft?
- 9 A. I think a Bombardier is a jet ski.
- 10 Q. Do you own any jet skis?
- 11 A. No.
- 12 Q. Have you owned any jet skis?
- 13 A. Yes.
- 14 Q. When did you sell them?
- 15 A. I never sold one.
- 16 Q. Where are they? I mean, do you still have
- 17 them?
- 18 A. You know, either abandon or crashed. Jet
- 19 skis are not a good investment.
- 20 Q. How many have you owned?
- 21 A. Four or five.
- 22 Q. Do you own any now, any operable?
- 23 A. No.
- 24 Q. Have you given any away to anybody?
- 25 A. No.

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1 Q. We went over a number of LLCs today. Are
2 there any that I've forgotten?

3 A. I'm not sure if you covered them all or
4 not.

5 Q. All right. We didn't talk about John V.
6 Brose I don't think, did we?

7 A. Yes, we did.

8 Q. Very brief. Is it still operating?

9 A. Yes.

10 Q. Do you draw a salary from John V. Brose?

11 A. No.

12 Q. Do you get a consulting fee?

13 A. No.

14 Q. Do you derive any income or does any LLC
15 that you own derive any income from John V. Brose
16 Exports?

17 A. No.

18 Q. How many employees does John V. Brose
19 have?

20 A. None.

21 Q. Who operates it?

22 A. To the extent that there is operations, I
23 do.

24 Q. Are there any current operations?

25 A. Nominal.

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1 Q. Tell me what you mean by "nominal." What
2 is the current deals on the table on the radar?

3 A. Right now nothing on the table.

4 Q. Do you have anything in the works, any
5 proposals or anything like that?

6 A. There is always things in the works, but
7 nothing that is reduced to writing.

8 Q. Tell me about the tire kicking that is
9 going on right now.

10 A. What do you mean?

11 Q. Who is talking to you wanting you to get
12 some exports for them?

13 MR. SCHEIDER: Objection. Form of
14 the question. It's too broad-based.

15 BY MR. FLOYD:

16 Q. All right. What sort of deals are you
17 trying to get right now with John V. Brose?

18 A. Well, I'm always looking at opportunities.
19 Right now in Argentina, Chile, Philippines, and
20 China.

21 Q. What sort of products?

22 A. It's generally building materials.

23 Q. Is the main thrust of Brose Exports
24 building materials?

25 A. Yeah, primarily plumbing.

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1 Q. Who is the shareholder -- is it a
2 corporation or is it an LLC?

3 A. It's a corporation.

4 Q. Who are the shareholders of John V. Brose?

5 A. Rockmore, Inc.

6 Q. Is it the single shareholder?

7 A. It's the sole shareholder.

8 Q. Only shareholder? Does Rockmore, Inc.,
9 charge or is it compensated for your services
10 through management fees? Is Rockmore, Inc.,
11 compensated for your services through management
12 fees?

13 A. Can you rephrase that?

14 Q. Sure. When you make money with John V.
15 Brose Exports, Inc., do you get paid that money
16 individually?

17 A. No.

18 Q. Does the money go to Rockmore, Inc.?

19 A. It's consolidated.

20 Q. Tell me what that means; it's
21 consolidated?

22 A. What does "consolidated" mean?

23 Q. Yeah. What are you saying; it's
24 consolidated? Who gets the money?

25 A. It's a C Corp structure, and the

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- 1 accounting is consolidated.
- 2 Q. All right.
- 3 A. So it's all in the accounting.
- 4 Q. Does John V. Brose have a checkbook?
- 5 A. Yes.
- 6 Q. Does it write a check to Rockmore, Inc.,
- 7 for money that it makes?
- 8 A. No.
- 9 Q. What does it do with profits?
- 10 A. There would be inner company transfers.
- 11 Q. Who would get those transfers?
- 12 A. Rockmore, Inc.
- 13 Q. Any other companies would get --
- 14 A. Again, it's consolidated.
- 15 Q. I'm going to apologize. I don't
- 16 understand what you mean by "consolidated."
- 17 A. Well, It's -- I mean, it's -- even though
- 18 they are separate C Corps, they are operated as one
- 19 from a tax perspective.
- 20 Q. John V. Brose, Rockmore --
- 21 A. Yes. Consolidated.
- 22 Q. All of your companies are consolidated?
- 23 A. No, the C Corps.
- 24 Q. The C Corporations, C Corps, are all
- 25 consolidated?

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1 A. Yes.

2 Q. All right. Do you ever get a check from
3 any of these consolidated? Do you ever get a check?
4 Do you ever deposit a check?

5 A. I'm not sure I understand. I get, you
6 know, my payroll -- my self-employed employment
7 income. It's not through checks though. It's
8 through direct deposits.

9 Q. From Rockmore, right?

10 A. Right.

11 Q. That would be the entity that paid you?

12 A. Yes.

13 Q. But you are not on payroll, right?

14 A. Right.

15 Q. So what do you call those distributions to
16 you?

17 A. Self-employment income.

18 Q. Self-employment income?

19 A. Uh-huh.

20 Q. Do you have a SEP?

21 A. No.

22 Q. Did you ever have a SEP?

23 A. No.

24 Q. Is there a reason why?

25 A. Couldn't.

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1 Q. Can you tell me why?

2 A. The law doesn't allow it.

3 Q. It did if you had one before '95, right?

4 A. It sounds like you know more about SEPs
5 than I do. I'm not sure.

6 Q. All right.

7 A. If you have an employee, you can't have a
8 SEP.

9 Q. All right. Tell me about Radari A.V.
10 Transatlantic. Have you ever heard of that?

11 A. Can you repeat that?

12 Q. A company Called Radari A.V.
13 Transatlantic? Have you ever heard of B&N,
14 Nordstrip? Have you ever heard of that?

15 A. Not that I know of.

16 Q. How about B&N Seko Union, have you ever
17 heard of that? S-e-k-o?

18 A. No.

19 Q. You never heard of those?

20 A. Not that I can recall.

21 Q. All right. Are you a shareholder in any
22 companies that are formed offshore, foreign
23 companies?

24 A. Derivatively, yes.

25 Q. Explain that to me.

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1 A. Indirectly, yes.

2 Q. I'm sorry?

3 A. Indirectly.

4 Q. Indirectly? Tell me.

5 A. Well, through my 401-K I own shares of
6 companies that are based in Europe and South America
7 and the Far East.

8 Q. That would be through stock ownership,
9 right?

10 A. How else would you own it?

11 Q. Through your 401-K. Do you have any
12 shares that you hold through Red Rocks or some other
13 entity; Rockmore?

14 A. No.

15 Q. Are you involved with any foreign
16 companies in consulting and that sort of stuff?

17 A. Yes.

18 Q. Which ones?

19 A. Just a variety of companies I've done
20 business with over the years.

21 Q. Can you tell me who those are?

22 A. Well, we're talking hundreds.

23 Q. Would that be through John V. Brose?

24 A. It would be in connection with John V.
25 Brose.

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1 Q. All right. In spite of all of those
2 business dealings, you don't have any ownership
3 interest in any other companies, any foreign
4 companies, other than through your 401-K. Is that
5 what you are telling me?

6 A. Correct.

7 Q. Have you had any ownership of any
8 companies outside of your 401-K?

9 A. Yes.

10 Q. Which ones?

11 A. Everything we've gone over.

12 Q. Those were foreign?

13 A. No. You didn't say foreign.

14 Q. All right. I'll reword the question.

15 A. Okay.

16 Q. You are a better listener than I am. A
17 better question asked. Have you ever owned any
18 foreign stock or foreign company besides using the
19 ownership through your 401-K?

20 A. Not directly.

21 Q. All right. Tell me about indirectly.

22 A. I owned a company in the Virgin Islands.
23 John V. Brose, Inc., owned a company in the Virgin
24 Islands that was consolidated with Rockmore and John
25 V. Brose.

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1 Q. It was a Virgin Islands company?

2 A. Correct.

3 Q. What was the name of that company?

4 A. John V. Brose, USVI, Inc.

5 Q. Did you set it up in the Virgin Islands to
6 do business in both places or was it already set up?

7 A. No. I formed it under Subpart F of the
8 Internal Revenue Code.

9 Q. Okay. What does that mean?

10 A. Subpart F is foreign business. It's a
11 foreign sales corporation.

12 Q. All right. Do you have any other
13 investments in foreign companies besides the 401-K?

14 MR. SCHEIDER: Asked and answered.

15 BY MR. FLOYD:

16 Q. I don't think I've asked that specific
17 question.

18 A. You did, but no.

19 Q. Okay. How about Seahorse Holdings? Have
20 you ever heard of that company?

21 A. No. At least I don't think so.

22 Q. Okay. Have you ever heard of Fiddler's
23 Holdings, LLC?

24 A. Yes.

25 Q. What is Fiddler's Holdings, LLC?

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1 A. It was an entity that owned a unit at
2 Fiddler's Cove.

3 Q. Who were the members?

4 A. John Cardimon and myself.

5 Q. Does it still own any real property?

6 A. No.

7 Q. Does John V. Brose have different
8 variations of its name? Has it been John V. Brose,
9 Brose Exports?

10 A. Well, its corporate name is John V. Brose,
11 Inc.

12 Q. Okay. Does it do business as something
13 else?

14 A. It's -- I mean --

15 Q. Such as Brose Experts? Does it have
16 tradenames?

17 A. Yeah. For example, Brose Exports.

18 Q. Okay. All right. Do you have a handle on
19 how many pieces of property or real estate that
20 you've owned, whether directly or indirectly, and
21 that would be through all the LLCs?

22 A. It's all in the tax returns.

23 Q. All right. Do you own any real estate
24 individually?

25 A. Yes.

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1 Q. What property do you own individually?

2 A. The Belfair Golf.

3 Q. Is it paid for?

4 A. No.

5 Q. What is the mortgage on that?

6 A. It's around 700.

7 Q. What is its value?

8 A. Well, that is the one that we tried to do
9 a short sale on that you declined to let happen.
10 And that was for 321.

11 Q. Presumably that buyer is gone?

12 A. Long gone.

13 Q. Okay. Do you own any other real estate
14 individually?

15 A. Yes.

16 Q. Which one?

17 A. Mountain house condominium.

18 Q. Any others?

19 A. No.

20 Q. Any other real estate would be owned
21 through LLCs and that sort of stuff? You do own --
22 excuse me. Let me ask it this way. You do own real
23 estate through LLCs, right?

24 A. Yes.

25 Q. A variety of them. So any other

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1 properties that you would own would be through LLCs,
2 right?

3 A. Yes.

4 MR. FLOYD: All right. Go off the
5 record for a moment.

6 (Recess 11:38 to 11:42.)

7 BY MR. FLOYD:

8 Q. For purposes of clarification, Mr.
9 Lindgren, I think you own three properties in some
10 interest individually. That would be your mountain
11 house -- the Mountain House Condominium in Vale,
12 Colorado; the Belfair cottage, individually, you
13 yourself; and you also own the home that you live in
14 at 32 Widewater Road --

15 A. Jointly.

16 Q. -- jointing with your wife?

17 A. Right.

18 Q. Is the name Pluth Mud, LLC --

19 A. Yes.

20 Q. -- familiar to you? What is Pluff Mud?

21 A. It is an entity that purchased a
22 condominium unit at The Plaza at Belfair.

23 Q. Does it still own the condo?

24 A. I presume.

25 Q. Are you a member of Pluff Mud, LLC?

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1 A. No.

2 Q. All right. Okay. Do you know who the
3 members of Pluff Mud, LLC, are?

4 A. Not really sure.

5 Q. Are you generating any rent from that?

6 A. No.

7 Q. Okay. So all of these properties that
8 we've talked about, the LLCs that own these various
9 properties -- and there are properties that generate
10 rent each month, right?

11 A. Some of them, yeah.

12 Q. Some of them do. In 2011 about a million
13 bucks; is that accurate?

14 A. Before expenses?

15 Q. Before expenses.

16 A. Yeah. I think altogether it was a net
17 \$200,000 loss.

18 Q. And would the entity Rockmore, Inc., be
19 the entity charged with taking in the rents --

20 A. No.

21 Q. -- allocating the expenses? Who does
22 that?

23 A. The different entities.

24 Q. Okay. Do those entities -- do any of
25 those entities have employees?

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1 A. No.

2 Q. All right. When you say those entities
3 would do that, would you mean to say that you as the
4 single member or a member of the LLC would allocate
5 those rents and expenses? Is that what you are
6 telling me?

7 A. What do you mean by "allocate those rents
8 and expenses"?

9 Q. Well, somebody has got to write a check to
10 the LLC or to whomever --

11 A. The tenant.

12 Q. The tenant has been told to write a check
13 to, right?

14 A. Right.

15 Q. Presumably. Are any of these on bank
16 direct deposit type rentals?

17 A. Yes.

18 Q. Okay. And where would that direct deposit
19 go into?

20 A. Well, when you say direct deposit, it's
21 not technically direct deposit. It's a lock box.

22 Q. Do they send the money straight to the
23 bank?

24 A. Yes.

25 Q. And which entity is that?

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- 1 A. Which bank?
- 2 Q. Or which LLC?
- 3 A. That would be Flat Creek.
- 4 Q. Flat Creek, LLC?
- 5 A. (Nodded head.)
- 6 Q. So that tenant that rents the Flat Creek,
- 7 LLC, property or properties, they send a check to a
- 8 lock box?
- 9 A. Right.
- 10 Q. And when it gets to the lock box, what
- 11 account does it get deposited in?
- 12 A. The lock box account.
- 13 Q. Is it for the bank to sweep -- to pay?
- 14 A. It's from the bank to accumulate to -- for
- 15 debt service.
- 16 Q. Is there any excess that ever comes out of
- 17 that?
- 18 A. Yes.
- 19 Q. Where is the excess transmitted to?
- 20 A. To an operating account.
- 21 Q. For Flat Creek?
- 22 A. Uh-huh. Yes.
- 23 Q. And then where does that money go from the
- 24 Flat Creek, LLC, account? To Rockmore?
- 25 A. It depends. You know, vendors. Operating

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1 expenses are paid out.

2 Q. After all the expenses are paid, if there
3 is any excess, will it be sent to Rockmore?

4 A. Well, there is a management fee that we
5 pay to Rockmore.

6 Q. Do all of these entities pay Rockmore,
7 Inc., some sort of management fee?

8 A. No.

9 Q. Okay. Did most of them pay a management
10 fee to Rockmore, Inc.?

11 A. No.

12 Q. They do not?

13 A. Right.

14 Q. All right. But you could compile a list
15 for me, just tell me who pays management fees --

16 A. We do have financial statements.

17 Q. -- to Rockmore, Inc.? Would the financial
18 statements show me who is paying management fees to
19 Rockmore?

20 A. Yes. They should.

21 Q. What expenses does Rockmore, Inc., have?

22 A. Payroll.

23 Q. Is that the only expense that it has?

24 A. Well, it has 401-K administration fees.

25 Q. Does it pay a power bill?

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1 A. No.

2 Q. Utilities and all of that sort of stuff?

3 A. No.

4 Q. What entity pays the power bills,
5 utilities?

6 A. For which properties?

7 Q. Would it be Dunmore Court?

8 A. No.

9 Q. Who pays it for that?

10 A. Tarbow.

11 Q. Does Rockmore, Inc., pay rent?

12 A. No.

13 Q. Do any of these entities pay rent to
14 Tarbow Properties?

15 A. No.

16 Q. How big is the office space that you have
17 at 5 Dunmore Court?

18 A. I think it's 3,450 square feet.

19 MR. FLOYD: Let's go off the record
20 for a second.

21 (Discussion off the record.)

22 BY MR. FLOYD:

23 Q. Do you use -- you said 33,000 square feet?

24 A. 3,450, I believe.

25 Q. Do you use all of that office space for

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1 your operations, the LLC's operations that we've
2 talked about today?

3 A. Yes.

4 Q. All right. Is there any other office
5 space that you have that you keep records and that
6 sort of stuff?

7 A. Personal?

8 Q. Personal and your business.

9 A. No.

10 Q. You may keep some at home, right?

11 A. Right.

12 Q. But generally speaking, 99 percent of your
13 documents would be at your business?

14 A. Yes.

15 Q. Okay. Do each of these LLCs have
16 financial statements?

17 A. Yes.

18 Q. Do you have an accountant?

19 A. No.

20 Q. Have you ever paid an accountant?

21 A. Yes.

22 Q. You have? For what purposes have you paid
23 an accountant?

24 A. When all the entities were running and I
25 had foreign sales in large volumes it was a lot more

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1 efficient to pay an accountant, accounting firm.

2 Q. For you to run the business?

3 A. Right. Because of the complexity of the
4 returns. They used to be a lot more complex.

5 Q. Okay. Who was your accountant whenever
6 they were?

7 A. Hancock Askew in Savannah.

8 Q. All right. Do they have a South Carolina
9 office?

10 A. I don't believe so.

11 Q. Okay. Do you get a check every month or
12 direct deposit you said from Rockmore?

13 A. Yes.

14 Q. What is that amount?

15 A. It's in the neighborhood of 10,000.

16 Q. Monthly draw kind of thing?

17 A. Yes. Well, it's self-employment income,
18 right.

19 Q. So about \$120,000 a year?

20 A. Right.

21 Q. And that is before taxes; is that correct?

22 A. You've seen my tax returns.

23 Q. Right.

24 A. How much do you think I pay in taxes?

25 Q. You haven't paid much in taxes, have you?

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1 A. Well, I have carry forewards.

2 Q. How many years can you use carry
3 forewards?

4 A. Indefinitely.

5 Q. At this pace with your losses how long do
6 you think you can have a carry forward loss?

7 A. It's a function of how much income I have
8 in the future.

9 Q. Okay.

10 A. Currently I have about eight million in
11 carry forwards.

12 Q. Which essentially means that you can
13 offset about \$8 million of income with those losses?

14 A. Not essentially. You can.

15 Q. Never made money through doing that
16 sort -- having that sort of losses though, have you?

17 A. Beg your pardon?

18 Q. Can't necessarily make money off of losses
19 though, can you?

20 A. Well, it depends.

21 MR. SCHEIDER: Let's be careful here.

22 MR. FLOYD: All right. Let's go off
23 the record.

24 (Recess 11:51 to 11:53.)

25 MR. FLOYD: We've talked about

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1 looking at some documents. And there is a number of
2 documents that your lawyer and I have talked about.
3 And we're going to, as he said, when we have a sane
4 moment after today we are going to go through and
5 figure out what documents exactly that I've asked
6 for and that you said that you could provide.

7 I also believe that you have a number of
8 financial documents at your office. I would like to
9 have the opportunity to look at those, but today I
10 think it's best perhaps if we do it once. And it
11 may take twice, but I would like perhaps to have
12 some financial assistants with me when we go through
13 those.

14 And as I understand it, neither you nor
15 your lawyer have any objection to us rescheduling a
16 document review at some point in the future; is that
17 right?

18 THE WITNESS: I don't.

19 MR. SCHEIDER: Without objection.

20 MR. FLOYD: Okay. Is there anything
21 else that we need to put on the record today?

22 MR. SCHEIDER: I think not other than
23 we are going to adjourn this session and --

24 MR. FLOYD: Have a conference call?

25 MR. SCHEIDER: Reconvene with a

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1 conference call.

2 MR. FLOYD: Okay. And, you know,
3 once we go through the record then there may be some
4 additional forms of remedy that I may ask for, but
5 I'm sure that you will be prepared for. All right.
6 That is all I have.

7 MR. SCHEIDER: We may not agree to
8 them, but --

9 MR. FLOYD: We won't agree to them.
10 Mr. Lindgren, I hope it's been as pleasant as it can
11 be.

12 (Whereupon, the Rule to Show Cause
13 Hearing was concluded at 11:54 a.m.)

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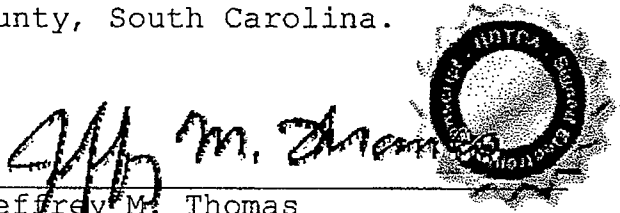
1 CERTIFICATE OF REPORTER

2 I, Jeffrey M. Thomas, Registered Professional
3 Reporter, and Notary Public for the State of South
4 Carolina at Large, do hereby certify:

5 That the foregoing hearing was taken before me
6 on the date and at the time and location stated on
7 Page 1 of this transcript; that the witnesses were
8 duly sworn to testify to the truth, the whole truth
9 and nothing but the truth; that the testimony of the
10 witnesses and all objections made at the time of the
11 examination were recorded stenographically by me and
12 were thereafter transcribed; that the foregoing
13 transcription as typed is a true, accurate and
14 complete record of the testimony of the witnesses
15 and of all objections made at the time of the
16 examination to the best of my ability.

17 I further certify that I am neither related to
18 nor counsel for any party to the cause pending or
19 interested in the events thereof.

20 Witness my hand, I have hereunto affixed my
21 official seal this 8th day of September, 2014, at
22 Columbia, Richland County, South Carolina.

23
24
25

Jeffrey M. Thomas
RPR, Notary Public
State of South Carolina at Large
My Commission expires
December 14, 2017

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4	BY MR. FLOYD	3
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6		
7	E X H I B I T S	

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(None were proffered)

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#19 7-8-15 first citizens hearing

1

1 State of South Carolina) Court of Common Pleas
) 14th Judicial Circuit
2 County of Beaufort) No.: 2011-CP-07-128 and 129

5 First Citizens Bank and)
Trust Company, Inc.,)
6 Plaintiff,)
vs.) HEARING
7 Blue Ox, LLC, and J.)
Chris Lindgren,)
8 Defendants.)
9 July 8, 2015
0)

HEARING

July 8, 2015

Hearing reported by Deborah S. Thomas,
Certified Verbatim Reporter and Notary Public in and
for the State of South Carolina; said hearing held
before the Honorable Marvin H. Dukes, III, Beaufort
County Master in Equity and Special Circuit Court
Judge in accordance with the South Carolina Rules of
Civil Procedure, at the Beaufort County Courthouse,
102 Ribaut Road, Room 212, Beaufort, South Carolina,
on July 8, 2015, at the hour of 9:54 a.m.

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2

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EXHIBIT INDEX

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Exhibits:

Marked at Page

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(None were proffered.)

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1 This hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.

3 JUDGE DUKES: Good morning. We are
4 here in a motion to reconsider subsequent to an
5 order on supplemental proceedings in Case
6 11-CP-07-128. And Mr. Lindgren's attorney,
7 Mr. Simons, has filed that motion. I'm happy to
8 hear from you, sir.

9 MR. SIMONS: Thank you, sir. First I
10 would like to thank the court for giving me an
11 opportunity to discuss the legal issues in this case
12 with you. As I indicated in our motion to

13 #19 7-8-15 first citizens hearing
14 reconsider, it's a little unusual. A lot of times
15 you file a motion to reconsider simply to make sure
16 you've got all of your bases for appeal purposes.

17 In this particular case I believe that the
18 court should truly reverse itself, correct an error
19 of law before the case goes up. And I thank the
20 court for allowing me the opportunity to make that
21 case to you.

22 What I would like to do is jump straight
23 to the key point in the case. I've indicated in my
24 motion and in e-mails to the court that I believe
25 that the order the Plaintiff submitted and the court
signed precedes from a faulty premise.

6

1 And the faulty premise, Judge Dukes, is
2 this. The Plaintiff takes the position that it is
3 wrong to convert non-exempt assets to exempt assets.
4 And that the mere fact of doing that, the mere act
5 of the conversion is fraudulent as against a
6 judgment creditor.

7 Based on that premise Plaintiff rejects
8 the notion that they have to prove fraudulent
9 intent. And so what they do is they say, okay,
10 number one, the conversion is bad. And therefore we

#19 7-8-15 first citizens hearing

11 don't have to prove that your conversion was
12 accompanied by fraud or motivated by fraudulent
13 intent. And they are simply wrong on that.

14 The first case we cited in our motion --
15 excuse me -- our memorandum on this issue was from
16 the '20s. And that was the case because I know you
17 remember the case because you commented about it on
18 the phone one time. That was the case involving the
19 cows and the pigs and the sheep and so forth.

20 In the 1920s it was regarded as, quote,
21 well settled that it is not fraudulent for a debtor
22 to take advantage of exemptions that are provided to
23 him by statute in order to shield those assets from
24 the claims of creditors. That is what the exemption
25 statutes are for.

7

1 And that case, of course, involved the man
2 converted -- I've forgotten the numbers now, but
3 they are in our motion. He converted cows and pigs
4 I believe it was. He had too many of those under
5 the exemption statute. He took the excess cows and
6 pigs and traded them for some sheep. And the sheep
7 that he got was less than the number that he's

8 #19 7-8-15 first citizens hearing
permitted by the exemption statute.

9 And so that was a pretty clear case of
10 where he had simply converted non-exempt assets in
11 the form of his cows and so forth into exempt assets
12 in the form of sheep. And I thought that was a
13 wonderful case to illustrate the point that the
14 exemption -- excuse me. That the conversion is not
15 ipso facto bad. It's okay.

16 And the courts have held that that is
17 expressly okay. And I've cited cases involving
18 people where they sold their non-exempt furniture
19 and used their money to put into exempt assets.

20 A fellow sold his pickup truck to the same
21 effect. Most recently we've cited two more cases
22 involving but one a traditional IRA, one a Roth IRA,
23 and both of those cases the people took tax refunds,
24 cash. In one of the cases it was a tax refund plus
25 some of his earned income which as Joey argues in

8

1 this case, my guy converted cash in his possession
2 which was non-exempt. And he converted it into
3 exempt meaning the IRA accounts.

4 And these cases we've cited to you all
5 involve the same thing where the debtor has

#19 7-8-15 first citizens hearing

6 converted a non-exempt asset into an exempt asset.
7 And in every single one of those cases that we've
8 cited in our brief and in our newest motion, the
9 more recent two cases that we've cited, the courts
10 have held that they were not fraudulent.

11 And what they've said is that in order for
12 it to be a fraudulent transfer the creditor has got
13 to prove something more than the transfer. That is
14 what the case from the 1920s going back to the cows
15 and the pigs and the sheep, what they said is the
16 creditor has got to prove extrinsic -- some
17 extrinsic evidence of fraud; in other words,
18 something beyond the mere transfer.

19 And in this case Joey hasn't done that.
20 All he has said is that Lindgren made voluntary,
21 which I take to mean knowing, post-judgment
22 contributions to his IRA accounts. In other words,
23 he took the money knowing that he was indebted to
24 the bank and he didn't give it to the bank. And he
25 instead put it in an IRA account.

9

1 Well, that is the mere conversion that the
2 courts have said is not enough to prove fraudulent

3 #19 7-8-15 first citizens hearing
4 intent for purposes of the relief they are seeking
5 here. There has got to be something beyond that.

6 Now, if you read the cases, the more
7 modern cases, they speak to what are called badges
8 of fraud. In the two cases we've cited most
9 recently, the count may differ, but they were
10 somewhere in the neighborhood of 17 or 19 different
11 badges or indicia of fraud that the courts examined.

12 Well, I've not addressed the badges of
13 fraud because it's the burden on Joey to come
14 forward to show something beyond the mere
15 conversion, to bring some evidence forth to
16 establish some of those badges of fraud, and he's
17 not done that. So I've not attempted to argue the
18 negative.

19 I say the burden is on him. And the law
20 in South Carolina is clear, at least on this point,
21 that for a fraudulent transfer claim he's got to
22 prove it by clear and convincing evidence.

23 So the law is that the Plaintiff has got
24 to come forward with evidence on these badges of
25 fraud to a clear and convincing standard to show
something beyond the mere conversion of the assets

10

#19 7-8-15 first citizens hearing

1 from non-exempt to exempt. That they haven't done.

2 And that is why I say it is just so
3 crystal clear because -- and I'll put it to you very
4 simply. If you believe that the mere conversion is
5 enough, then there is nothing else to talk about.
6 But if you agree with me after you've read the cases
7 that the mere conversion is not enough, and there
8 has got to be something else, then you will examine
9 the record in this case and find out there is
10 nothing else.

11 And that, in essence, is the argument.
12 There is another piece of this to be considered.
13 And that is in -- and the matter of the 401-Ks is
14 not before you today but something that is -- and we
15 talked about it before we got on the record about
16 there is something different about the 401-Ks and
17 the IRAs.

18 One of the differences is in the Homestead
19 Exemption Statute provides that ERISA plan funds are
20 exempt. And it doesn't contain a fraudulent
21 transfer exception. That is one of the reasons why
22 the 401-K has got a greater degree of protection
23 from the claims of the Plaintiff in this case than
24 do the traditional or Roth IRAs.

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25 I mention that because the subsection of

11

1 the homestead statute that pertains to individual
2 retirement accounts does contain a fraudulent
3 transfer exception. And you wonder, okay, what does
4 that mean?

5 Now, Joey would have you believe that even
6 though it talks about fraudulent transfer as an
7 exception in the homestead exemption statute, he
8 doesn't have to prove fraudulent intent. I've
9 already explained why other courts all around the
10 country have concluded to the contrary, but there is
11 also an issue of statutory interpretation in South
12 Carolina. And that is that the subsection of the
13 Homestead Exemption Statute that pertains to the
14 individual retirement accounts and that has the
15 fraudulent transfer exemption also says that the
16 interest of an individual under a retirement plan
17 shall be exempt from creditor process to the same
18 extent permitted in Section 522(d) under Federal
19 Bankruptcy Law.

20 We've laid it out in our memorandum, and I
21 believe also in the motion to reconsider, how that

22 #19 7-8-15 first citizens hearing
reference to 522(d) brings in the applicable Federal
23 standard on fraudulent transfers which unambiguously
24 and without any question provides and requires proof
25 of an actual intent to hinder, delay, defraud, the

12

1 magic language of the statute.

2 So for two different reasons, one the
3 complete unanimity of the law elsewhere that the
4 mere fact of the conversion is not enough. You've
5 got to extrinsically prove actual intent to commit
6 fraud onto the creditor. You've got that argument.
7 Then you've also got the statutory argument that I
8 submit to you expressly incorporates the Federal
9 standard into our State standard again requiring
10 proof of intent and again requiring actual intent
11 and to a clear and convincing standard.

12 And, again, there is no evidence in this
13 record on that. Now, that is the -- I guess the sum
14 and the substance of the arguments on the merits --
15 on the key issues of the merits. Some other points
16 I would make just to briefly go through the motion
17 to reconsider, the order that Joey submits or
18 submitted said that the parties stipulated to the
19 facts. We did not stipulate to the facts. We

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20 expressly did not stipulate to the facts. We did
21 agree on what the record consisted of.

22 And I would ask the court to clearly
23 define in whatever order is entered as a result of
24 today that the content of the record on which the
25 court has acted be clearly stated in the order so we

13

1 don't have any questions when we go elsewhere.

2 My recollection, and what is reflected in
3 my correspondence with Joey is that we agreed that
4 the -- obviously the hearing transcript when Mr.
5 Lindgren was here on the supplemental proceedings
6 testimony, that is part of the record. Lindgren
7 submitted an affidavit. That is part of the record.
8 And Joey submitted a one-page summary of the
9 evidence as it related to the amounts and the timing
10 of the contributions that he challenges. And that
11 is in the record.

12 Insofar as I'm concerned nothing else is
13 in the record other than the memoranda we've
14 submitted and the motions and so forth. Now turning
15 to the facts, Mr. Lindgren filed an affidavit. And
16 the court in the order submitted by Joey did not

17 #19 7-8-15 first citizens hearing
make any findings of fact based on that affidavit.

18 And we would specifically ask that the
19 court -- and this is again set forth in Point 2 of
20 our motion to reconsider.

21 JUDGE DUKES: Can I ask you real
22 quickly about any factual dispute though because as
23 I recall there really wasn't too much of a factual
24 dispute about the following. Number one, the
25 judgment existed. Mr. Lindgren knew it existed.

14

1 Number 2, he had previously had this IRA. I think
2 that is not disputed. And that he had been making
3 contributions to it in the past.

4 MR. SIMONS: That he had.

5 JUDGE DUKES: That he had.

6 MR. SIMONS: Yeah. Yes, sir.

7 MR. FLOYD: I'm not sure there is
8 evidence on that point.

9 MR. SIMONS: Sure there is. It's in
10 his affidavit.

11 MR. FLOYD: There was evidence of
12 contributions to the IRA -- to the 401-K, but not
13 the IRA. I could be wrong.

14 MR. SIMONS: You are wrong. I'm

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15 sorry.

16 MR. FLOYD: The affidavit speaks for
17 itself. I'll agree with that.

18 JUDGE DUKES: All right. But I guess
19 I'm trying to figure out what was undisputed. There
20 was no evidence that the IRA was created to dump
21 this money into as I recall. It was a preexisting
22 IRA, maybe. Maybe I'm misremembering it.

23 MR. SIMONS: That is true. He did
24 open and fund a Roth IRA. And to that extent there
25 was an IRA opened post-judgment. My answer to that
15

1 is that in both of the cases we've more recently
2 cited the accounts were opened post-creditor
3 activity. I don't remember whether it was a
4 judgment or what the creditor activity was, but they
5 were both clearly done with a view toward the
6 creditor activity. They opened new accounts.

7 And the law on Roth and traditional IRAs
8 is you can fund one or the other or both, but only
9 up to the total that you are allowed on an annual
10 basis. You can put half in each one of the
11 accounts. So the fact that he put all of his

12 #19 7-8-15 first citizens hearing
permitted annual contribution into a new Roth as
13 opposed to an old traditional IRA is of no
14 consequence to me in the analysis.

15 JUDGE DUKES: Well, I guess I asked
16 the wrong question. The undisputed facts I think
17 were he had made consistent contributions --

18 MR. SIMONS: Over many years.

19 JUDGE DUKES: -- over many years.
20 And the contributions had not increased. Is that
21 accurate or not?

22 MR. SIMONS: Except to the extent
23 that Federal law would have enabled him to increase
24 them, right.

25 JUDGE DUKES: Right. But, I mean,

16

1 they hadn't doubled or tripled or anything like
2 that. They had gone up concurrent with whatever
3 the --

4 MR. SIMONS: Precisely.

5 JUDGE DUKES: Okay. Because that
6 seemed like I recall it being an undisputed fact.
7 So, you know what, let me let you finish your
8 argument. And I have a couple of questions.

9 MR. SIMONS: The only fact that is

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10 disputed that I'm aware of is that the order that
11 Joey put in front of you says, in effect, you don't
12 have to find fraudulent intent, but if I do have to
13 find it, I find it without ever telling what is the
14 basis on which such a finding is made.

15 So I suppose that the order says that
16 Lindgren's post-judgment transfers were accompanied
17 by fraudulent intent --

18 JUDGE DUKES: Because they were
19 post-judgment transfers?

20 MR. SIMONS: Right.

21 JUDGE DUKES: That is your first
22 argument. You are just --

23 MR. SIMONS: So that is the issue of
24 fact.

25 JUDGE DUKES: Right.

17

1 MR. SIMONS: Lindgren has sworn that
2 he made these contributions the same as he has. And
3 they were not motivated by an intent to defeat his
4 claims or anybody else's. The Plaintiff's claims or
5 anybody else's.

6 Now, that is what he says under oath. And

7 #19 7-8-15 first citizens hearing
8 Joey would have you reject that finding, but without
9 ever making any finding on what the basis is for
10 saying that Lindgren is lying. And -- but anyway,
11 when you say are there any undisputed facts, the
12 ultimate fact of whether the contributions were
13 fraudulent, that is in dispute.

14 JUDGE DUKES: I got you.

15 MR. SIMONS: I don't believe there is
16 another factual issue in the case that you would
17 have to resolve. Can you think of one, Joey?

18 MR. FLOYD: I'm sorry. What were you
19 saying?

20 MR. SIMONS: I don't think there is
21 any factual dispute other than whether Lindgren's
22 contributions were fraudulent.

23 MR. FLOYD: I don't think it's a
24 factual dispute at all, but I mean I'm not aware of
25 anything. I think the affidavit and the account
summary -- I think we agreed at least to the account

18

1 summary being accurate.

2 MR. FLOYD: Yeah.

3 JUDGE DUKES: So it's the factual
4 portion that you are talking about is a factual

#19 7-8-15 first citizens hearing

5 finding of fraud where the evidence -- I think it's
6 undisputed the evidence was that -- let me say this.
7 There was nothing beyond his knowledge of the
8 judgment and his transfer with that knowledge. And
9 as I understand the argument, that is fine. You can
10 have that, but you have to accompany that with an
11 independent finding of fraud from some other
12 evidence other than the mere transfer under
13 knowledge of the judgment. That is the sum and
14 substance I think of the first argument and the
15 second.

16 MR. SIMONS: Right.

17 JUDGE DUKES: Okay. Anything else?

18 MR. SIMONS: Well, now I want to get
19 into sort of a nuanced argument, but I want you to
20 have -- boy, I was going to say I want you to have a
21 complete understanding. I don't mean to suggest
22 that your understanding is incomplete.

23 JUDGE DUKES: Oh, I'm never insulted
24 by that. I often don't have a complete
25 understanding, so go right ahead.

19

1 MR. SIMONS: The bank argues that

2 #19 7-8-15 first citizens hearing
3 under South Carolina law -- and this is just
4 standard Statute Elizabeth black letter law that a
5 transfer accompanied by valuable consideration is
6 not fraudulent absent intent to defraud.

7 On the other hand, a transfer without
8 valuable consideration can be fraudulent without
9 proof of intent to defraud. And the bank would
10 argue that Lindgren's transfer was unaccompanied by
11 consideration, therefore they don't need to prove
12 fraudulent intent.

13 And I agree with the sort of black letter
14 rules that I've summarized and they argue. What I
15 don't agree with, and this is the nuanced part, I
16 don't believe that -- and I've read everything I can
17 read on this subject. I don't believe that the
18 Statute of Elizabeth construct about looking at a
19 transfer and whether there was or was not valuable
20 consideration is applicable to the conversion case
21 that we have here.

22 Joey wants to argue, and does in his
23 briefing and maybe in the order, that all Lindgren
24 did was move money from one pocket to another, and
25 that is the conversion. But then he wants to argue
26 that there was no consideration when he transferred

20

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1 it.

2 Now, what I would say to the court is that
3 the Statute of Elizabeth juris prudence that is
4 looking at a transfer and valuable consideration
5 isn't applicable here because consideration -- if
6 you go back to Contracts 101, consideration involves
7 an exchange of consideration.

8 And so when a court is talking about
9 whether a transfer was accompanied by consideration
10 they are talking about whether the party to whom the
11 transfer of the asset was made parted with valuable
12 consideration in exchange.

13 Well, that doesn't happen when the money
14 goes from one pocket to the other pocket, but the
15 courts have held that the conversion is to be
16 treated as a transfer for fraudulent conveyance
17 purposes.

18 And what I suggest to the court is that in
19 conversion cases, as opposed to third party transfer
20 cases, the existence or presence or absence of
21 consideration shouldn't be determinative, but if you
22 want to apply the old fashioned Statute of
23 Elizabeth, you know, either/or situation, was there

#19 7-8-15 first citizens hearing

24 or was there not consideration accompanying this
25 transfer? The answer is there was consideration.

21

1 And that is that Lindgren -- the cases Joey cites
2 would be a case where the husband gives his house to
3 the wife.

4 That is obviously no consideration.
5 That's a gift. Well, Lindgren didn't give his money
6 away. To the extent there was a transfer, it was a
7 transfer to Fidelity. And Lindgren received
8 valuable consideration in return for that transfer.
9 He got the right to get that money back with a tax
10 free rate of return and to be potentially taxed at a
11 lower rate in the future.

12 Now, the niceties of that are a little bit
13 different between the traditional and the Roth IRAs
14 for reasons I'm sure you know, but the point is that
15 he didn't just give away his money for no
16 consideration, which would trigger a Statute of
17 Elizabeth analysis in sort of the old fashioned way.

18 In this case he converted non-exempt to
19 exempt. And if you want to consider that to be a
20 transfer, and if want to examine whether that was

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22 accompanied by consideration, the answer is it was
23 accompanied by consideration. And as I say, that is
24 a nuance I don't think is necessary to get into, but
25 it is an interesting academic discussion of how to
apply very old what used to be common law and then

22

1 Statute of Elizabeth fraudulent conveyance concepts,
2 how to apply that to a traditional IRA that didn't
3 even exist when courts were writing early decisions
4 on the Statute of Elizabeth.

5 And it didn't exist when the court held in
6 the Vorzburg case in the '20s that it was well
7 settled that the conversion was okay. IRAs didn't
8 exist at that time. So anyway, I question whether
9 those juris prudential principles are applicable to
10 a transfer from a debtor from his checking account
11 to an IRA.

12 The order contains a finding to the effect
13 that Lindgren failed to retain sufficient property
14 assets, to pay First Citizens. There is no evidence
15 in the record to my knowledge of Mr. Lindgren's
16 financial status other than --

17 JUDGE DUKES: Nulla bona or not?

18 MR. SIMONS: There --

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19 JUDGE DUKES: I thought that was in
20 nulla bona.

21 MR. SIMONS: There may be.

22 JUDGE DUKES: All right. Any way --

23 MR. SIMONS: But whether -- whether
24 the Sheriff found something versus what he retained
25 is different to my understanding, but --

23

1 JUDGE DUKES: All right.

2 MR. SIMONS: And understand the case
3 doesn't turn on that factual finding.

4 JUDGE DUKES: Right.

5 MR. SIMONS: But if I don't question
6 it here, I can't argue about it later. And it also
7 contained a finding that Lindgren maintains that he
8 has no assets that can be used to apply towards the
9 judgments.

10 I couldn't find any testimony from
11 Lindgren to that effect. So I would say both of
12 those factual findings are without evidentiary
13 support.

14 And the only other point I would make at
15 this time is that -- and that is relating to if the

16 #19 7-8-15 first citizens hearing
court is going to adhere to its position that
17 Fidelity should be required to pay Lindgren's IRA
18 money to the bank.

19 In other words, if you don't truly
20 reconsider your position today, then I would ask the
21 court to include in that order a provision that that
22 order be stayed pending appeal, otherwise I've got
23 to run around like a headless chicken and get my
24 notice of appeal filed and my supersedeas or
25 petition for stay filed before Joey can talk

24

1 Fidelity into parting with my client's money.

2 JUDGE DUKES: Well, we've got a
3 current order basically that says nothing is going
4 to happen until I rule on this.

5 MR. SIMONS: Correct.

6 JUDGE DUKES: That is what the order
7 said the other day.

8 MR. SIMONS: And I just want whatever
9 ruling today to clarify going forward.

10 JUDGE DUKES: No, I understand.

11 MR. SIMONS: That's all.

12 JUDGE DUKES: Okay.

13 MR. SIMONS: And I would be delighted

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14 to answer whatever questions you might have, Judge
15 Dukes. I know I've been kind of long winded and I
16 apologize.

17 JUDGE DUKES: No, it's always
18 interesting. So the essence of it essentially as I
19 understand it is that you had mentioned 15 badges of
20 fraud. I didn't know there were 15. I don't think
21 I could recite them, but --

22 MR. SIMONS: Actually 19.

23 JUDGE DUKES: Nineteen. But that the
24 one that basically talks about transfers without
25 consideration is not applicable here as fraud

25

1 because in essence the payment into an IRA is not a
2 transfer -- a classic transfer without any sort of
3 consideration. I mean, that's --

4 MR. SIMONS: I think you can look at
5 one of two ways or both ways at the same time.

6 JUDGE DUKES: Uh-huh.

7 MR. SIMONS: I don't know how much
8 particle physics you remember, but --

9 JUDGE DUKES: None. I don't even
10 know if I took particle physics, but --

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11 MR. SIMONS: A particle can be a
12 particle and it can be a wave at the same time.

13 JUDGE DUKES: I do remember that
14 somehow.

15 MR. SIMONS: Yeah. Okay. Well, in
16 this case, and I don't mean to get metaphysical
17 about it, but you can consider it to be not a
18 transfer or you can consider it to be a transfer
19 with consideration. I would submit to you that the
20 best way to analyze it is the way that other courts
21 have. And they are the cases that we've cited and
22 I'm sure you will read.

23 And that is that when you convert assets,
24 you haven't really transferred them to anybody else,
25 although in this case we have transferred them

26

1 physically, I guess, to Fidelity, but to the extent
2 that Lindgren retains control over them, he haven't
3 really transferred them, but that conversion is
4 deemed to be a transfer for purposes of considering
5 whether the conversion was fraudulent.

6 And in order to treat a conversion as
7 fraudulent, the courts are unanimous that there has
8 got to be something more than the mere conversion.

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9 JUDGE DUKES: But if the transfer is
10 a transfer without consideration, and I understand
11 you take a different position, but if it is that is
12 one of the 19 -- I didn't realize -- 19 you said?
13 Nineteen badges of fraud?

14 MR. SIMONS: I don't know that the
15 transfer without consideration is one of the badges.
16 They are most recently listed, and comprehensively
17 listed in the -- I want to say the Bodan case. I
18 sent you a copy -- copies of the two cases we cited
19 most recently, the Bodan and the Channon cases were
20 both attached to the motion. If you've got the
21 court's copy of the motion here, they list them in
22 there.

23 And I don't remember a transfer without
24 consideration as being one of the badges of fraud.
25 They had to do more with things like concealment and

27

1 things of that nature, actions taken by the debtor
2 in connection with the conversion that could be
3 relevant to the guy's state of mind.

4 JUDGE DUKES: Okay. So -- but the
5 summary then in essence is you can't just show the

6 #19 7-8-15 first citizens hearing
transfer. And the transfer itself is not the proof
7 of the fraud. You must show the transfer and the
8 fraud, this is your argument as I understand it.

9 MR. SIMONS: Yes, sir.

10 JUDGE DUKES: And that the transfer
11 to the 401-K is not indicative of fraud because,
12 first of all, maybe it's not one of the badges of
13 fraud. And second, because it's not truly a
14 transfer without consideration based on the
15 mechanics of the 401-K system and all of that.

16 MR. SIMONS: I want to be sure I
17 understand what you are asking me. Whether the
18 transfer to the 401-K can be used as a badge of
19 fraud with respect to the transfer to the IRA
20 account? Is that what you are --

21 JUDGE DUKES: I'm sorry. Not 401-K.
22 The IRA.

23 MR. SIMONS: Okay.

24 JUDGE DUKES: The IRA. I misspoke.
25 The IRA is what we are talking about, not the 401-K.

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1 MR. SIMONS: Okay.

2 JUDGE DUKES: The transfer to the
3 IRA -- and I understand that is your -- I'm not

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4 asking you that. I think that is your argument.
5 Your argument is, in fact, the transfer to the IRA,
6 forgive me if I said 401-K. The IRA, even though
7 traditional consideration was not paid back, is not
8 a transfer without consideration. That is
9 Lindgren's argument?

10 MR. SIMONS: It is certainly not a
11 transfer without consideration here. I don't
12 believe a transfer to an IRA is ever a transfer
13 without consideration because, A, you can argue
14 there is no transfer because he retained control.
15 B, to the extent there was a transfer to the third
16 party holding the funds, there was valuable
17 consideration. He didn't just give away the money.

18 I received in return custodial services
19 plus various tax benefits. So you can't say that it
20 was without consideration if you want to treat it as
21 a true traditional transfer. My argument is that
22 the modern cases deem it to be a transfer for
23 purposes of fraudulent conveyance examination, but
24 don't get hung up about whether there was or wasn't
25 consideration when somebody makes a deposit into an

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1 #19 7-8-15 first citizens hearing
2 IRA. That is the nuance of it I'm suggesting to
3 you.

4 JUDGE DUKES: Okay. I think I
5 understand it.

6 MR. SIMONS: In other words, I don't
7 think you can simply apply old black letter Statute
8 of Elizabeth rules to an IRA --

9 JUDGE DUKES: That predate the IRA.

10 MR. SIMONS: To an IRA transfer and
11 say, okay, there was no consideration; therefore, he
12 doesn't have to prove intent which is what, I guess
13 at bottom, his argument is, but there is not a case
14 in the country that has reached that conclusion.

15 JUDGE DUKES: This is different, you
16 are saying, from someone selling the house to their
17 friend for a dollar kind of thing?

18 MR. SIMONS: Right. Very much so.

19 JUDGE DUKES: Okay.

20 MR. SIMONS: And one final point, and
21 that is that if the law is as sit forth in the order
22 that Joey put in front of you that means that no
23 judgment debtor could ever put any money in their
24 retirement plan because the mere act of doing so
25 would expose that money to the claims of the

25 #19 7-8-15 first citizens hearing
 creditors.

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1 And no court anywhere has reached that
2 conclusion. And, 2, that conclusion would just fly
3 in the face of the public policy of promoting and
4 protecting retirement savings. I mean, the mere
5 fact that we've got all of these tax advantages for
6 making these contributions to retirement plans and
7 the fact that these retirement plans are by statute
8 exempt from creditor claims as a general matter
9 shows that there is a public policy to promote
10 retirement savings, keep these people off the dole.

11 And the result that is achieved in Joey's
12 order is just to the contrary. Hey, anybody in this
13 country can save for retirement except judgment
14 debtors. And it would even go farther than that.
15 Once you get sued and there is a prospect that you
16 might have a judgment against you, you better not
17 contribute to your retirement plan.

18 And I say again that that is an extreme
19 position that no court has ever reached that
20 conclusion. And the cases that we've cited again
21 and again say that it's okay for the debtor to
22 convert his property.

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23 JUDGE DUKES: Okay.

24 MR. SIMONS: To protect it.

25 JUDGE DUKES: Anybody need a break

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1 before we go onto Joey? Deborah, you good? Okay.

2 All right.

3 MR. FLOYD: My turn?

4 JUDGE DUKES: Your turn.

5 MR. FLOYD: Okay. Judge, what we
6 have here today is that the Defendant is saying to
7 allow us to execute on these funds that are
8 otherwise not exempt are now allegedly exempt. The
9 debtor has moved from one pocket to the other is
10 essentially a shelter.

11 And I would suggest that his last
12 statement, what he said about courts and public
13 policies and all of that sort of stuff, well, I
14 would submit to you that the court has never found
15 to the contrary of what he said either.

16 They haven't said you can contribute to
17 your retirement account. I think debtors -- and I
18 think the court -- these courts -- the South
19 Carolina courts will ultimately find that if you are

20 #19 7-8-15 first citizens hearing
21 a judgment debtor you need to take care of your
22 judgment creditors before you start moving money
23 around and doing things to the chagrin of your
24 creditors.

25 Also -- as a preliminary matter I also
 want to point out that the record contains the

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1 record of contributions. And I'm certain that you
2 will go back and look at that. And I would submit
3 to you that it is sporadic. It does show a spike.

4 He opened up an education IRA
5 post-judgment. He opened up a Roth IRA
6 post-judgment. It's neither here nor there. I know
7 you will look at that, but I did want to bring that
8 up.

9 But additionally as a preliminary matter I
10 think it's important to note that debt in these
11 judgments arises by way of confession of judgment.
12 The debtor's counsel suggests that there is no
13 evidence to support the assertion that he has no
14 assets to apply towards the judgment.

15 And it's exactly as you pointed out. We
16 have a nulla bona return. If the debtor -- I guess
17 what he's saying is, I have chosen not to pay the

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18 judgment because either he has assets or he doesn't.
19 If he had assets he would have paid the judgments
20 and we wouldn't be here today.

21 Either way there is a nulla bona return.
22 I would submit to you that this is just another
23 index or indicia of fraud because he's not paying
24 the judgment. Also I want to keep in mind that all
25 of these contributions are post-judgment, voluntary

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1 contributions.

2 To allow a judgment debtor to aggressively
3 contribute towards his IRAs effectively provides a
4 shelter for debtors. A Swiss bank account, I mean
5 moving money from one pocket to the other, it's wide
6 open for execution. And then you've moved it over
7 into another pile where purportedly creditors can't
8 reach is just fundamentally wrong to me.

9 One of the cases cited by the debtor's
10 counsel in this case makes reference or quotes a
11 case from New Mexico which I found pretty
12 interesting. It's the case of Donanne Savings
13 versus Dofflemyer.) And it's cited in the Channon
14 case. And I wanted to read just a couple paragraphs

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because I thought it was pretty instructive.

16 We hold that the object of exemption
17 statutes quoted above is to allow for exemptions in
18 certain funds, but that it does not allow a debtor
19 to find shelter in these statutes by perpetrating a
20 fraud upon his or her creditors. On their face the
21 statutes allow for unlimited exemptions in life
22 insurance annuities and pension and retirement
23 funds.

24 At least one judge, however, has noted
25 that the potential for the abuse of the legitimate

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1 exemptions under the statute. It cites a case. The
2 legislature did not intend that these generous
3 provisions should be prostituted to the
4 encouragement of extravagance and the evasion of
5 just indebtedness.

6 Then it goes on to say, to hold that a
7 debtor automatically may find refuge in these
8 statutes on the eve of execution would render the
9 statute's application absurd, unreasonable, and
10 unjust.

11 That sums it up better than I can sum it
12 up, probably. If the court allows the debtor to

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13 take these actions that essentially give approval to
14 all debtors to immediately convert assets that are
15 otherwise subject to exemption into exempt assets
16 would render not only the Statute of Elizabeth
17 meaningless and provide creditors with no remedy --
18 I think it sets a horrible precedent for judgment
19 creditors going forward because if someone were to
20 get a judgment against somebody, essentially would
21 take all of their money, move it over into a life
22 insurance policy or into a 401-K or an IRA and
23 immediately claim they are all exempt. You can't
24 touch this money.

25 I think that is fundamentally wrong in

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1 South Carolina. And, in fact, if you read all of
2 these cases, even the ones that he's cited, it's not
3 this automatic protection.

4 And even if you buy into this I have to
5 show fraud argument, I mean the record is replete --
6 even if you go into these indicia of fraud, badges
7 of fraud, there is nothing in South Carolina that
8 says you have to do that, but even under the Statute
9 of Elizabeth it's there.

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10 He had the money. He moved it over here.

11 I hid it from his creditors. Maybe he didn't hide
12 it, but he made this transfer. In all of these
13 bankruptcy cases that you cite or that we cite and
14 we see, all of these things are disclosed on their
15 schedules. They tell the bankruptcy trustee, this
16 is what I did.

17 In this instance but for these
18 supplemental proceedings I would not have found what
19 I found, and that is that he took money, cash. He's
20 moving it over. And it's also important to note a
21 lot of these cases have the suggestion that it's
22 prudent retirement planning. It's prudent
23 retirement planning. It's good for the debtors to
24 not get on the dole.

25 Well, I would submit to you in this

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1 instance nothing could be farther from the truth
2 because there is evidence in the record of where
3 he's using this money just like a bank account. Not
4 this IRA, but he's using his 401-K just like a bank
5 account.

6 He took a distribution. Page 19, Lines 11
7 through six. He took a distribution from his 401-K.

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8 That is no different than a bank account. He took
9 the money -- yes, he's entitled to do it, but that
10 money that he took some \$200,000, plus or minus,
11 that he testified, was nothing more than a bank
12 account that was not subject to exemption that he
13 had access to. He took the money. And who knows
14 where that money has gone because he didn't have
15 enough money in the bank to pay my client during
16 these supplemental proceedings.

17 So I think all the facts taken into
18 account, the fact that he's using the 401-K at
19 least, and he used the education IRA that he opened
20 up -- the education IRA was opened in 2012 with a
21 contribution of \$22,000.

22 And immediately withdrawn or immediately
23 went away. There were no contributions in 2013 and
24 2014. So as we sit here at the time of the
25 supplemental proceedings there was no more money

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1 left. That is another piece of evidence that I
2 think is important.

3 You take the money that is not exempt.

4 You throw it in an exempt account until you need it.

5 #19 7-8-15 first citizens hearing
6 Then when you need it, creditors can't get it, but
7 you have access to it. Mr. Lindgren controlled all
8 of this money. It was all within his control. It's
9 all post-judgment. It's all voluntary. It's not
10 like he's working at some major corporation where
11 they're putting money into his retirement for him.

12 I think the record is sufficient and ample
13 to show that these are fraudulent transfers. And to
14 somehow suggest that moving money, cash, into an IRA
15 is somehow with consideration is to me just an
16 unreasonable assertion that I don't think any court
17 is ever going to find that to be with consideration.

18 That again flies in the face of a judgment
19 creditor's rights to try and collect money. To not
20 allow a judgment creditor to get this money in this
21 situation is fundamentally unfair by giving a debtor
22 the right to move money that is otherwise not exempt
23 into an exempt account and to put up a fence around
24 it and tell creditors you can't get it. And for
25 that reason I think the ruling is correct on the
 IRAs.

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1 JUDGE DUKES: Let me ask you this. I
2 mean, are there ever circumstances in which a

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3 judgment debtor can pay into an IRA in the face of a
4 judgment against them? I guess that would -- by
5 definition make them a judgment debtor.

6 MR. FLOYD: So, in other words, you
7 are saying with a judgment debtor --

8 JUDGE DUKES: When a judgment debtor
9 has an IRA, is it the bank's position that they
10 simply cannot pay into an IRA in any amount?

11 MR. FLOYD: I believe that speaks to
12 the case that one must be just before one is
13 generous. Before you give money to yourself I think
14 you have to make proper arrangements with your
15 creditors before you do that.

16 JUDGE DUKES: So you are saying there
17 would be no circumstances under which -- I mean, is
18 that the -- I guess that is a no.

19 MR. FLOYD: I don't want to make a
20 blanket statement, but in the facts of this case I
21 think the answer is no because he clearly has
22 sufficient cash that he could have dealt with this
23 judgment within the past four years between the
24 contribution to his 401-K, the traditional IRA, the
25 educational IRA, the Roth IRA, over \$92,000 since

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1 the judgment was entered, not saying what he took
2 out in the other cash activities that he did and the
3 other expenditures that he had.

4 But in this specific case the two
5 judgments in this case total \$113,000. Over the
6 course of four years he could have dealt with this
7 judgment. He could have paid it. He could have
8 made arrangements with the creditor or creditors.

9 Does he have to pay them off? No. I'm
10 not saying he has to pay them off, but I think he
11 could have made the necessary arrangements to do
12 both.

13 JUDGE DUKES: Okay. How about back
14 to the fraud issue for a second. The bank's
15 position I think is fraud isn't really required in
16 South Carolina under these circumstances. And so is
17 it the bank's position that because fraud isn't
18 required that there -- well, let me ask this. Is it
19 the bank's position that there is any evidence of
20 fraud in the record?

21 MR. FLOYD: Absolutely.

22 JUDGE DUKES: And is that the
23 transfer without consideration or what is that?

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24 MR. FLOYD: That is the transfer that
25 he made. He converted the exempt asset into a --

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1 the non-exempt asset into an exempt asset to shield
2 it from his creditors. That is one. Another is --

3 JUDGE DUKES: I guess what I meant is
4 independent of the transfer itself which I think is
5 Mr. Simons' argument is -- everyone acknowledges the
6 transfer. I think Mr. Simons' argument is that
7 exclusive of that it requires -- if I understand the
8 argument correctly, exclusive of the transfer itself
9 it requires some other independent evidence of
10 fraud. Is that -- did I understand that correctly?

11 MR. SIMONS: That is my -- that is
12 one of my arguments, yes, sir.

13 JUDGE DUKES: So that is -- my
14 question is was there anything in the record?

15 MR. FLOYD: I think so. If you -- he
16 talked about these 19 badges of fraud. And if you
17 go through them, these are the 19. Whether the
18 transfer was disclosed or concealed. It was
19 concealed because it didn't find out until these
20 supplemental proceedings.

21 Whether the debtor was being sued or

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22 threatened with suit when the transfer was made, a
23 judgment was there. Whether the transfer was of
24 substantially all the debtors assets, well, it was
25 because he had no more cash. There are no more

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1 assets that I have found that have been subject to
2 execution beyond the cash that was contributed to
3 the 401-K and the IRA at this time.

4 Whether the debtor absconded. He clearly
5 absconded with the education IRA money. It's gone.
6 Whether the debtor removed or concealed assets.
7 Yes. Whether the debtor was insolvent or became
8 insolvent shortly after the transfer was made or the
9 obligation was incurred. Yes.

10 Whether the transfer occurred shortly
11 before or shortly after a substantial debt was
12 incurred. Yes. The value of the asset claimed is
13 exempt. And, yes. The value was asset is a
14 substantial asset if you take into consideration the
15 401-K and the IRA. But even the IRAs, the education
16 IRA being 22,000 and the two other IRAs being of
17 substantial money as well.

18 The proportion of the debtor's non-exempt

19 #19 7-8-15 first citizens hearing
20 assets transmuted into exempt form. I would submit
21 to the court at this time that those are the only
22 assets that we found. Those were all converted into
23 exempt form. Whether the exemption is limited or
24 unlimited. In this instance he says that those are
25 all unlimited. So yes, we meet that one, too.

25 Whether the debtor already owned the 42

1 exempt asset and used non-exempt assets to increase
2 its value. He purports that an IRA was already in
3 existence. He used those assets to increase the
4 value.

5 Whether the debtor borrowed funds to
6 acquire the exempt asset. There was no borrowing in
7 that. Whether the debtor intended to use the exempt
8 asset for the legislative purpose behind the claimed
9 exemption. Taking money that is otherwise
10 non-exempt and moving it into exempt I think is the
11 absurd result because I think what the legislature
12 says is if you've got money there that you
13 preplanned for retirement we are going to protect
14 that. We are not going to protect you from that
15 money that you move in post-judgment. I think that
16 is a more realistic reading and not bending it and

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17 stretching it and contorting the statute.

18 Whether allowance of the exemption is
19 consistent with the legislative purpose for the
20 exemption. I think I went over that. Whether the
21 transmutation of the non-exempt asset into exempt
22 form was made in contemplation of a bankruptcy
23 filing and the proximity of the transmutation to the
24 bankruptcy filing, that is a bankruptcy issue not
25 necessarily applicable, but it is applicable to --

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1 if you change that into execution -- judgment
2 execution.

3 And then it goes into another bankruptcy,
4 voluntary, involuntary. Whether the debtor
5 misrepresented any aspect of the transaction by
6 which exempt assets were acquired or the values of
7 assets in question. Whether and to what extent
8 non-exempt assets remain available for distribution
9 to creditors in the bankruptcy case.

10 By going all of those that he cited in New
11 Mexico, I think you can put a check by most if not
12 all of those, even though I don't think you have to
13 look to those little indicia of fraud or badges of

14 #19 7-8-15 first citizens hearing
fraud, whatever you want to call them.

15 The acts -- you can't just look at the
16 facts through a needle -- the eye of the needle as
17 the debtor's counsel wants us to look at. These are
18 just contributions. I think if you look at the
19 whole scheme of things from the time the confession
20 of judgment was entered, no efforts were made to pay
21 the judgment. During that whole time period he is
22 contributing post-judgment voluntary contributions.
23 He's opening up IRAs. He's moving money that is
24 otherwise exempt into non-exempt assets.

25 That in and of itself to me I believe --

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1 and the law I believe says is not right. And the
2 bank is entitled to those assets. To hold otherwise
3 would suggest and give a license to all future
4 judgment debtors that if you see a judgment coming
5 or if you see something bad going on in your life,
6 gather all of that money up, open up IRAs, as many
7 as you can, and open them up to protect them from
8 your creditors.

9 I don't think that is the case. I don't
10 think that is the intent of the legislature. I
11 think the intent is to keep the status quo. Take a

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12 snapshot of what is there. And then go from there.

13 So to the extent fraud is required, I
14 think the record is replete with plenty of evidence
15 for that. I don't think it's required, but to the
16 extent it's necessary I think you can look at all of
17 those and get to where you need to be.

18 JUDGE DUKES: Now, he didn't take it
19 all and put it in the IRAs. He took the -- what is
20 the amount that you can put?

21 MR. SIMONS: 5,000 or 6,000 bucks,
22 depending on the year, I believe.

23 JUDGE DUKES: And that was the amount
24 he put, right?

25 MR. SIMONS: Yes, sir.

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1 JUDGE DUKES: It wasn't like he
2 put -- because you can certainly put more, but then
3 you lose tax advantages, obviously. But it was the
4 taxable maximum benefit amount. Is that accurate?

5 MR. SIMONS: Correct.

6 MR. FLOYD: In the years that he did
7 contribute.

8 JUDGE DUKES: Right. But, I mean,

9 #19 7-8-15 first citizens hearing
10 what I'm saying is, I think, your point was you can
11 take all of your assets and dump them in an IRA and
12 shield them. That is not what we've got going on
13 here. He made the standard contribution pursuant to
14 Federal law to get the maximum tax advantage.

15 MR. FLOYD: Or a 401-K. You can open
16 up multiple IRAs because he did have multiple IRAs
17 and that sort of stuff, so --

18 JUDGE DUKES: I mean, but in any
19 given year it either went to the Roth or to the
20 regular one. Was that what happened? I'm trying
21 to --

22 MR. SIMONS: There was only one year
23 of a Roth contribution. And you could do one or the
24 other --

25 JUDGE DUKES: Right.

 MR. SIMONS: -- or both, but only up 46

1 to one limit.

2 JUDGE DUKES: Right. And it was
3 the -- I guess my question as I recall this, and
4 it's been awhile, was it was the limit every year,
5 whether it was one, both, or a combination, it was
6 the limit --

#19 7-8-15 first citizens hearing

7 MR. SIMONS: Yes.

8 JUDGE DUKES: -- not exceeding the
9 limit.

10 MR. SIMONS: Correct.

11 JUDGE DUKES: All right.

12 MR. FLOYD: Along with the education
13 IRA that he loaded up.

14 JUDGE DUKES: But that one, of
15 course, is not the subject I don't think of today
16 because that one has already gone, right?

17 MR. FLOYD: That's correct.

18 JUDGE DUKES: You are just saying as
19 a matter of the compilation of the facts associated
20 with the whole thing, not necessarily the motion?
21 Okay.

22 MR. SIMONS: May I address a couple
23 of points I'm trying to make?

24 JUDGE DUKES: Yes. Go ahead, please.

25 MR. SIMONS: Since you were talking

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1 about -- I'm going to start at the end.

2 JUDGE DUKES: I think you were
3 finished, right? You were finished.

#19 7-8-15 first citizens hearing

4 MR. FLOYD: I'll be finished whenever
5 you want me to. Yeah.

6 JUDGE DUKES: I'm sorry.

7 MR. FLOYD: No. No. That's fine.

8 JUDGE DUKES: I thought you were.

9 Okay.

10 MR. FLOYD: I'll be glad to answer
11 any questions that you have.

12 JUDGE DUKES: Okay.

13 MR. FLOYD: But that covers it.

14 MR. SIMONS: It sounded like a
15 crescendo.

16 JUDGE DUKES: It did sound like you
17 were finished.

18 MR. SIMONS: Yes. Joey finished with
19 that if you agree with me, then that would be
20 setting a bad precedent because you would be telling
21 potential debtors that if you see something coming
22 up you better hurry up and do something to protect
23 your assets or something to that effect was his
24 closing argument.

25 And it put me in mind of one of the most

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1 interesting comments in one of the cases we cited.

#19 7-8-15 first citizens hearing

2 And you will find it when I know you will sit down
3 and read all of these cases, that if that were the
4 standard, then it would mean that you could only use
5 your exemptions up until the time you actually
6 needed to.

7 When you can see something coming and you
8 want to do some pre-bankruptcy planning, under
9 Joey's argument, you can't do it then. It's too
10 late. You can only use your exemptions when you
11 don't need to. And that was one of the more
12 fascinating little twists in one of the cases.

13 So that argument is self-defeating. Joey
14 talks about -- and the debtor would take all of
15 their money and convert it into an exempt property.
16 And as you pointed out, that is not what we have
17 here.

18 The cases that have gone against the
19 debtors have been when the debtors have done
20 something extreme. One of my favorites, and again I
21 cite this case in our briefing on the original
22 issue, was a guy takes his money and he -- as I
23 recall he borrowed money to fund to buy an annuity
24 or no he bought an annuity. He borrowed money,
25 secured it with the annuity, and then made

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#19 7-8-15 first citizens hearing

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1 arrangements so the annuity would repay the loan.

2 So the creditor couldn't get to the cash
3 because it had been tied up in the life insurance
4 contract. And they couldn't get to the life
5 insurance contract because it was an exempt annuity.
6 What the guy had effectively done was take a whole
7 bunch of money and protect it in this way. That was
8 an extreme aggressive -- to use Joey's term,
9 aggressive attempt by a debtor.

10 Another similarly aggressive attempt was
11 in the case that was relied upon by Joey involved a
12 woman -- I believe it was a woman who did an IRA
13 rollover. As you may know, you can take all of your
14 money out of one IRA and put it in another IRA.

15 She took all of her money out of a New
16 York IRA and put it in a New Jersey IRA. And that
17 was -- the court put the kibosh on that. In that
18 particular case there was an existing order
19 requiring that she not make any transfers out of the
20 New York IRA. And she ignored that and tried to put
21 all the money in the New Jersey IRA. And the New
22 Jersey court said, no, we are not going to let you

23 #19 7-8-15 first citizens hearing
get away with that.

24 Both of those were extreme, aggressive,
25 over-the-top situations in which the homestead

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1 exemptions and the exemptions provided for the IRAs
2 did not protect the money.

3 Lindgren has not been aggressive. As you
4 were obviously well aware the contributions to the
5 IRA were in the routine amounts on a year in, year
6 out basis. Lindgren did not change his behavior as
7 a result of this judgment. And so the use of the
8 word aggressive is just simply not applicable here.

9 Concerning the education IRA, Joey wants
10 to argue that Lindgren's transfer to that is somehow
11 evidence of his fraudulent intent with respect to
12 the IRA. I have a 529 account for my son who is now
13 at Clemson. And I only opened that account I guess
14 it was about two years ago. My son will be a rising
15 Junior.

16 And my accountant said, well you need to
17 have a 529 plan. I said, well, it's kind of late to
18 be saving for paying Clemson. He said, well, all
19 you've got to do is you put the money in. And the
20 next day you take it out and give it to Clemson and

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#19 7-8-15 first citizens hearing

21 you get a tax deduction for doing that. I said,
22 you've got to be kidding me. He said, oh, no. No.
23 No. That is what the law is.

24 So the fact that Lindgren -- let me back
25 up. All that money, the \$22,000, went for qualified 51

1 educational expenses for his daughter at I believe
2 it's the University of Denver. And had Lindgren
3 simply stroked a check to the University of Denver
4 and stroked checks on the landlord for her apartment
5 wherever the University of Denver is, Boulder I
6 think, I don't think Joey would be here arguing that
7 the University of Denver has to give the money back.

8 That was clearly a household expense of
9 educating his daughter that he took. It was not
10 fraudulent to the bank in any sense. He only put it
11 in the 529 account for the same reason I put money
12 in my 529 account because I get a State tax
13 deduction for doing it. And it doesn't matter how
14 long the money stays in the account.

15 So the educational account, not only is
16 the money gone so it's irrelevant to your decision
17 from that point of view, because of the nature of

18 #19 7-8-15 first citizens hearing
19 the 529 account it's got nothing whatsoever to do on
20 whether Lindgren's IRA funding was fraudulent. I
21 would also point out with regard to the educational
22 529 plan, we haven't claimed that that money is
23 exempt. And I don't know that it is.

24 We've not briefed it. We've not asserted
25 it. From the very git-go our position was the money
 is not there. And furthermore, all it was was not

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1 fraudulent because he could have just given the
2 money to the people in Colorado and we wouldn't even
3 be having this discussion.

4 I'm tempted to go through the badges of
5 fraud individually for you, but I'm not going to do
6 that. What I will encourage you to do, Judge, is
7 Joey acknowledged, I believe, that his position is
8 that a judgment debtor cannot make the typical IRA
9 contributions, period. He wanted to quibble a
10 little bit, but the answer -- that is clearly what
11 the bank's position is.

12 And if you review your e-mail
13 correspondence with us in which we argued back and
14 forth you will see that that is their position.
15 That a per se rule that a judgment creditor --

#19 7-8-15 first citizens hearing

16 excuse me. Judgment debtor cannot make the routine
17 annual IRA contributions following judgment. That
18 is their position.

19 When you read the two cases, the Channon
20 case and the Bodan case, they talk about -- and
21 other cases as well make the observation that it is
22 difficult for a practitioner, legal practitioner to
23 know how to advise a client, what can you do? What
24 can you not do in terms of retirement funding,
25 pre-bankruptcy planning.

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1 And the courts note that there is a fine
2 line between what is permitted and what is not
3 permitted. And in the cases we've cited the courts
4 have all held that the debtor stayed on the clean
5 side of that fine line.

6 And in this case all Lindgren has done is
7 continue to do what he had done for years. And that
8 was to make the routine annual contributions to the
9 IRA. The contributions made by his employer to the
10 401-K plan have got nothing to do with whether
11 Lindgren's personal contributions to his IRAs were
12 fraudulent.

#19 7-8-15 first citizens hearing

13 And, again, I'm going to resist the
14 temptation to go through all 19 or 17, however many
15 there are, badges, one of them I didn't hear Joey
16 comment on was whether the debtor varied from his
17 historical conduct.

18 And in both of those cases the debtor had
19 varied from his historical because they both
20 involved newly opened accounts. And the court said
21 that that badge weighed against the debtor but
22 nevertheless it wasn't fraudulent.

23 In my case that badge strongly weighs in
24 favor of the non-fraudulent nature of the conduct
25 because Lindgren has not varied from his historical

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1 behavior. And again I'm not going to go through all
2 the badges. I'm sure you will when you analyze the
3 record in the case.

4 There is no evidence that Lindgren has
5 used all of his money. There is no evidence -- you
6 know, Joey wants to say, well, he hasn't paid us.
7 Well, I would submit that he's under no obligation
8 to come forward and pay.

9 Obviously there is a judgment against him.
10 And he's at risk to having procedures taken out

#19 7-8-15 first citizens hearing

11 against him and to have non-exempt property taken
12 from him, but every time he gets a paycheck there is
13 nothing in the law that says that he's required to
14 tithe to the bank.

15 And he says that Lindgren concealed these
16 transfers. He didn't conceal them. He was asked
17 about them. He produced all of his account records
18 and gave an affidavit of them. He was under no
19 obligation to volunteer the fact of these
20 contributions simply because there was a judgment
21 out there.

22 So when you go through those badges of
23 fraud consider what was Lindgren obligated to do.
24 And in this case he has done everything he was
25 obligated to do. He was served with supplemental

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1 proceedings. He came in. He produced records. He
2 answered all the questions that were put to him
3 truthfully.

4 Joey says Lindgren doesn't have assets.
5 Well, Lindgren has never said that. And Joey has
6 identified a host of LLC interests that Lindgren
7 owns. And he's not been fooling with that. Why, I

8 #19 7-8-15 first citizens hearing
9 don't know. He's apparently going straight for
10 cash, but in this case it's cash that he's not
11 entitled to access.

12 You've probably heard enough from me for
13 the day and for the week.

14 JUDGE DUKES: No. No. It's
15 interesting stuff.

16 MR. FLOYD: Briefly, three points?

17 JUDGE DUKES: Yeah.

18 MR. FLOYD: One of the things he said
19 was exemptions are not available when you need them.
20 The exemptions are there. I'm not trying to get
21 into the corpus that was already there. I'm looking
22 at post-judgment voluntary contributions.

23 This business about his employer
24 contributing to the 401-K. Let's all keep in mind
25 that he is his employer or he was. Now he says he's
26 not employed by his own corporation. And the

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1 variance from the historical account. The data
2 shows itself. There was no money contributed in
3 2011. And the amount spikes up. I think the record
4 will speak to that. I mean, there is no reason for
5 us to go over all of that, but beyond that, that is

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6 all I have.

7 JUDGE DUKES: All right. Can you all
8 do me a favor and you have filed your motion with
9 the cases, I guess, or sent those to Heather or
10 where --

11 MR. SIMONS: The two more recent
12 cases that I've kept referring to, the Channon and
13 the Bodan, I think it's Bodan -- I don't know
14 whether it's Bodan or Bodan. Those cases were
15 attached to the motion filed with the clerk. They
16 were also attached to the copy that I believe --
17 didn't I e-mail?

18 MR. FLOYD: Yeah, you did. You
19 attached those to the e-mail.

20 JUDGE DUKES: Okay. So Heather must
21 have it in her --

22 MR. SIMONS: I would be delighted to
23 collect all the cases and stick them into one e-mail
24 and send them to you if that would --

25 JUDGE DUKES: If you've got them PDF

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1 where you can do that --

2 MR. SIMONS: I can do that.

#19 7-8-15 first citizens hearing

3 JUDGE DUKES: -- that would be great.

4 And then your response, if you don't mind, just PDF
5 it to me again so I can have it all in one. I'll
6 try it assemble like a file. That way I'll know --

7 MR. FLOYD: Do you want us just to
8 PDF the cases that we've cited for support?

9 JUDGE DUKES: That would be great.
10 And I can put it in one spot. It's a lot easier as
11 you all know than printing things.

12 MR. SIMONS: What I would propose to
13 do -- I don't want to burden you, but I want to do
14 whatever I can to make your review of all of this
15 easy. I don't mind collecting in one e-mail the
16 memoranda that I filed and Lindgren's affidavit,
17 your exhibit, your memoranda, my motion, all the
18 cases that I've cited and that you want to include.
19 I'll put all of that into one e-mail and send it to
20 you or send it to Heather and she can print the
21 whole kit and caboodle.

22 JUDGE DUKES: Well, I would rather --
23 I try not to print things unless I have to, but,
24 yeah, that would be great. Thanks. At least I
25 could have a tab, you know, on my home screen, I can

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#19 7-8-15 first citizens hearing

1 hit it.

2 MR. SIMONS: Joey, can we collaborate
3 on the content of that?

4 MR. FLOYD: Sure.

5 JUDGE DUKES: All right.

6 MR. SIMONS: We will get you an
7 e-mail with what we want you to consider.

8 JUDGE DUKES: Outstanding. Okay.
9 Anything else for this record? No? Okay. Well,
10 thank you all so much.

11 MR. FLOYD: Thank you, Your Honor.

12 MR. SIMONS: Thank you.

13 (Whereupon, the hearing was concluded
14 at 11:04 a.m.)

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#19 7-8-15 first citizens hearing

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Certificate of Reporter

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I, Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the hearing of First Citizens Bank v. Blue Ox, et al, on the 8th day of July, 2015: and that the foregoing 58 pages constitute a true and correct transcription of the said hearing.

7

8

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

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11

I further certify that the original of said transcript shall be hereafter delivered to Keating L. Simons, III, Esquire, Simons & Dean, 47 Wappoo Creek Drive, Suite 604, Charleston, SC 29412.

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In witness whereof I set my hand and seal this 17th day of December, 2015.

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My Commission
Expires 1/4/18

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

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#19 7-8-15 first citizens hearing

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
First Citizens Bank and Trust Company,)
Inc.,)

Plaintiff,)

vs.)

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

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-129

**AFFIDAVIT OF
J. CHRISTOPHER LINDGREN**

2014 NOV -3 PM 3:39
J. CHRISTOPHER LINDGREN
BEAUFORT COUNTY, S.C.

Personally appeared before me, J. Christopher Lindgren, who upon being first duly sworn did depose and say as follows:

1. I am the J. Chris Lindgren named as a defendant herein. I have reviewed Plaintiff's submission to the court dated October 2, 2014, and offer this affidavit in response. I am over the age of majority, have personal knowledge of the matters stated herein unless otherwise indicated, and if called to court, could and would so testify under oath.

2. I have been employed by Rockmoor, Inc. ("Rockmoor") continuously since June of 1990. Since 1992 Rockmoor has had in place a 401(k) plan (the "Plan"). Rockmoor is the employer and Plan sponsor. The Plan is administered by a third party in Savannah, known as Qualified Plans. I am the Plan trustee. The Plan documents, consisting of 94 pages, have been provided to Plaintiff for review as requested.

3. The Plan has complied in all material respects with all reporting and filing requirements mandated under ERISA and the IRS has issued a determination letter that the Plan is qualified under ERISA (copy attached).

4. Employee contributions can only be funded through payroll deferrals. That is, a participant cannot make lump sum contributions to the Plan; rather, contributions can only be made sequentially throughout the year with respect to each payroll. There are twenty four (24) payrolls during each Plan year so there have generally been twenty four (24) separate contributions spread out during each Plan year.

5. I have participated in the Plan for twenty-two (22) straight years and have attempted to contribute the maximum allowable each year, all in accordance with IRS rules. The maximum annual allowable contribution amount has changed slightly over the years. Also, there is a catch-up provision allowed for individuals who have reached 50 years of age. The current maximum annual allowable contribution to a 401(k) plan is \$17,500 and the maximum catch-up provision is \$5,500. This means an individual at or over the age of fifty (50) can currently defer \$23,000 in payroll per year. I reached 50 years of age in 2006 and have tried to utilize the catch-up provision since then.

6. Set forth below are my Plan contributions for as far back as online records are available along with explanatory notes as necessary:

2006	\$26,550	
2007	\$20,850	
2008	\$29,200	
2009	\$19,975	
2010	\$4,463	Wages drastically reduced, contributions limited
2011	- 0 -	No wages paid, no contributions permitted
2012	\$20,450	

2013	\$23,000	
2014	\$1,917	Employment terminated, no further contributions permitted

7. The 401(k) Plan 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. Moreover, all of these contributions consisted of wages, not subject to garnishment in South Carolina, paid directly by the Employer to the Plan, in keeping with the wage deferral feature of 401(k) plans.

8. Beginning in 1986, I have also made regular annual contributions to an Individual Retirement Account ("IRA") as permitted by law. During the years covered by paragraph 6 herein I have made the following contributions to my IRA:

2006	\$5000	
2007	\$5000	
2008	\$6000	
2009	\$6000	
2010	None	
2011	\$6,000	
2012	\$6,000	
2013	\$6,500	
2014	None	Contribution for this year made to Roth IRA

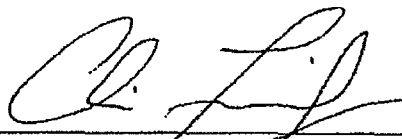
9. In 2014 I opened a Roth IRA. Federal law permits contributions into both a traditional IRA and a Roth IRA in the same year but the total cannot exceed the maximum

contribution applicable to the taxpayer. For 2014 the maximum contribution I am permitted to make is \$6,500, and I placed all of this into the Roth IRA.

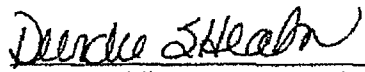
10. The IRA and Roth IRA contributions challenged by Plaintiff as fraudulent transfers were part of a decades-long, regular pattern of retirement savings and were not motivated by any intent to evade claims of Plaintiff or any other creditor.

11. In addition to the retirement accounts described above, I also had what is known as a 529 Plan for expenses associated with my youngest daughter's college education expenses. The 529 Plan contributions were made into the Fidelity Education Account referenced in Plaintiff's October 2, 2014 submission. In 2012, \$22,000 was paid into this account, \$17,236.33 was paid directly out of the account to the University of Colorado, and \$5,020.00 was withdrawn and used for my daughter's housing expense, a qualifying educational expense under Section 529 of the IRC. As of June 30, 2014 the value of the account was \$13.18. All of these transactions were made for the benefit of my daughter; none was motivated by any intent to defeat or avoid creditor claims.

FURTHER THE AFFIANT SAYETH NOT.


J. CHRISTOPHER LINDGREN

SWORN and subscribed to before
me this 28 day of October, 2014


Notary Public of South Carolina
My Commission Expires: 10-31-2021

07



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Plan Description: Volume Submitter Profit Sharing Plan with CODA
FPN: 315B3140701-002 Case: 200608263 EIN: 58-2605983
BPD: 01 Plan: 002 Letter Serial No: M581882a
Date of Submission: 01/31/2006

QUALIFIED PLANS LLC
545 EAST YORK STREET
SAVANNAH, GA 31401

Contact Person:
Janell Hayes/Letitia Young
Telephone Number:
513-263-3602/513-261-3584
In Reference To:
TEGE-EP:7521
Date: 03/31/2008

Dear Applicant:

In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees. This opinion relates only to the acceptability of the form of the plan under the Internal Revenue Code. It is not an opinion of the effect of other Federal or local statutes.

You must furnish a copy of this letter, a copy of the approved plan, and copies of any subsequent amendments to adopting employers if the practitioner is authorized to amend the plan on their behalf, to each employer who adopts this plan.

This letter considers the changes in qualification requirements contained in the 2004 Cumulative List of Notice 2004-84, 2004-2 C.B. 1030.

Our opinion on the acceptability of the form of the plan is not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a). However, an employer that adopts this plan may rely on this letter with respect to the qualification of its plan under Code section 401(a), as provided for in Rev. Proc. 2005-16, 2005-1 C.B. 674 and outlined below. Please review Announcement 2008-23 I.R.B. 2008-14 to determine the items necessary for filing an application for a determination letter if one is required for reliance, or is otherwise desired. The terms of the plan must be followed in operation. Generally, the employer may request a determination letter by filing an application with Employee Plans Determinations on Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans.

Except as provided below, our opinion does not apply with respect to the requirements of: (a) Code sections 401(a)(4), 401(l), 410(b) and 414(s). Our opinion does not apply for purposes of Code section 401(a)(10)(B) and section 401(a)(16) if an employer ever maintained another qualified plan for one or more employees who are covered by this plan. For this purpose, the employer will not be considered to have maintained another plan merely because the employer has maintained another defined contribution plan(s), provided such other plan(s) has been terminated prior to the effective date of this plan and no annual additions have been credited to the account of any participant under such other plan(s) as of any date within the limitation year of this plan. See section 19.02(1) of Rev. Proc. 2005-16, 2005-1 C.B. 674 regarding volume submitter defined contribution plans and the repeal of Code section 415(e). Our opinion also does not apply for purposes of Code section 401(a)(16) if, after December 31, 1985, the employer maintains a welfare benefit fund defined in Code section 419(e), which provides postretirement medical benefits allocated to separate accounts for key employees as defined in Code section 419A(d)(3), or an individual medical account as defined in Code section 415(l)(2).

Letter 4335

QUALIFIED PLANS LLC
FFN: 315B3140701-002
Page 2

Our opinion applies with respect to the requirement of Code section 410(b) if 100 percent of all nonexcludable employees benefit under the plan. Employers that elect a safe harbor allocation formula and a safe harbor compensation definition can also rely on an advisory letter with respect to the nondiscriminatory amounts requirement under Code section 401(a)(4).

This letter is not a ruling with respect to the tax treatment to be accorded contributions which are picked up by the governmental employing unit within the meaning of section 414(h)(2) of the Internal Revenue Code.

If you, the volume submitter practitioner, have any questions concerning the IRS processing of this case, please call the above telephone number. This number is only for use of the practitioner. Individual participants and/or adopting employers with questions concerning the plan should contact the volume submitter practitioner. The plan's adoption agreement, if applicable, must include the practitioner's address and telephone number for inquiries by adopting employers.

If you write to the IRS regarding this plan, please provide your telephone number and the most convenient time for us to call in case we need more information. Whether you call or write, please refer to the Letter Serial Number and File Folder Number shown in the heading of this letter.

You should keep this letter as a permanent record. Please notify us if you modify or discontinue sponsorship of this plan.

Sincerely yours,



Andrew Zuckerman
Director,
Employee Plans Rulings and Agreements

CERTIFICATE OF SERVICE

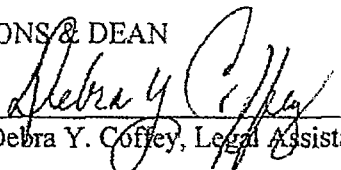
I, Debra Y. Coffey, a legal assistant with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Affidavit of J. Christopher Lindgren upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

Joey R. Floyd, Esquire
BRUNER, POWELL, WALL & MULLINS, LLC
P.O. Box 61110
1735 St. Julian Place, Suite 200 (29204)
Columbia, SC 29260-1110

2014 NOV -3 PM 3:59
CLERK OF COURT
JUDICIAL DISTRICT
COLUMBIA, S.C.

This 30 day of October, 2014.

SIMONS & DEAN

BY: 

Debra Y. Coffey, Legal Assistant

Keating

From: Dukes, Marvin [mdukes@bcgov.net]
Sent: Friday, January 16, 2015 3:53 PM
To: Keating L. Simons, III; Joey Floyd
Cc: McLeod, Heather
Subject: Lingren

Dear Joey and Keating,

I have not forgotten about Lindgren.

The statute reads:

(13) The debtor's right to *receive* (italics mine) 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.

Federal BR Code 522(d)(10) and (12) read

(d)The following property may be exempted under subsection (b)(2) of this section:

(10)The debtor's right to receive—

(A)a social security benefit, unemployment compensation, or a local public assistance benefit;

(B)a veterans' benefit;

(C)a disability, illness, or unemployment benefit;

(D)alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E)a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i)such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii)such payment is on account of age or length of service; and

(iii)such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(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.

I'm not completely sure that a strict reading of the statute doesn't show that the protection extends

only the corpus of the retirement account(s) and the payments received therefrom, rather than new payments into such accounts.

I'd be happy to hear both of your thoughts, but not until the middle of next week as I would not like either of you to think about this at all during this sunny weekend.

Best to both of you,

Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Post Office Drawer 1228
Beaufort, SC 29901
Office: 843.255.5710
Fax: 843.255.9505

Neither this office, nor its staff gives legal, financial or other advice. Any information obtained from this office or its staff, regardless of form, should not be taken as legal or financial advice. Persons seeking to purchase properties from foreclosures or other sales should obtain independent advice as to value, sufficiency of title, tax consequences, other liens, and all other matters related to said purchase. Persons involved in litigation should obtain counsel and may not rely on any information obtained from this office as legal advice. Do not rely on this office for legal advice- always obtain independent legal advice.

Keating**Subject:** FW: Lingren**Attachments:** Lindgren Memo FILED 11-10-14 rev'd 1-19-15.pdf

From: Keating L. Simons, III [mailto:ksimons@simonsanddean.com]
Sent: Monday, January 19, 2015 12:11 PM
To: Dukes, Marvin; Joey Floyd
Cc: McLeod, Heather
Subject: RE: Lingren

Judge Dukes:

In response to your email I offer the following comments:

1) The money upon which Plaintiff seeks to levy is on deposit with the financial institutions holding Lindgren's IRA and 401(k) accounts. The remedy Plaintiff seeks is an order directing the financial institutions to pay money to Plaintiff. Money is fungible and of necessity any order directing payment(s) to Plaintiff by the financial institutions would require those institutions to invade the corpus of Lindgren's retirement accounts. The funds at issue, therefore, are part of the corpus of the retirement plans referenced in the exemption statutes you discuss in your email. Requiring the financial institutions to pay Plaintiff part of Lindgren's retirement accounts is plainly forbidden by 15-41-30(A)(13), 15-41-30(A)(14), 11 U.S. Code 522(b)(3)(A), and 11 U.S. Code 522(d)(12), even if, as you suggest, these statutes only exempt the corpus of funds held in retirement accounts.

2) Since any "new payments into" retirement accounts are now in fact part of the corpus of the respective funds, and because all money in the accounts was at one time "new payments into" the accounts, we don't believe a distinction between "payments into" versus "the corpus of" the retirement funds drives the outcome of this matter. No court has held that retirement contributions made post-judgment are reachable by creditors on that basis alone. And if that were the law, the fraudulent conveyance language contained in S.C.'s exemption statute for IRAs would be wholly unnecessary.

15-41-30(A)(13) provides that the debtor's exemption for funds held in IRA accounts "may be reduced or eliminated by the amount of a fraudulent conveyance." Under the statute a judgment creditor cannot rest upon the mere fact that retirement contributions were made after entry of its judgment. Rather, the creditor must establish the fraudulent nature of the "new payments" into the plan. Under the facts of this case, where the debtor merely continued a long-standing practice of making regular, lawfully permitted retirement contributions, there is no extrinsic evidence of fraud and hence no factual support for finding the retirement contributions to be fraudulent transfers. Proof required to establish the fraudulent nature of retirement contributions is discussed at pages 3 to 11 of our memorandum.

3) The S.C. statute exempting 401(k) accounts from levy, unlike the exemption statute for IRAs, does not include a fraudulent transfer exception. 401(k) plans are a form of deferred compensation and the contributions at issue in this case were all made by Lindgren's employer from withheld wages. As discussed in our memorandum at pages 11 and 12, there is no conversion of non-exempt cash to exempt retirement funds when an employer makes contributions to a debtor's 401(k) plan.

(Our memorandum included a typo. The last sentence of the first full paragraph on page 12 should have read: "When an employer pays to the 401(k) Plan wages withheld from its employee, there is no conversion of non-exempt cash to exempt retirement plan assets." We have corrected this and a couple of other typos and are today mailing an amended memorandum to the clerk for filing. A copy is attached for your convenience.)

4) Even if 401(k) plans are subject to a fraudulent transfer exception, notwithstanding the absence of any such exception in the relevant statutes, Plaintiff has again failed to make out a case of fraudulent intent on the part of Lindgren.

As we see it, the present matter can be disposed of on a single ground: that the facts of this case - the continuation of a regular pattern of retirement contributions, unaccompanied by any change in the debtor's actions post-judgment - negates any finding of fraudulent intent or transfers by the debtor.

I welcome the opportunity to discuss these issues further at the court's convenience.

Best regards, Keating

Keating L. Simons, III
Simons & Dean
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412

Phone: 843.762.9132
Fax: 843.406.9913
Cell: 843.709.4447

Keating**Subject:** FW: Lingren

From: Joey Floyd [mailto:JFloyd@brunerpowell.com]
Sent: Monday, January 19, 2015 3:55 PM
To: 'Dukes, Marvin'; Keating L. Simons, III
Cc: McLeod, Heather
Subject: RE: Lingren

Judge Dukes,

Good afternoon. All contributions by Mr. Lindgren to his 401k and IRAs after the entry of the Judgments are/were fraudulent transfers – these contributions were post-judgment voluntary contributions. The voluntary post-judgment contributions consisted of cash that was otherwise subject to execution by First Citizens Bank. By making the post-judgment voluntary contributions to his 401K and IRA accounts, Mr. Lindgren attempted to place the cash beyond the reach of his creditors because the cash was placed into accounts that have some limited protections through the homestead exemption statute. However, the homestead exemption statute and the Statute of Elizabeth expressly prohibit such transfers (i.e. fraudulent transfers) into these types of accounts (IRAs) or other plans (401k). In particular, see SC Code 15-41-30 (13): “A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan.” The statute speaks specifically to IRAs and speaks to transfers to “other plan[s].” A 401k is an “other plan” as contemplated by the homestead exemption statute. There is no requirement that “fraudulent intent” be shown on the part of Lindgren. Under Mr. Lindgren’s theory, as long as a judgment debtor stashes the cash in an IRA or some “other plan,” such as a 401k plan, the judgment debtor’s creditors can never touch the money in the IRA or 401k plan. First Citizens Bank maintains that Mr. Lindgren’s post-judgment voluntary contributions to his 401k and IRAs should be set aside as fraudulent transfers. First Citizens Bank requests that the Court issue an Order to enable First Citizens Bank to execute on Mr. Lindgren’s post-Judgment voluntary contributions to his 401K and IRA accounts.

With my highest regards,

Joey R. Floyd

BRUNERPOWELL

BRUNER, POWELL, WALL & MULLINS, LLC

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Keating

From: Joey Floyd [JFloyd@brunerpowell.com]
Sent: Wednesday, July 15, 2015 1:08 PM
To: Dukes, Marvin
Cc: 'Keating L. Simons, III'
Subject: First Citizens Bank v. Lindgren, et.al.
Attachments: Gilchinsky v National Westminster Bank NJ.PDF; Mathis v Burton.pdf; Coleman v Daniel.pdf; Memo in Support of Motion to execute on 401k, IRA, etc. (filed).pdf; Letter to Bfrt. Cty. Clerk of Court filing Reply Memo and Reply Memo 7.15.15.pdf

Judge Dukes,

I am going to be out of the office next week on vacation (giving the mouse in Florida some money). In the interest of keeping things moving along in this case (and so that I do not cause any delays in this case), I have attached the following:

- (1) Plaintiff's Memo in Support of Motion to Execute on 401(k), etc..
- (2) Plaintiff's Reply Memorandum, which is being filed and served today.
- (3) Three cases

- (a) *Gilchinsky v. National Westminster Bank* (NJ case)
- (b) *Mathis v. Burton* (SC case)
- (c) *Coleman v. Daniel* (SC case)

I am certain that Mr. Simons will share/provide his information (the Defendants' filings/cases) in short order.

With my highest regards,

Joey R. Floyd

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Keating

Subject: FW: First Citizens Bank v. Lindgren, et.al.

Attachments: First Texas Savings v Reed.pdf; Ford v Poston.pdf; Forsberg v. Security State Bank,.pdf; In re Addison.pdf; In re Beaudin.pdf; In re Channon.pdf; In re Crater.pdf; In re Duncan.pdf; In re Jones.pdf; In re Koehler.pdf; In re Zouhar.pdf; Lindgren Affidavit.pdf; Lindgren Amended Memo in Oppo.pdf; Lindgren motion to recon and to stay.pdf; Marine Midland v Carey.pdf; Norwest Bank Nebraska, NA v. Tveten.pdf

From: Keating L. Simons, III [mailto:klsimons@simonsanddean.com]

Sent: Thursday, July 16, 2015 4:09 PM

To: Joey Floyd; Dukes, Marvin

Subject: RE: First Citizens Bank v. Lindgren, et.al.

Judge Dukes:

In accordance with discussions at the conclusion of the hearing on July 8, attached are the following materials:

- 1) Amended Memorandum of J. Christopher Lindgren in Opposition to Plaintiff's Motion to Set Aside and Execute
- 2) Affidavit of J. Christopher Lindgren
- 3) J. Chris Lindgren's Motion to Reconsider and for Stay of Execution of Judgment
- 4) *Forsberg v. Security State Bank*, 15 F.2d 499 (8th Cir.1926)
- 5) *In re Addison*, 540 F.3d 805 (8th Cir. 2008)
- 6) *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985)
- 7) *First Texas Savings Association v. Reed*, 700 F.2d 986 (5th Cir.1983)
- 8) *Marine Midland Bus. Loans, Inc. v. Carey*, 938 F.2d 1073 (10th Cir.1991)
- 9) *In re Jones*, 397 B.R. 765 (Bkrcty. D.S.C. 2008)
- 10) *In re Koehler*, 2012 WL 719744 (Bkrcty. E.D.N.C. 2012)
- 11) *In re Duncan*, No. S-06-00025-5-AP (Bkrcty. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrcty. E.D.N.C. Jun. 18, 2007) at page 6 of 8.
- 12) *In re Zouhar*, 10 B.R. 154 (Bankr. N.M.1981)
- 13) *Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871 (8th Cir. 1988)

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

15) *In re Channon*, 424 B.R. 895 (Bkrcty. D.N.M. 2010)

16) *In re Beaudin*, No. 0935557-EEB (Bkrcty. D.CO. 2010)

Judge Dukes, I will resist the temptation to respond to Joey's post-hearing submission of a new memorandum other than to observe that the plaintiff has yet to cite a single case from any jurisdiction setting aside a routine IRA contribution. Every case I have found supports the debtor's right to lawfully make such contributions. After you have had the chance to review the materials before you I would welcome the opportunity to address any questions or concerns you might have.

Joey, enjoy your vacation - you're at one of my alltime favorite places.

Best regards, Keating

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Charleston, SC 29412

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Fax: 843.406.9913
Cell: 843.709.4447

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.

CERTIFICATE OF COUNSEL

As required by Rule 210(g), SCACR, the undersigned certifies that the Record on Appeal contains all material proposed to be included by the parties and not any other material.



Keating L. Simons, III
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Attorneys for Appellant/Respondent

March 30, 2016

Final Appellant's Brief
of *Respondent-Appellant*

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

APR 19 2016

SC Court of Appeals

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

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

Appellate Case No.: 2015-002156

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

v.

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

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

APPELLANT'S BRIEF OF RESPONDENT-APPELLANT

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

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

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

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

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

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

v.

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

APPELLANT'S BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

- I. WHETHER THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT A DEBTOR'S VOLUNTARY POST-JUDGMENT CONTRIBUTIONS TO A 401(k) PLAN ARE NOT SUBJECT TO EXECUTION BY A CREDITOR, WHERE THE DEBTOR, HAVING FULL KNOWLEDGE OF THE JUDGMENTS AGAINST HIM AND CLAIMING TO HAVE NO ASSETS WHICH COULD BE APPLIED TO THE JUDGMENT, CONTRIBUTED \$45,366.67 TO THE 401(K) AFTER THE JUDGMENTS ARE FILED?

STATEMENT OF THE CASE

On May 13, 2010, Blue Ox, LLC ("Blue Ox") and Chris Lindgren ("Lindgren") executed two Confessions of Judgments in the amounts of \$100,000.00 and \$13,702.24 in Favor of Respondent/Appellant, First Citizens Bank and Trust Company, Inc. ("First Citizens"). (R. pp. 27-34). Both Confessions of Judgment were filed with the Beaufort County Clerk of Court on January 6, 2011. (*Id.*). On September 2, 2014, the parties appeared before the Honorable Marvin H. Dukes, III, the Beaufort County Master-in-Equity, for a Supplemental Proceedings hearing. During the supplemental proceedings hearing, it was discovered that Lindgren made a number of voluntary post-judgment contributions to a 401(k) and Individual Retirement Accounts ("IRAs"). (R. pp. 12-13). Counsel for First Citizens moved to execute on the voluntary post-judgment contributions to the 401(k) and the IRAs. (R. pp. 11-12). After the parties submitted briefs on the issue, on June 11, 2015, Judge Dukes entered an Order finding that First Citizens was entitled to execute on Lindgren's voluntary post-judgment contributions to his IRA account; however, Lindgren's voluntary post-judgment contributions to the 401k were not subject to execution. (R. pp. 13-19). On June 22, 2015, Lindgren filed a Motion to Reconsider and for Stay of Execution and supporting memorandum. (R. p. 41). A hearing on the Motion for Reconsideration was held on July 8, 2015. First Citizens filed a reply memorandum in opposition to the Motion for Reconsideration on July 20, 2015. (R. p. 48). 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 its Notice of Cross Appeal on October 20, 2015.

FACTS

Blue Ox and Lindgren executed Confessions of Judgment in favor of First Citizens on May 13, 2010, both of which were filed with the Beaufort County Clerk of Court on January 6, 2011.¹ (R. pp. 27-34). Combined, the judgments amounted to \$113,702.24. (*Id.*) On September 2, 2014, a Supplemental Proceedings hearing was held before the Honorable Marvin H. Dukes. Lindgren is a former practicing attorney with a LLM in tax law and now a businessman residing on Hilton Head Island, South Carolina. (R. pp. 123, 166, 179). During the hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. ("Rockmoor") (R. pp. 103-04). Lindgren also testified that he was formerly an employee of Rockmoor. (R. p. 111). In addition to Rockmoor, Lindgren testified that he had formed 38 LLCs to serve as "investment vehicles." (R. p. 118). Lindgren owns a membership interest in various LLCs (some of which are single member LLCs and some of which are multiple member LLCs) and the various LLCs own real properties. Rockmoor is Lindgren's company that he uses as a management company to manage payroll and operations for the various LLCs. (R. p. 122, lines 18-22). While an employee with Rockmoor, Lindgren established a 401(k) that is a profit sharing plan funded through "employee deferrals." (R. p. 14, lines 5-24). At the hearing, Lindgren testified that the balance of his 401(k) was approximately \$300,000. (R. p. 116, line 6). The balance previously exceeded \$550,000.00 prior to Lindgren taking more than \$250,000.00 in distributions during the spring of 2014. (R. p. 115, lines 11-20).

¹ C/A No.: 2011-CP-07-128 (\$100,000.00) and C/A No.: 2011-CP-07-129 (\$13,702.24).

After the supplemental proceedings hearing on September 2, 2014, the parties engaged in the exchange of documents and post-judgment discovery. (R. p. 11). Through discovery, First Citizens discovered that Lindgren made \$45,366.67 in post-judgment contributions to his Rockmoor 401(k) between 2012 and 2014.² (R. p. 12). Despite making these contributions, Lindgren maintained that he had no property or assets to satisfy the judgments First Citizens held against him and he made no payments towards the Judgments.

STANDARD OF REVIEW

“An appellate court’s ‘scope of review for a case heard by a Master-in-Equity who enters final judgment is the same as that for review of a case heard by a circuit court without a jury.’” *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 243 (Ct. App. 2008) (quoting *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)). In an action at law decided by a Master-in-Equity, the appellate court will correct any error of law. *Id.* at 275, 659 S.E.2d 243-44 (citing *Sea Cabins on the Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App.1999)). The appellate court must affirm the Master’s factual findings unless no evidence reasonably supports those findings.” *Id.*

ARGUMENT

First Citizens respectfully requests that this Court reverse the Master-in-Equity’s holding that Lindgren’s voluntary, post-judgment transfers to his 401(k) account are not subject to execution.

- I. BECAUSE SOUTH CAROLINA LAW PROHIBITS A DEBTOR FROM MAKING FRAUDULENT CONVEYANCES DESIGNED TO DELAY, HINDER OR DEFRAUD CREDITORS, THE MASTER-IN-EQUITY INCORRECTLY DETERMINED THAT LINDGREN’S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO HIS 401(K) ARE NOT SUBJECT TO EXECUTION.

²Specifically, Lindgren contributed \$20,450.00 in 2012, \$23,000 (the maximum allowed by the IRS) in 2013 and \$1,916.67 in 2014. *See* R. p. 64..

- A. Because Lindgren was (1) indebted to First Citizens when he made contributions to his 401(k); (2) the contributions were voluntary; and (3) Lindgren failed to retain sufficient funds to satisfy the judgment against him, Lindgren's contributions are subject to execution.

The Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

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).

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).

There was no consideration for the transfer of the money from Lindgren to his 401(k). 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). Here, Lindgren neither received a benefit nor suffered a detriment because he did nothing more than move money from one pocket to another in an effort to protect his assets (i.e., cash) from his judgment creditors. Because of the absence of consideration, First Citizens need not prove "actual intent to hinder or delay creditors." *See Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d, 406, 408 (Ct. App. 1995). Rather, First Citizens must only prove that (1) Lindgren was indebted to First Citizens at the time of the contributions at issue; (2) Lindgren's contributions were voluntary; and (3) Lindgren failed to retain sufficient funds to satisfy the judgment against him. *See id.*

All of the funds First Citizens seeks to execute upon were voluntarily transferred to Lindgren's 401(k) after the judgments were entered against him on January 6, 2011. As such, there is no dispute that Lindgren was indebted to First Citizens at the time of the voluntary contributions at issue. Lindgren personally executed the Confessions of Judgment in favor of First Citizens and was, at all relevant times, fully aware of the judgments against him. As to the second element set forth in *Mathis*, Lindgren admits that the post-judgment contributions were voluntary in his Amended Memorandum in Opposition to Plaintiff's Motion to Set Aside and Execute. *See R. p. 90.* The fact that Lindgren failed to retain sufficient property or assets to satisfy the judgment against him is also not in dispute. Lindgren has continuously maintained that he is unable to satisfy the judgments against him. Accordingly, pursuant to the Statute of

Elizabeth, this Court should find Lindgren's post-judgment transfers to his 401(k) were fraudulent transfers and therefore subject to execution.

Even assuming that there was consideration for the transfers, something First Citizens denies, Lindgren's post-judgment contributions should be set aside as fraudulent. As discussed above, Lindgren was indebted to First Citizens when the contributions at issue were made. There is also evidence that Lindgren's actions were made with the "intent of defrauding his creditors." *See Durham*, at 432, 438 S.E.2d at 262. Finally, the issue of whether the grantor's intent is imputable to the grantee is irrelevant because Lindgren is both the grantor and the grantee.

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, courts often evaluate the particular circumstances of the transfer for "badges of fraud." *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 *Coleman*, the Supreme Court of South Carolina stated the following regarding the badges of fraud:

The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Id. (citing 37 Am.Jur.(2d), Fraudulent Conveyances, § 10 (1968)). The circumstances of Lindgren's post-judgment contributions to his 401(k) meet at least seven 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, Lindgren (1) was indebted to First Citizens at the time of the contributions; (2) transferred the funds to himself, the person with whom he clearly has the closest relationship, (3) made the contributions while litigation was pending, (4) attempted to conceal the contributions from First Citizens and increased his contributions after the judgments were filed, (5) reserved the benefit of the funds to himself, and (6) retained possession of the funds. The presence of these badges of fraud surrounding Lindgren’s post-judgment contributions reveals Lindgren’s “actual intent to hinder, delay, or defraud” First Citizens from obtaining the debt they are rightfully owed. Also relevant is the degree of control Lindgren maintained over the funds in his 401(k). Lindgren freely took distributions from his 401(k) which clearly shows that his 401(k) was simply another checking account. In the spring of 2014, Lindgren took a distribution of approximately \$250,000.00 from his 401(k). *See R. p. 115*, lines 11-20. Based on the foregoing, regardless of whether this Court finds that the contributions were made on valuable consideration, the contributions should be subject to execution.

The lower court relied on S.C. Code 15-41-30(A)(14) in finding that Lindgren’s post-judgment contributions to his 401(k) were not subject to execution. S.C. Code 15-41-30(A)(14) provides that a “debtor’s interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974...” is “exempt from attachment, levy, and sale.” First Citizens does not deny that this statute protects a debtor to the extent that it prevents creditors from executing on funds which have already been contributed to a 401(k) account. However, there is a

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. 7-8. 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.

significant distinction between allowing a debtor to protect assets which have previously been set aside in a retirement account and allowing a debtor to contribute more than \$45,000 to his 401(k) all the while claiming he has no assets to satisfy a judgment against him. First Citizens takes the position that 15-41-30(A)(14) only protects a debtor's pre-judgment contributions and any earnings stemming from those contributions. The exemption does not protect a debtor's post-judgment contributions to a 401(k) plan. Had the legislature intended to exempt a debtor's post-judgment contributions to a debtor's 401(k), it could have done so using more specific language.

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. Hickie*, 312 S.C. 520, 435 S.E.2d 870 (1993)). Adopting an interpretation of section 15-41-30(A)(14) which only protects pre-judgment contributions to a 401(k) is consistent with what this Court has determined to be the legislature's intent. It allows a debtor to protect his retirement account; however, it prevents a debtor from funneling money that would otherwise be subject to execution into a "sheltered account" from creditors.

Courts from other jurisdictions have established that while exemption statutes are intended to provide protection to debtors, they are not to be abused. In *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 debts they are rightfully owed.

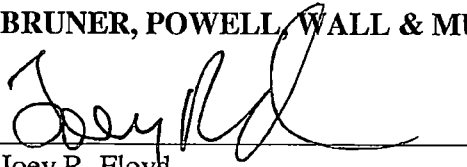
The reasoning and decision of the Supreme Court of Nevada in *Breedlove v. Breedlove*, 100 Nev. 606, 691 P.2d 426 (1984) is also applicable to the case at hand. In *Breedlove*, a former spouse who was owed back child support payments sought to execute on her ex-husband’s home. *Id.* at 607, 691 P.2d at 426. The ex-husband attempted to use a homestead exemption to prevent his former spouse from executing on the home. *Id.* The Court, noting that the ex-husband purchased the home for a substantial amount after defaulting on payments to his ex-wife, ruled that the ex-husband was not entitled protection from the exemption. The *Breedlove* court stated that the ex-husband was “not the type of debtor whom the legislature sought to protect” and interpreting the exemption statute in a highly technical fashion would lead to absurd results and contravene the legislature clear intent in enacting the statute. *Id.* at 608-09, 691 P.2d at 427-28. Like the ex-husband in *Breedlove*, Lindgren is “not the type of debtor whom the legislature sought to protect.” In addition to several properties in South Carolina, Lindgren owns a vacation home in Vail, Colorado of which the current assessed value is \$1,636,000. *See R.* p. 150-51). Furthermore, should this Court find that the post-judgment contributions are subject to execution, the remaining balance in Lindgren’s 401(k) will still exceed \$240,000. Clearly, Lindgren is in no danger of becoming dependent on the state.

“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 avoid his creditors under the guise of “retirement planning.” This is not a situation where Lindgren seeks to protect his retirement savings. In essence, Lindgren has used his 401(k) as his personal “offshore bank account”, funneling, in a number of instances, the maximum amount of money possible on an annual basis and then taking distributions as needed. In effect, using his retirement account as another checking account. Again, First Citizens only seeks to execute on the funds which Lindgren contributed to his 401(k) after the judgments were filed against him. First Citizens recognizes that it is sound policy to exempt certain funds from creditors. However, the lower court’s ruling creates dangerous precedent whereby debtors, even those in no danger of becoming destitute, can not only protect past savings but also continue to set aside additional funds while maintaining they have no assets to satisfy a judgment against them. An interpretation of section 15-41-30(A)(14) which does not exempt post-judgment contributions to a 401(k) adequately protects debtors without unreasonably limiting the rights of creditors.

CONCLUSION

First Citizens respectfully requests that this Court reverse the lower court’s decision finding Lindgren’s post-judgment contributions to his 401(k) as exempt from execution. For the reasons set forth herein, Lindgren’s voluntary post-judgment contributions to his 401(k) should be set aside as fraudulent transfers, thereby allowing First Citizens to execute on the funds contributed to the 401(k) account after the Confessions of Judgments were filed.

BRUNER, POWELL, WALL & MULLINS, LLC

A handwritten signature in black ink, appearing to read "Robert C. Osborne III", written over a horizontal line.

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April 14, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

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

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

Appellate Case No.: 2015-002156

RECEIVED

APR 19 2016

SC Court of Appeals

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

v.

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

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

CERTIFICATE OF COUNSEL

I, Joey R. Floyd, Esquire, do hereby certify that the Appellant's Brief of
Respondent/Appellant, First Citizens Bank and Trust Company, Inc. complies with Rule 221(b),
SCACR.



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

CERTIFICATE OF SERVICE

I, Rita DeCarlis, with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Respondent-Appellant, do hereby certify that on this 19th day of April, 2016, I served the Appellant's **Brief of Respondent-Appellant** upon counsel for the Appellant-Respondent by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

VIA U.S. Mail

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April 19, 2016
Columbia, SC


Rita DeCarlis

Final Respondent's Brief
of *Appellant-Respondent*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APR 22 2016

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

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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Respondent/Appellant,

v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent

RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the lower court correctly determine that S.C. Code §15-41-30(A)(14) exempts from execution Lindgren's interest in his ERISA-qualified 401(k) Plan notwithstanding that some of the funds in the Plan were contributed after entry of judgments against Lindgren by the Bank?

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] Both judgments were entered on January 6, 2011.

On July 11, 2014, the Bank filed petitions for supplemental proceedings in each case and the clerk entered orders referring the matters 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 and a Roth Individual Retirement Account, both of which were held by Fidelity Investments. ("IRA"

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

and “Roth IRA” respectively). Lindgren also testified that he participated in a 401(k) pension plan sponsored by his employer, Rockmoor, Inc., to which contributions had been made by Rockmoor, Inc. after entry of the Bank’s judgments (“401(k) Plan”).

During the examination, the Bank moved that any contributions made to the IRA, Roth IRA and 401(k) Plan 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 401(k) Plan and the investment 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

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. Both parties responded by email on January 19, 2015. Lindgren’s email included an amended version of a memorandum previously filed correcting several typographical errors in the original. On January 26, 2015, Judge Dukes requested in an email that

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

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.

Lindgren timely made a Rule 59 motion to reconsider on June 22, 2015. The court held a hearing on the motion on July 8, 2015, which was reported. The court asked that the parties submit via email whatever materials they wished the court to consider. Both parties complied. 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.

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

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

The IRA contributions at issue in Lindgren's appeal total \$25,000.00. The 401(k) Plan contributions at issue in the Bank's cross-appeal total \$45,366.37.

STATEMENT OF FACTS

The evidentiary hearing in this matter was held on September 2, 2014 before Judge Dukes. Lindgren was extensively interrogated about his assets, income and other aspects of his financial condition for over two hours. Counsel's examination was facilitated by his having tax returns and a personal financial statement Lindgren had provided to the Bank in March of 2014. Counsel also questioned Lindgren from a list of entities for whom Lindgren was the designated registered agent for service of process. Lindgren testified that he had formed 38 limited liability companies. [R. Tr 22] He was asked specific questions about 31 of them. Some had never commenced operating or were otherwise dormant. Some were single-purpose entities formed to acquire and develop real estate, had accomplished their objective and sold their assets in the ordinary course. Eight LLCs, as was the case with Blue Ox, LLC, had acquired real estate for development but had lost the property to foreclosure or a deed-in-lieu thereof.

Some of the LLCs continued to own real estate at the time of the hearing. To summarize, either personally or through LLCs Lindgren owned membership interests in LLCs owning: half a trailer park in Ridgeland, South Carolina; an office building on Hilton Head Island; an undeveloped parcel in Bluffton, South Carolina; a 35 acre mobile home park in Bluffton; and, a developed commercial parcel, also in Bluffton. [R. p. 130, line 23 - p. 131, line 2; p. 139, lines 14 - 25; p. 142, lines 1 - 15; p. 143, line 7 - p. 144, line 14; p. 145, lines 12 - 22] Lindgren's tax returns reflected rental receipts from these properties in excess of \$1 million dollars. [R. p. 173, line 34]

Lindgren also testified to his ownership personally of 3 parcels of real estate: his personal residence, owned jointly with his wife; a golf cottage at Belfair Plantation in Bluffton; and, a vacation condominium unit in Vail, Colorado. [R. p. 196, lines 13 - 17; p. 195, lines 1 - 2; p. 150,

line 20 - p. 151, line 5]

Lindgren also testified that he is the sole shareholder of Rockmoor, Inc., a company formed to manage the operations of the various other entities in which Lindgren is involved. That company owns 10,000 shares of stock in Coastal States Bank. [R. p. 122, lines 4 - 17]

In addition to describing his assets, Lindgren also testified about his income. He had been an employee of Rockmoor, Inc. for many years, but at the time of the hearing Lindgren was no longer on the payroll of Rockmoor, Inc. as an employee. [R. pp. 275 - 277, ¶¶ 2, 6; p. 189, line 14] His income at that time consisted of self-employment income through Rockmoor, Inc., for which Lindgren takes distributions of about \$120,000 annually. [R. p. 189, line 17; p. 203, line 20]

Lindgren answered questions from Bank counsel about his retirement contributions and later filed an affidavit detailing the particulars. He also provided the Bank with account statements for his retirement accounts and documents establishing the 401(k) Plan. [R. p. 275, ¶ 2; p. 56] A chart depicting Lindgren's history of retirement contributions is included in the Statement of Facts of his Appellant's Brief. For the convenience of the reader the chart is repeated here:

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

At issue in the Bank's appeal are 3 contributions made to a 401(k) Plan established by Rockmoor, Inc. A 401(k) Plan is funded through payroll deferrals. [R. p. 276, ¶ 4] That is to say, a portion of the participating employees' wages are withheld and paid by the employer to the Plan. The amounts withheld each year appear on the employee's W-2 for that year. [R. p. 156, line 18] The Plan assets are held by Mass Mutual f/k/a The Hartford. [R. p. 110, line 6; p. 56] For additional information about 401(k) Plans see: [https://www.irs.gov/Retirement-Plans/401\(k\)-Resource-Guide](https://www.irs.gov/Retirement-Plans/401(k)-Resource-Guide). The contributions for Lindgren about which the Bank complains were made in 2012, 2013 and 2014 and total \$45,366.37. [R. p. 56]

During the hearing the Bank moved to execute on the post-judgment retirement contributions, including the IRA, the Roth IRA and the 401(k) Plan. [R. p. 155, line 18] It did not seek relief directed at any of the other assets, real or personal, described by Lindgren in his testimony. The Bank introduced no evidence of Lindgren's solvency or net worth; it did not put in evidence Lindgren's financial statement or tax returns, even though Bank counsel brought these materials to the hearing. [R. p. 109, line 20; p. 171, line 19; p. 178, line 16] Contrary to the Bank's assertion, Lindgren never "maintained that he had no property or assets to satisfy" the Bank's judgments, nor did he testify to this effect. The evidence of record actually reflects Lindgren's ownership of significant assets and property.

The Bank did not seek to execute on Lindgren's corporate stock or his membership interests in the various LLCs about which he testified. Instead, the Bank moved to execute on Lindgren's 401(k) Plan on the theory that the post-judgment contributions made into the Plan were fraudulent transfers. But there is not a shred of evidence that Lindgren's 401(k) Plan contributions were made

with the intent or purpose to delay, hinder or defraud the Bank or any other creditor. To the contrary, the undisputed facts show that the retirement contributions at issue were not made in anticipation of or in response to the Bank's judgments. Lindgren simply continued his long-standing practice of regular, annual retirement savings. [R. pp. 276 - 277, ¶¶ 5 - 7]

Being unable to establish Lindgren's fraudulent intent as a factual matter, the Bank is left with one argument: that all retirement contributions made by a judgment debtor after entry of judgment are per se fraudulent and subject to execution by the judgment creditor. [App. Br. of Resp/App. pp. 11, 13] If this were the case, no judgment debtor could make contributions to his or her 401(k) Plan. Thus, the ultimate question to be decided by this Court is whether South Carolinians are to be denied the opportunity to save for retirement whenever a judgment has been entered against them.

STANDARD OF REVIEW

The Bank asserts that this case is an action at law decided by a judge without a jury and is to be reviewed under standards described in *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008). [App. Br. of Resp/App. p. 6] This could be advantageous to Lindgren, as there is evidence that reasonably supports the lower court's implicit finding that Lindgren's 401(k) Plan contributions were not fraudulent transfers. [R. pp. 276 - 277, ¶¶ 5 - 7] But the Bank is incorrect about the standard of review. Supplementary proceedings are equitable in nature. *Ag-Chem Equip. Co., Inc. v. Daggerhart*, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct.App. 1984). In an equitable matter referred to a master-in-equity for final judgment, the appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Van Blarcum v. City of North Myrtle Beach*, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct.App. 1999). However, the appellate court is not required to

disregard the findings of the master-in-equity. *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n*, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct.App. 1995). Further, 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 CORRECTLY DETERMINE THAT S.C. CODE §15-41-30(A)(14) EXEMPTS FROM EXECUTION LINDGREN'S INTEREST IN HIS ERISA-QUALIFIED 401(K) PLAN NOTWITHSTANDING THAT SOME OF THE FUNDS IN THE PLAN WERE CONTRIBUTED AFTER ENTRY OF JUDGMENTS AGAINST LINDGREN BY THE BANK?

Since 1992, Lindgren's employer, Rockmoor, Inc., has sponsored a 401(k) retirement plan. The plan is funded by wages withheld from Rockmoor's employees at each pay period. The money in the plan is currently held and invested by Mass Mutual. Lindgren has participated in the plan in every year since 1992 in which he has had qualifying wages. Rockmoor's other employee also is a plan participant whose wages were withheld and contributed to the 401(k) Plan on her behalf. [R. p. 126, line 1] The Bank obtained judgments against Lindgren in 2011. After entry of the judgments Rockmoor continued withholding wages from Lindgren and its other employee and contributing those withheld wages to the plan. The post-judgment contributions on behalf of Lindgren total to \$45,366.37. The Bank moved for an order requiring Mass Mutual to pay the Bank \$45,366.37 from Lindgren's interest in the 401(k) plan. [R. p. 61] The lower court denied the Bank's motion, holding:

With regards to the 401(k), I find that the statute, SC Code 15-41-30(14) precludes execution on the 401(k) plan. SC Code 15-41-30(A)(14) provides that the debtor has an exemption in: 'The

debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974.' Since the 401(k) is an ERISA plan, I find the proceeds in the 401(k) exempt from execution. [R. p. 18]

The lower court ruled correctly. The 401(k) Plan sponsored by Rockmoor is a qualified ERISA retirement plan. [R. p. 275, ¶ 3] As such, it is exempt from creditors' claims under South Carolina's homestead exemption statute:

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 interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.

S.C. Code § 15-41-30(A)(14).

The Bank argues in this Court, as it did below, that the exemption statute should be interpreted to except from its reach contributions into an ERISA-qualified plan that are deemed to be fraudulent transfers. Further, the Bank argues that any contribution made by a judgment debtor to a 401(k) Plan after entry of judgment against him is *ipso facto* fraudulent. The lower court did not explicitly rule on these issues. Other than its conclusion, quoted above, the only indication of the court's reasoning is in these two paragraphs in the order:

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *See In re Goldschein*, 241 B.R. 370 (Bkry. D. Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." *Id.* at 379 (emphasis mine).

Notwithstanding this fact, this Court notes that Lindgren has submitted an Affidavit in an effort to show/establish a 'pattern' of contributing to his retirement account for a number of years. Having carefully reviewed and considered Lindgren's Affidavit, this Court

finds that the voluntary post-judgment transfers to the 401k are not subject to execution by First Citizens Bank. [R. p. 14]

These passages, in particular the underlined phrase emphasized by the court, suggest that the court believed that the exemption provided for ERISA plans in South Carolina's homestead statute is subject to a fraudulent conveyance exception, despite the absence of any language in the statute to that effect. If that was indeed the lower court's conclusion concerning the proper legal interpretation of the exemption statute, then it must have found, based on Lindgren's history of consistent retirement contributions, that the 401(k) contributions at issue were not fraudulent conveyances as a factual matter. *See Waring v. Jennings*, 91 S. C. 426, 74 S. E. 987 (1912)(in the absence of a direct finding upon the facts, the rendition of a judgment for plaintiff presupposes that all facts in issue were decided in his favor).

Lindgren certainly agrees with the latter point. Not only did he deny, under oath, any fraudulent intent, the record demonstrates beyond dispute that the retirement contributions at issue were not motivated by or connected in any way to the Bank's judgments. Lindgren and his employer simply continued what they had done in every year since 1992; they withheld a portion of Lindgren's wages and payed them to Mass Mutual for investment in Lindgren's 401(k) Plan. The undisputed evidence showing Lindgren's history of retirement contributions is a relevant fact tending to establish an absence of fraudulent intent on his part. *In re Channon*, 424 B.R. 895 (Bkrcty. D. N.M. 2010). That his behavior did not deviate from his historical conduct is likewise supportive of a finding that the contributions in question were not fraudulent. *In re Beaudin*, No. 0935557-EEB (Bkrcty. D. CO. 2010). There is evidence in the record reasonably supporting the lower court's finding that the 401(k) contributions were not fraudulent transfers and if the Bank is correct as to the

appropriate standard of review the lower court's order must be affirmed. *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008) citing *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)(in an action at law the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports them).

Lindgren cannot agree with so much of the lower court's order as implies an interpretation of the exemption statute for ERISA-qualified plans that includes an exception for contributions deemed to be fraudulent transfers. S.C. Code §15-41-30(A)(13), dealing with individual retirement accounts, expressly provides: "A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan."³ In contrast, the very next subsection, the one that exempts ERISA-qualified plans from execution, has no fraudulent transfer qualification or limitation. It provides, simply and concisely, that "[t]he debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended" is "exempt from attachment, levy, and sale." S.C. Code Ann. §15-41-30(A)(14).

A 401(k) Plan is different from an IRA in ways that explain the difference in treatment established by the Legislature. Contributions to a 401(k) Plan are made by the taxpayer's employer rather than by the taxpayer himself. The employer withholds wages in amounts strictly limited by law and pays these funds directly to the Plan. The employee does not acquire possession of the funds unless and until they are withdrawn from the Plan as permitted by law. Further, wages are not subject to garnishment in South Carolina. S.C. Code Ann. §15-39-410. Thus, the 401(k) Plan contributions -

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The words "other plan" refer to the other retirement vehicles listed in §15-41-30(A)(13): "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."

consisting of the employee's withheld wages - are exempt from levy or execution while in the hands of the employer and remain so after payment to the Plan. When an employer pays withheld wages to the 401(k) Plan, there is no conversion of exempt cash to non-exempt retirement plan assets, nor is there a transfer by a debtor to be subjected to scrutiny as a possible fraudulent conveyance.

The Bank invites this Court to adopt "an interpretation" of the statute to protect only "pre-judgment contributions and earnings stemming from those contributions." [App. Br. of Resp/App. pp. 11, 12, 13] The Bank's invitation should be declined. Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "[Courts] are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App.1985). That the homestead exemption statute included an exception for fraudulent conveyances in §15-41-30(A)(13) but not in §15-41-30(A)(14) evidences legislative intent that the exception not apply in the latter case under the principle "*expressio unius est exclusio alterius*." See *Hodges, supra*. Had the legislature intended the exception to apply to both types of retirement plans there would have been no need to deal with IRAs and ERISA-qualified plans in separate subsections.

The Bank argues that the legislature could have used "more specific language" if it intended to exempt from creditors' claims funds in a 401(k) Plan contributed after entry of a judgment against the plan participant. In this case the Bank seeks an order directing the depository institution to take money out of the plan and pay it to the Bank. The relief the Bank seeks is squarely prohibited by the plain language of the statute. Lindgren's interest in the 401(k) is "exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding." The language

could not be more specific or clear.

At page 12 of its brief the Bank cites *Dona Ana Savings and Loan Association v. Dofflemeyer*, 115 N.M. 590, 855 P.2d 1054 (1993), in which the Supreme Court of New Mexico, construed that state's exemption statute to be subject to a fraudulent conveyance exception notwithstanding the plain meaning of the statute pursuant to New Mexico rules of statutory construction:

In interpreting a statute, a court not only looks to the plain meaning of the language employed, but also to the object of the legislation. Our interpretation of statutes must be consistent with legislative intent, and our construction must not render a statute's application absurd, unreasonable, or unjust.

115 N.M. at 592, 855 P.2d at 1056 (citations omitted).

Principles of statutory interpretation in South Carolina are similar:

However, the plain meaning rule is subject to this caveat:

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)(quoting *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Even so, what the legislature says in the text of a statute is the best evidence of legislative intent. *Id.* And the fact that the General Assembly included a fraudulent transfer exception and a monetary limit with respect to IRAs but did not do so in the very next subsection dealing with ERISA-qualified plans should be dispositive on the question of legislative intent as to those features.

The Bank cites *Webster v. Rodrick*, 64 Wn.2d 814, 394 P.2d 689 (Wash., 1964) for the

proposition that exemption statutes cannot be used as instruments of fraud and imposition. [App. Br. of Resp/App. p. 12] In that case funds embezzled by one of the defendants were used to purchase and improve the defendants' residence. Washington law requires that an exemption must be claimed in good faith. The court held that the homestead exemption statute would not be applied to prevent a lien in favor of the embezzled party from attaching to the defendants' residence. This case has no application to the circumstances presented here.

Breedlove v. Breedlove, 100 Nev. 606, 691 P.2d 426 (1984), also cited by the Bank, supports Lindgren's position. [App. Br. of Resp/App. p. 12] The defendant claimed a homestead exemption as one of a lengthy series of devices by which he sought to avoid paying child support payments owed to his former wife. As the Nevada Supreme Court explained in denying the exemption on public policy grounds:

Homestead laws in this country were designed for the purpose of protecting families and making families secure in their homes from creditors they are unable to pay. As such, when an ex-wife or child attempts to enforce court-ordered support payments, the rationale behind upholding the homestead exemption can no longer be said to apply since the policy of protecting the family would no longer be served by such an application. A former family member attempting to enforce a support judgment can hardly be said to be a creditor of the sort against which the legislature sought to protect the homesteader, and it would be extremely unfair to permit the homestead to be used as a shield under these circumstances to insulate a father from being forced to pay the support that is owed to his own children.

100 Nev. at 608, 691 P.2d at 427 (internal citations omitted)

Needless to say, the Bank is not Lindgren's child or former spouse. The judgments the Bank seeks to collect arise out of Lindgren's guarantees of deficiencies owed to the Bank following a deed in lieu of foreclosure by Blue Ox, LLC of property acquired by that entity for business purposes. [R.

pp. 27 - 28, 31 - 32] To the extent *Breedlove* is relevant at all, it suggests the Bank is exactly the sort of creditor against whom the exemption statutes were intended to apply.

Even if the Court were inclined to consider interpreting §15-41-30(A)(14) to except fraudulent transfers in a proper case, this is not such a case. The Bank relies on authorities finding transfers to be fraudulent when the debtor failed to retain sufficient property to pay the indebtedness, citing *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993) and *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d. 406 (Ct. App. 1995). The Bank states in its brief: “The fact that Lindgren failed to retain sufficient property or assets to satisfy the judgment against him is also not in dispute. Lindgren has continuously maintained that he is unable to satisfy the judgments against him.” [App. Br. of Resp/App. p. 9] The Bank provides no references to the record for these supposed “facts.” Indeed, it would be impossible to do so because there is nothing in the evidentiary record to support them.⁴ Lindgren never testified, much less “continuously maintained,” that he owned no property.

To the contrary, in response to the Bank’s questions Lindgren described his ownership interests in companies owning: half a trailer park in Ridgeland, South Carolina; an office building on Hilton Head Island; an undeveloped parcel in Bluffton, South Carolina; a 35 acre mobile home park in Bluffton; and, a developed commercial parcel, also in Bluffton. Collectively these properties are of sufficient value that they generate over a \$1 million in annual rents as reflected on Lindgren’s personal tax returns. Lindgren also testified to his personal ownership of a condominium in Vail,

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The lower court’s order recited that: “Lindgren has failed to retain sufficient property/assets to pay First Citizens” and “Lindgren maintains that he has no assets that can be used to apply towards the Judgments [sic] that First Citizens holds against him.” In his motion to reconsider Lindgren noted that there is no evidentiary support for these “findings” in the record and asked that they be stricken.

Colorado and his joint ownership with his wife of their residence. Indeed, in arguing that Lindgren is not deserving of protection under the exemption statute the Bank states: “In addition several [sic] properties in South Carolina, Lindgren owns a vacation home in Vail, Colorado of which the current assessed value is \$1,636,000.” [App. Br. of Resp/App. p. 13] ⁵ The Bank’s admissions concerning property and assets retained by Lindgren should be fatal to its claim that the 401(k) Plan contributions are fraudulent transfers under *Durham v. Blackard*, 313 S.C. 432, 438 S.E.2d 259 (Ct. App. 1993) and *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d. 406 (Ct. App. 1995), both of which require the creditor to establish that the debtor failed to retain sufficient property to pay the indebtedness.

Alternatively, the Bank argues that the 401(k) Plan contributions are subject to execution because they were made with the actual intent to defraud creditors. [Bank Br p 9] As discussed above, beginning at page 9, comments made in its order imply that the lower court found as a matter of fact that the post-judgment 401(k) Plan contributions were not fraudulent transfers. The Bank asks this Court to reverse the lower court’s finding on this point based upon the presence of “badges of fraud” as set forth in *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973).

The “badges of fraud” argument was not made prior to or addressed in the lower court’s order, nor did the Bank move for reconsideration of the order. Issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497

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The value of the condominium is not in the record on appeal. Ordinarily, facts stated in a party’s brief that are outside the record will not be considered by the appellate court. *Becker v. Uhe*, 221 S.C. 334, 70 S.E.2d 346 (1952). But inasmuch as the valuation of the condominium is adverse to the Bank it could be treated as an admission and properly considered by this Court. See *Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 343 S.E.2d 446 (1986) (party bound by facts included in statement of the case).

S.E.2d 731, 733 (1998). The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Id.* 330 S.C. at 76, 497 S.E.2d at 733. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Id.*

The Bank mentioned badges of fraud in opposing Lindgren’s motion to reconsider the court’s decision regarding the IRAs, but that is insufficient. [R. p. 252, line 15 - p. 256, line 14] The so-called “badges of fraud” have not until now been raised by the Bank in regard to the 401(k) Plan contributions. Even had the Bank made its own motion to reconsider the court’s denial of its motion to execute on the 401(k) Plan, which it did not, it would have been too late. *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (issue may not be raised for the first time in a motion to reconsider). Thus, the Bank’s “badges of fraud” argument is not properly before this court.

On the merits, the Bank’s “badges of fraud” argument is unavailing. It cites *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) for its recitation of 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. [App. Br. of Resp/App. p. 9]

Examination of these factors in light of the facts of record reveals the following conclusions:

- Insolvency or indebtedness of the transferor: Rockmoor not Lindgren was the transferor, and in any case there is no evidence of insolvency on the part of Lindgren. The Bank brought to the hearing, but chose not to put into

evidence, Lindgren's financial statement.

- Lack of consideration for the conveyance: There was valuable consideration involved. Lindgren suffered a detriment in the form of reduced current income for the future benefit of tax-free earnings on his retirement savings.
- Relationship between transferor and transferee: The actual transfer was by Lindgren's employer to the investment company holding the Plan assets.
- Pendency or threat of litigation: There was no litigation pending; all of the contributions at issue were made in the years between the conclusion of the Bank's initial cases against Lindgren and the filing of the Bank's petition for supplemental proceedings.
- Secrecy or concealment: There was none. Prior to the institution of supplemental proceedings Lindgren voluntarily provided the Bank with his personal financial statement and copies of his tax returns. At the hearing he forthrightly answered all questions put to him by the Bank and after the hearing he provided to the Bank account statements and other documents related to the 401(k) Plan.
- Departure from the usual method of business: Again, there was none; Lindgren and Rockmoor did exactly what they had done in every year since 1992.
- Transfer of the debtor's entire estate: Lindgren's entire estate was not transferred; the record reflects, and the Bank acknowledges, that Lindgren retains substantial other valuable properties.
- Reservation of benefit to the transferor: Again, Lindgren is not the actual transferor, but he acknowledges that he is the owner of the "interest" in the 401(k) Plan exempted from creditor claims by §15-41-30(A)(14).
- Retention by the debtor of possession of the property: Lindgren does not and never did have possession of the funds at issue; they were withheld from him and paid directly into the Plan by his employer. Lindgren acknowledges that he has the right to obtain possession by making withdrawals from the 401(k) Plan but if he were to do so the funds withdrawn or any non-exempt assets purchased with them would be subject to execution by the Bank.

Contrary to the Bank's argument, the facts of record do not support a factual finding that Lindgren, who did not change his behavior in any way in response to the Bank's judgments, made

any retirement contributions with the purpose or intent to hinder, delay or defraud the Bank or any other creditor. The lower court's implicit finding to this effect should be affirmed.

The undersigned has been unable to find cases involving a creditor's challenge to an employer's contribution of withheld wages to a 401(k) Plan. There are cases, however, dealing with debtors' repayment of loans taken from 401(k) Plans. See *In re Hoetmer*, 2012 WL 4482387 (Bkrtcy. S.D. Ind., Slip Copy, Sept. 26, 2012) and *In re Dunbar*, 313 B.R. 430, 436 (Bankr. C.D. Ill.2004). These cases are distinguishable and not relevant here because the money at issue in those cases was transferred from the debtors' own bank accounts to their 401(k) Plan, not as we have here, from the debtor's employer to the Plan. Both cases turned upon a consideration of circumstances under which it is permissible for a debtor to convert non-exempt assets to exempt assets. Here there has been no conversion of non-exempt cash to exempt retirement plan assets and therefore no basis for finding any cognizable legal injury to the Bank or for finding any fraudulent transfer. Again, exempt wages were withheld from Lindgren's paycheck and paid by his employer to the exempt 401(k) Plan.

The Bank argues that Lindgren is not deserving of the protections of the homestead exemption statute because he owns several properties in South Carolina, a condominium in Vail and a 401(k) Plan that would still have a balance in excess of \$240,000. [App. Br. of Resp/App. p. 13] The short answer to this is that Lindgren has not asserted a claim of exemption with respect to anything other than his retirement accounts and the statutory exemption provided for his 401(k) Plan is not subject to a monetary limit. The Bank's assessment that "Lindgren is in no danger of becoming dependent on the state," even if accurate, is not germane to the important legal issues presented by this case.

Finally, the Bank likens Lindgren's 401(k) Plan to an "offshore bank account," suggesting

that debtors could treat retirement plans as simply “another checking account” to which they would move money back and forth to defeat the claims of creditors. [App. Br. of Resp/App. p. 13] Elsewhere the Bank asserts “Lindgren freely took distributions from his 401(k) which clearly shows that his 401(k) was simply another checking account.” [App. Br. of Resp/App. p. 10] The Bank’s concerns are misplaced and its characterization of Lindgren’s distributions as having been “freely” taken are erroneous.

As a matter of law, an employee is not permitted to take distributions from the Plan prior to age 59 ½ absent “hardship.” 26 U.S. Code § 401(k)(2)(B)(i)(III). Meeting this test requires showing that “[the distribution] is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need.” 26 CFR 1.401(k)-1(d)(3)(I). The determination of this two-part test “must be made in accordance with nondiscriminatory and objective standards set forth in the plan.” *Id.* The plan standards in this case have been reviewed and approved by the Internal Revenue Service. [R. p. 279] Specific, detailed regulations are in place to prevent the casual withdrawal of funds about which the Bank expresses concern. 26 CFR 1.401(k)-1(d)(3)(iii)(B) and (C).

In the absence of evidence in the record to the contrary, it must be assumed that the Plan provisions comply with applicable law in regard to hardship distributions and that Lindgren’s distributions were properly taken. As appellant on the 401(k) issue the Bank has the burden of presenting this Court with an adequate record. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). “The appellate court will not consider any fact which does not appear in the record on appeal.” Rule 210(h), SCACR. Contrary to the Bank’s assertions, a 401(k) Plan is not and should not be treated as simply another checking account, offshore or otherwise.

The Bank argues that only pre-judgment retirement contributions and the earnings thereon should be protected from creditors' claims. This means, of course, that in the Bank's view all retirement contributions made after entry of a judgment and any earnings on those contributions would be subject to seizure by judgment creditors. Effectively, judgment debtors would be prevented from putting money aside for retirement in otherwise exempt ERISA-qualified plans or IRAs. Why would debtors defer current income and put it aside for retirement knowing that at any time some creditor could step in and seize their hard-earned savings? And if the law were as urged by the Bank, why would it be applicable only to judgment debtors? The Statute of Elizabeth is not so limited in its reach; entry of a judgment is not necessary for relief under the statute. *Lebovitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987). Anyone sued for money damages, or merely threatened with such a suit, or whose debts exceeded their assets at a point in time, would be subject to claims such as those made by the Bank in this case. If the Bank were to prevail, only those with no financial problems could be safe or secure in their retirement planning. Others, including financially vulnerable individuals needing help the most, would be deprived of the benefits of tax-free retirement savings accounts and protections afforded those accounts by South Carolina's homestead exemption statutes. The Bank's position in this case is not supported by the facts, the law or public policy considerations favoring retirement savings.

CONCLUSION

For all the reasons stated this Court should affirm the order of the lower court denying the Bank's motion to set aside and execute upon Lindgren's post-judgment 401(k) Plan contributions.

Respectfully submitted

A handwritten signature in black ink, appearing to read "K. L. Simons III", written over a horizontal line.

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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,

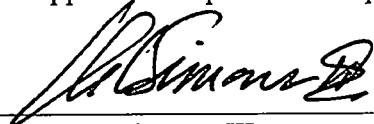
Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

CERTIFICATE OF COUNSEL

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


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April 19, 2016

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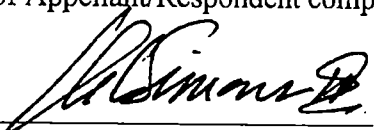
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PROOF OF SERVICE

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 Respondent'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:

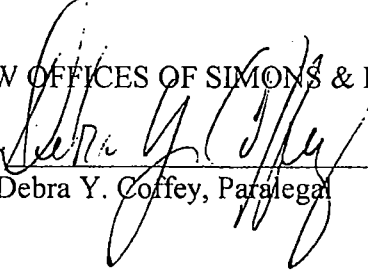
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This 19th day of April, 2016.

LAW OFFICES OF SIMONS & DEAN

BY


Debra Y. Coffey, Paralegal

Final Reply Brief
of Respondent-Appellant

THE STATE OF SOUTH CAROLINA
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Of Whom J. Chris Lindgren is the Appellant/Respondent.

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**THE STATE OF SOUTH CAROLINA
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Blue Ox, LLC, and J. Chris Lindgren.....Defendants,

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

APPELLANT'S REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENTS IN REPLY

- I.** FIRST CITIZENS MISTATED THE PROPER STANDARD OF REVIEW.
- II.** AN EXEMPTION CLAIMED PURSUANT TO S.C. CODE § 15-41-30(A)(14) CAN BE REDUCED OR ELIMINATED BY THE AMOUNT OF A FRAUDULENT CONVEYANCE.
- III.** THE BADGES OF FRAUD ARGUMENT WAS PRESERVED FOR APPEAL AND SUPPORTS FIRST CITIZENS POSITION THAT LINDGREN ACTED WITH FRAUDULENT INTENT.
- V.** LINDGREN'S ADMISSIONS REGARDING HIS OTHER ASSETS ARE EVIDENCE OF HIS INTENT TO HINDER, DELAY AND DEFRAUD FIRST CITIZENS.

I. FIRST CITIZENS MISTATED THE PROPER STANDARD OF REVIEW.

First Citizens recognizes that it misstated the proper standard of review in its Appellant's Brief of Respondent/Appellant. Lindgren set forth the proper standard of review. An action to set aside a fraudulent conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012) (citing *Future Group, II*, 324 S.C. at 97 n. 6, 478 S.E.2d at 49 n. 6).

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

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

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

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

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

If this Court finds that the transfers were supported by consideration, the issue of fraudulent intent becomes relevant. *See id.* Lindgren asserts that the badges of fraud argument raised by First Citizens is not properly before this Court. Early in this case, First Citizens argued that a claimed exemption may be reduced or eliminated if the debtor is found to have made a fraudulent conveyance. *See R.* p. 57. The badges of fraud are used by courts to determine whether a debtor acted with fraudulent intent. *See Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) (“Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as ‘badges of fraud.’”) First Citizens set forth the badges of fraud argument to support its underlying argument that Lindgren’s transfers to his 401(k) were fraudulent conveyances. The badges of fraud are not a separate and distinct issue.

Furthermore, as noted by Lindgren, First Citizens raised the badges of fraud argument before the lower court in its Memorandum in Opposition to Lindgren's Motion for Reconsideration. *See R. p.49*. The case cited by Lindgren as support of his argument that an issue may not be raised for the first time in a motion to reconsider involved a party bringing an entirely new issue before the court in its motion to reconsider. *See Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999). This is not the case here. Lindgren's argument that the badges of fraud argument is not properly before this Court should be rejected.

On the merits, the badges of fraud argument supports First Citizens' position that Lindgren's contributions to his 401(k) were fraudulent. One of the badges of fraud examines the relationship between the transferor and transferee. *See Coleman*, 261 S.C. at 209, 199 S.E.2d at 79. It is important to note that Lindgren is the sole shareholder of Rockmoor, Inc. ("Rockmoor"). *See R. p. 122*, lines 15-17. Although Lindgren attempts to distinguish himself from Rockmoor, Lindgren has total control over the company. In his brief, Lindgren also claims that Rockmoor contributed to the 401(k). Lindgren contends that he contributed nothing. *See Respondent's Brief of Appellant/Respondent at 17-18*. This contradicts the testimony given by Lindgren during the September 2, 2014 supplemental proceedings hearing. When asked about Rockmoor's contributions over the years, Lindgren stated that Rockmoor contributed "nothing." *R. p. 112*, line 4. Lindgren then stated "I contributed." *R. p. 112*, line 7. Finally, although Lindgren argues that his post-judgment contributions part of a historical trend of annual contributions, the evidence in the record shows a different story. In the two years prior to the judgments being filed, Lindgren contributed just over \$4,000 to his 401(k). *See R. pp. 275-78; Respondent's Brief of Appellant/Respondent at 5*. After the judgments were filed, Lindgren's contributions increased significantly. *Id.* From 2012 to 2014, Lindgren contributed more than

\$45,000 to his 401(k). *Id.* Lindgren's increased contributions along with the fact that he took distributions shortly after making the contributions evidences Lindgren's fraudulent intent. *See* R. p. 115-16. Lindgren deliberately increased his contributions to the 401(k) after the judgments were filed knowing that he could (and would) take distributions when needed.

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

For the first time, Lindgren now makes the argument his post-judgment contributions to his 401(k) are not fraudulent because he has other assets that can be used to satisfy the judgments against him. Essentially, Lindgren argues that he is able to pay but has chosen not to do so. Lindgren's counsel points to rental receipts from 2011 which were in excess of \$1,000,000 as evidence that Lindgren has sufficient assets to pay the judgment. However, Lindgren testified that much of the rental income was paid to his various LLCs which are not a party to this action. *See* R. p. 197. Additionally, opposing counsel failed to mention that those receipts do not account for expenses incurred. After accounting for expenses, Lindgren testified to a "net \$200,000 loss." R. p. 197. As to the vacation home in Colorado, First Citizens domesticated its judgment in Colorado; however, it is behind substantial prior liens which effectively precludes First Citizens from collecting on the judgments. Up to this point, Lindgren has consistently testified that he, individually, has few assets. Lindgren testified that the car he drives is owned by his wife. R. p. 102, line 17. When asked about the amount of cash kept at his home, Lindgren answered "[p]robably about 30 bucks. A jar of coins." R. p. 121, line 15. When asked whether he personally owned stocks or securities, he responded "no". R. p. 121, line 23. Regardless of whether Lindgren is unable to pay the judgments or he has simply chosen not to pay the judgments, the fact remains that First Citizens has not been paid the debt they are rightfully owed. The fact that Lindgren now admits to making a conscious decision to not make a single

payment towards the judgments even though he claims to have the assets to do so only further supports First Citizen's contention that Lindgren has acted with actual intent to hinder delay or defraud First Citizens.

CONCLUSION

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

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April 14, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

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

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

Appellate Case No.: 2015-002156

RECEIVED

APR 19 2016

SC Court of Appeals

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

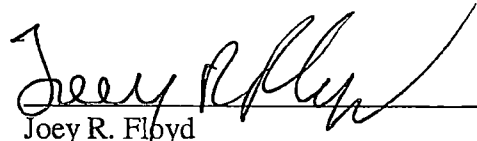
v.

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

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

CERTIFICATE OF COUNSEL

I, Joey R. Floyd, Esquire, do hereby certify that the Appellant's Reply Brief of Respondent/Appellant, First Citizens Bank and Trust Company, Inc. complies with Rule 221(b), SCACR.



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April 14, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

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

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

RECEIVED

APR 19 2016

SC Court of Appeals

Appellate Case No.: 2015-002156

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

v.

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

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

CERTIFICATE OF SERVICE

I, Rita DeCarlis, with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Respondent-Appellant, do hereby certify that on this 19th day of April, 2016, I served the **Appellant's Reply Brief of Respondent-Appellant** upon counsel for the Appellant-Respondent by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

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April 19, 2016
Columbia, SC


Rita DeCarlis

Final Appellant's Brief
of *Appellant-Respondent*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APR 22 2016

SC 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.

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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

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

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

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 (Bkrcty. 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 (Bkrcty. E.D.N.C. Nov. 28, 2006), *vacated by consent order* (Bkrcty. 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 (Bkrcty. 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 (Bkrcty. 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

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,

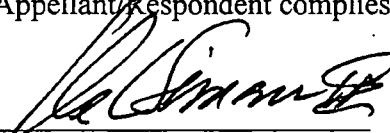
Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

CERTIFICATE OF COUNSEL

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

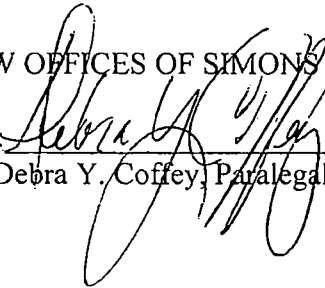
I, Debra Y. Coffey, a paralegal with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Appellant's Brief of Appellant/Respondent upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed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

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This 19th day of April, 2016.

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BY: 
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Final Respondent's Brief
of *Respondent-Appellant*

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

SC Court of Appeals

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

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

Appellate Case No.: 2015-002156

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

v.

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

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

RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

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 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.

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

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

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STATEMENT OF THE ISSUE ON APPEAL

- I. WHETHER THE MASTER-IN-EQUITY PROPERLY DETERMINED THAT A DEBTOR'S VOLUNTARY, POST-JUDGMENT CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ACCOUNTS ARE SUBJECT TO EXECUTION BY A CREDITOR, WHERE THE DEBTOR, HAVING FULL KNOWLEDGE OF THE JUDGMENTS AGAINST HIM AND CLAIMING TO HAVE NO ASSETS WHICH COULD BE APPLIED TO THE JUDGMENT, CONTRIBUTED \$25,000 TO HIS INDIVIDUAL RETIREMENT ACCOUNTS AFTER THE JUDGMENTS WERE FILED?

STATEMENT OF THE CASE

On May 13, 2010, Blue Ox, LLC ("Blue Ox") and Chris Lindgren ("Lindgren") executed two Confessions of Judgments in the amounts of \$100,000.00 and \$13,702.24 in favor of Respondent/Appellant, First Citizens Bank and Trust Company, Inc. ("First Citizens").¹ (R. pp. 27-34). Both Confessions of Judgment were filed with the Beaufort County Clerk of Court on January 6, 2011. (*Id.*). On September 2, 2014, the parties appeared before the Honorable Marvin H. Dukes, III, the Beaufort County Master-in-Equity, for a Supplemental Proceedings hearing. During the supplemental proceedings hearing, it was discovered that Lindgren made a number of voluntary, post-judgment contributions to a 401(k) and Individual Retirement Accounts ("IRAs"). (R. pp. 12-13). Counsel for First Citizens moved to execute on the voluntary post-judgment contributions to the 401(k) and the IRAs.² (R. pp. 11-12). After the parties submitted briefs on the issue, on June 11, 2015, Judge Dukes entered an Order finding that First Citizens was entitled to execute on Lindgren's voluntary post-judgment contributions to his IRA account; however, Lindgren's voluntary, post-judgment contributions to the 401(k) were not subject to execution. (R. pp. 13-19). On June 22, 2015, Lindgren filed a Motion to

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

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

Reconsider and for Stay of Execution and supporting memorandum. (R. p. 41). A hearing on the Motion for Reconsideration was held on July 8, 2015. First Citizens filed a reply memorandum in opposition to the Motion for Reconsideration on July 20, 2015. (R. p. 48). 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 challenging Judge Duke's ruling as to the IRAs. First Citizens filed its Notice of Cross Appeal on October 20, 2015 challenging Judge Duke's ruling as to the 401(k).

FACTS

Lindgren is a former practicing attorney with a LLM in tax law and now a businessman residing on Hilton Head Island, South Carolina. (R. pp. 123, 166, 179). In his role as a businessman, Lindgren has formed at least 38 LLCs to serve as "investment vehicles." (R. p. 118, lines 2-6). Lindgren's investments generally performed well affording Lindgren and his family the opportunity to buy luxury vehicles and a mountain home in Vail, Colorado.³ (R. p. 150-51).

In spite of his financial success, Blue Ox and Lindgren executed Confessions of Judgment in favor of First Citizens on May 13, 2010, both of which were filed with the Beaufort County Clerk of Court on January 6, 2011.⁴ (R. pp. 27-34). Combined, the judgments amounted to \$113,702.24. (*Id.*) On September 2, 2014, a Supplemental Proceedings hearing was held before the Honorable Marvin H. Dukes. During the Supplemental Proceedings hearing, Lindgren testified that he had an Individual Retirement Account ("IRA") and a Roth Individual Retirement Account ("Roth IRA"), both of which were held through Fidelity Investments. (R. p. 113-14). Lindgren also testified that he established a 401(k) funded through "employee

³ First Citizens domesticated its judgment in Colorado; however, First Citizens is behind substantial prior liens which effectively precludes the bank from collecting on the judgment.

⁴ C/A No.: 2011-CP-07-128 (\$100,000.00) and C/A No.: 2011-CP-07-129 (\$13,702.24).

deferrals” while an employee with one of his various LLCs, Rockmoor, Inc. (R. p. 110, lines 5-24). After the hearing, it was discovered that Lindgren contributed \$25,000 to his IRAs and more than \$45,000 to his 401(k) **after** the judgments held by First Citizens against him were filed.⁵ Despite making these contributions, Lindgren maintained that he had no property or assets to satisfy the judgments First Citizens held against him. To date, Lindgren has made no payments towards the Judgments.

STANDARD OF REVIEW

“When both equitable and legal causes of action are maintained in one suit, each must be analyzed separately according to its own identity as legal or equitable.” *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 142, 641 S.E.2d 53, 57 (Ct. App. 2007) (citing *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005); *Future Group, II v. Nationsbank*, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996)). In an action at law decided by a Master-in-Equity, the appellate court will correct any error of law. *Mellen v. Lane*, 377 S.C. 261, 275, 659 S.E.2d 236, 243 (Ct. App. 2008) (citing *Sea Cabins on the Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App. 1999)). However, the appellate court must affirm the Master’s factual findings unless no evidence reasonably supports those findings.” *Id.* An action to set aside a fraudulent conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012) (citing *Future Group, II*, 324 S.C. at 97 n. 6, 478 S.E.2d at 49 n. 6).

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

ARGUMENTS

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

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

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

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

The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy and sale under any mesne or final process issued by a court or bankruptcy proceeding:

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

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

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

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

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

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

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

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

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

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

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

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

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

The Statute of Elizabeth states that:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. (emphasis added).

S.C. Code § 27-23-10. In *Durham v. Blackard*, this Court, interpreting the Statute of Elizabeth, held that conveyances can be set aside in two instances:

First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (1)

the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. **Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full-not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.**

313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993) (emphasis added).

Here, First Citizens need not prove “actual intent to hinder or delay creditors” because the transfers at issue were not based upon valuable consideration. *Mathis v. Burton*, 319 S.C. 261, 264-65, 460 S.E.2d, 406, 408 (Ct. App. 1995). Rather, First Citizens must only prove that (1) Lindgren was indebted to First Citizens at the time of the contributions at issue; (2) Lindgren's contributions were voluntary, i.e., based upon no consideration or upon nominal consideration; and (3) Lindgren failed to retain sufficient funds to satisfy the judgment against him. *See id*; *see also First State Sav. And Loan Ass'n v. Nodine*, 291 S.C. 445, 450, 354 S.E.2d 51, 54 (1987) (“A conveyance made upon a mere nominal consideration or without consideration is ‘voluntary.’”).

All of the funds First Citizens seeks to execute upon were contributed to Lindgren's IRAs after the judgments were entered against him on January 6, 2011. As such, it is undisputed that Lindgren was indebted to First Citizens at the time of the contributions at issue. Lindgren personally executed the Confessions of Judgment in favor of First Citizens and was, at all relevant times, fully aware of the judgments against him.

As to the second element in *Mathis*, there was no consideration for the transfer of the money from Lindgren to his IRAs. Under South Carolina law, “consideration...may consist either in some right, interest, profit or benefit **accruing to one party**, or some forbearance, detriment, loss, or responsibility given, suffered, or **undertaken by the other**.” *Furman Univ. v. Waller*, 124 S.C. 68,---, 117 S.E. 356, 358 (1923) (emphasis added). The definition of consideration set forth in *Waller* clearly shows that that consideration involves two separate parties. Here, Lindgren neither received a benefit nor suffered a detriment because he did nothing more than move money from one pocket to another in an effort to protect his assets (i.e., cash) from his judgment creditors. Lindgren was in the exact same position before and after the transfers to his IRAs. His assets were simply in different accounts. Lindgren maintained full control over the accounts and could withdraw or invest the funds as he chose.

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

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

easily established by the fact that Lindgren has not paid a single dollar towards the judgments. However, Lindgren disputes that he is unable to pay. Lindgren states that he is able to pay the judgments but has chosen not to do so. *See Appellant's Brief of Appellant/Respondent* at 17-18. Lindgren's counsel points to rental receipts from 2011 which were in excess of \$1,000,000 as evidence that Lindgren has sufficient assets to pay the judgment. However, Lindgren testified that much of the rental income was paid to his various LLCs which are not a party to this action. *See R. p. 197*. Additionally, opposing counsel failed to mention that those receipts do not account for expenses incurred. After accounting for expenses, Lindgren testified to a "net \$200,000 loss." *R. p. 197*. Regardless of whether Lindgren is unable to pay the judgments or he has simply chosen not to pay the judgments, the fact remains that First Citizens has not been paid the debt they are rightfully owed. Lindgren's actions, even in this appeal, demonstrate his clear intent to frustrate, delay, hinder and defraud First Citizens.

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

If this Court finds that the post-judgment contributions were supported by consideration or that 11 U.S.C. § 548 provides the proper standard as to what constitutes a fraudulent conveyance, Lindgren's post-judgment contributions are still subject to execution. Under South Carolina law, if the transfers at issue were supported by consideration, the transfers should be set aside if it is shown that the transfers were (1) made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the

grantor's intent is imputable to the grantee. *See Durham*, 313 S.C. at 437, 438 S.E.2d at 262. Pursuant to 11 U.S.C. § 548, a transfer is fraudulent if made “with actual intent hinder, delay or defraud.” As discussed above, it is undisputed that Lindgren was indebted to First Citizens when the contributions at issue were made. The issue of whether the grantor’s intent is imputable to the grantee is irrelevant because Lindgren is both the grantor and the grantee. Therefore, if this Court finds that there was consideration for the transfers or that 11 U.S.C. § 548 applies, the only real issue for the court is whether Lindgren’s post-judgment contributions were made with the “intent of defrauding his creditors.” *See id*; 11 U.S.C. § 548.

In determining whether a debtor acted with the requisite intent to establish a fraudulent conveyance, South Carolina and federal courts evaluate the particular circumstances of the transfer for “badges of fraud.” *See Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973) (“Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as ‘badges of fraud.’ The badges tend to excite suspicions as to the Bona fides of a challenged conveyance.”); *In re Maryland Prop. Associates, Inc.*, 309 F. App’x 737, 753 (4th Cir. 2009). In *Coleman*, the Supreme Court of South Carolina stated the following regarding the badges of fraud:

The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Id. (citing 37 Am.Jur.(2d), Fraudulent Conveyances, § 10 (1968)). The circumstances of Lindgren’s post-judgment contributions to his IRAs meet at least seven of the nine badges of

fraud listed above.⁶ “Although the presence of a single factor, i.e., badge of fraud, may cast suspicion on the transferor’s intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud.” *Gilchinsky v. Nat’l Westminster Bank*, 732 A.2d 482, 490 (1999). Here, Lindgren (1) was indebted to First Citizens at the time of the contributions; (2) transferred the funds to himself, the person with whom he clearly has the closest relationship, (3) made the contributions while litigation was pending, (4) failed to voluntarily disclose the contributions, (5) reserved the benefit of the funds to himself, and (6) retained possession of the funds. The presence of these badges of fraud surrounding Lindgren’s post-judgment contributions reveals Lindgren’s actual intent to hinder, delay, or defraud First Citizens from collecting the judgments.

Also relevant to Lindgren’s intent is that that Lindgren now states that he has assets which can be used to pay the judgment. *See Appellant’s Brief of Appellant/Respondent* at 17-18. Up to this point, Lindgren has consistently testified that he, individually, has very few assets. Lindgren testified that the car he drives is owned by his wife. R. 102, line 17. When asked about the amount of cash kept at his home, Lindgren answered “[p]robably about 30 bucks. A jar of coins.” R. p. 121, line 15. When asked whether he personally owned stocks or securities, he responded “no”. R. p. 121, line 23. The fact that Lindgren now admits to making a conscious decision to not make a single payment towards the judgments even though he claims to have the assets to do so only further supports First Citizen’s contention that Lindgren has acted with actual intent to hinder delay or defraud First Citizens.

⁶ One of the badges of fraud satisfied is lack of consideration. First Citizens takes the position that the contributions at issue were not made on valuable consideration. *See supra* pp. 12-13. However, as this section of the brief assumes, *arguendo*, that there was consideration, First Citizens will only address the other badges of fraud that are present.

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

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

Establishing that a debtor acted with actual intent to hinder, delay or defraud a creditor is rarely proven by direct evidence. *In re Schmit*, 71 B.R. 587, 590 (Bankr. D. Minn. 1987). It is

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

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

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

In *Scholtec v. Estate of Reeves*, this Court stated that the “rationale for Homestead exemptions is well established: to protect from creditors a certain portion of the debtor’s property, and to prevent citizens from becoming dependent on the State for support.” 327 S.C. 551, 560, 490 S.E.2d 603, 607 (1997) (quoting *Cerny v. Salter*, 311 S.C. 430, 432, 429 S.E.2d 809, 811 (1993); *American Service Corp. v. Hickle*, 312 S.C. 520, 435 S.E.2d 870 (1993)). Adopting an interpretation of section 15-41-30(A)(13) which only protects pre-judgment contributions to an IRA and any earnings stemming from those pre-judgment contributions is consistent with what this Court has determined to be the legislature’s intent. It allows a debtor to protect his retirement account; however, it prevents a debtor from funneling money that would otherwise be subject to execution into a “sheltered account” from creditors.

Courts from other jurisdictions have established that while exemption statutes are intended to provide protection to debtors, they are not to be abused. In *Gilchinsky v. National Westminster Bank N.J.*, a case involving a debtor’s attempted use of a homestead exemption covering IRAs, the Supreme Court of New Jersey found that “the exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment.” 159 N.J. 463, 483, 732 A.2d 482, 493 (1999). The *Gilchinsky* court went on to state that the legislature did not intend to allow debtors to funnel money into IRAs in order to avoid paying judgments. In *Dona Ana Savings and Loan Association v. Dofflemeyer*, 115 N.M. 590, 855 P.2d 1054 (1993), the Supreme Court of New Mexico stated that the object of exemptions statutes is to “allow for exemptions in certain funds, but [exemption statutes do] not allow a debtor to find shelter in these statutes by perpetrating fraud upon his or her creditors.... ‘The legislature did not intend that these generous provisions be prostituted to the encouragement of extravagance, and the evasion of just indebtedness.’” *Id.* at 593, 855 P.2d 1054 (quoting *New Mexico Nat’l Bank v.*

Brooks, 9 N.M. 113, 129 49 P. 947, 952 (1897)). Similarly, in *Webster v. Rodrick*, the Supreme Court of Washington stated that an exemption statute “cannot be used as an instrument of fraud and imposition.” 64 Wash.2d 814, 818, 394 P.2d 689, 691 (1964). These cases demonstrate that courts around the country recognize the need to strike a balance between protecting debtors and allowing creditors to collect judgments.

The reasoning and decision of the Supreme Court of Nevada in *Breedlove v. Breedlove*, 100 Nev. 606, 691 P.2d 426 (1984) is also applicable to the case at hand. In *Breedlove*, a former spouse who was owed back child support payments sought to execute on her ex-husband’s home. *Id.* at 607, 691 P.2d at 426. The ex-husband attempted to use a homestead exemption to prevent his former spouse from executing on the home. *Id.* The Court, noting that the ex-husband purchased the home for a substantial amount after defaulting on payments to his ex-wife, ruled that the ex-husband was not entitled protection from the exemption. The *Breedlove* court stated that the ex-husband was “not the type of debtor whom the legislature sought to protect” and interpreting the exemption statute in a highly technical fashion would lead to absurd results and contravene the legislature clear intent in enacting the statute. *Id.* at 608-09, 691 P.2d at 427-28. Like the ex-husband in *Breedlove*, Lindgren is “not the type of debtor whom the legislature sought to protect.”

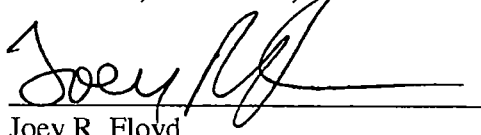
“Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.” *Ex parte Dibble*, 279 S.C. 592, 595; 310 S.E.2d 440, 442 (Ct. App. 1983). First Citizens urges this Court to recognize the inherent unfairness in allowing a debtor to set aside more than \$25,000 for “retirement” all the while claiming that he has no assets to satisfy judgments against him. Again, First Citizens only seeks to execute on the funds which Lindgren contributed to his IRAs after the judgments were filed

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

CONCLUSION

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

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April 14, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

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

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

RECEIVED

APR 19 2016

SC Court of Appeals

Appellate Case No.: 2015-002156

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

v.

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

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

CERTIFICATE OF COUNSEL

I, Joey R. Floyd, Esquire, do hereby certify that the Respondent's Brief of
Respondent/Appellant, First Citizens Bank and Trust Company, Inc. complies with Rule 221(b),
SCACR.



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CERTIFICATE OF SERVICE

I, Rita DeCarlis, with the law firm of Bruner, Powell, Wall & Mullins, LLC, Attorneys for the Respondent-Appellant, do hereby certify that on this 19th day of April, 2016, I served the Respondent's **Brief of Respondent-Appellant** upon counsel for the Appellant-Respondent by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed as follows:

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April 19, 2016
Columbia, SC


Rita DeCarlis

Final Reply Brief
of Appellant-Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APR 22 2016

APPEAL FROM BEAUFORT COUNTY
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SC Court of Appeals

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Beaufort County
Trial Court Case No. 2011-CP-07-128 and 2011-CP-07-129

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v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

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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?

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?

Make no mistake about it. At stake is whether some South Carolinians, those who have had the misfortune to have a judgment entered against them, may continue to save for retirement. The Bank argues that the homestead exemption statute simply "does not protect post-judgment contributions to an IRA." [Resp. Br. of Resp/App. p. 11] Whether a debtor does or does not have other assets available for execution does not matter. In the Bank's view, if the debtor is unable to pay the judgment due to lack of assets the creditor need not prove fraudulent intent. On the other hand, if the debtor has assets but has not satisfied the judgment, his failure to pay establishes his fraudulent intent. If this were the law it would mean in practical terms that a debtor must first pay all his creditors before making any provision for his and his family's retirement security. The Bank cites not a single case reaching such a conclusion.

The Bank attempts to justify the extreme result it seeks in this case by an attack on the debtor. He is described as a "former practicing attorney with an LLM in tax law" whose business endeavors have "generally performed well" enabling him and his family to "buy luxury vehicles and a mountain

home” but who has “chosen not to pay” the Bank’s judgments. [Resp. Br. of Resp/App. pp. 6, 15] This court should not be diverted from the legal issues at stake by these *ad hominem* arguments. The Bank asks the court to affirm the result below not because of those supposed “facts” but “BECAUSE S.C. CODE §15-41-30(A)(13) ONLY EXEMPTS PRE-JUDGMENT CONTRIBUTIONS TO AN IRA.” [Resp. Br. of Resp/App. p. 8, emphasis in original] The Bank’s reading of the statute leaves no room for consideration of the debtor’s profession, his level of education attainment, his business success or lack thereof, the car he drives, other elements of his lifestyle or his state of mind. One could reasonably ask: Why does the Bank characterize Lindgren as it does in view of its legal argument that under the homestead exemption statute any IRA contribution made by anyone in any circumstance is subject to execution if made after entry of a judgment that remains unsatisfied at the time the contribution is made?

THE IRA EXEMPTION UNDER S.C. CODE § 15-41-30(A)(13)
IS NOT LIMITED TO PRE-JUDGMENT CONTRIBUTIONS

The Bank concedes, as it must, that the homestead exemption statute, S.C. Code §15-41-30(A)(13), by its reference to 11 U.S.C § 522(d), explicitly exempts from execution retirement funds that are “in” an IRA. That should end the matter. The money at issue in this appeal was already “in” the IRA accounts when the Bank filed its petitions for supplemental proceedings and when the lower court issued the order under appeal. The Bank cites authorities establishing that the bankruptcy estate and the exemptions applicable thereto are fixed upon the filing of the petition in bankruptcy and argues that IRA contributions made by a bankrupt after filing for bankruptcy are not exempt under federal bankruptcy law. Further, or so the argument runs, because the debtor may claim exemptions only as to funds that are already “in” an IRA when the petition in bankruptcy is

filed, this somehow leads to a conclusion that the state homestead exemption statute for IRAs only applies to money that is already “in” the IRA at the time a judgment is entered against the owner of the IRA. Consideration of the differences between a bankruptcy filing and entry of a state court money judgment shows that the conclusion the Bank seeks does not follow from the premise it posits.

There are reasons why exemptions are fixed upon the date of filing the petition in bankruptcy, reasons that readily distinguish a bankruptcy filing from entry of a state court judgment. “At the time the debtor files a Chapter 7 petition, a bankruptcy estate is created which is comprised of all of the debtor's legal and equitable interests in property.” *In re Peterson*, 897 F.2d 935, 936 (8th Cir. 1990)(citations omitted). Debtors are permitted “to exempt from the bankruptcy estate any property that is exempt under federal, state, or local law applicable on the date of filing the petition.” *Id.* Debtors claim their exemptions “by filing a list of exempt property at the time the petition is filed.” *Id.* At that time control of the non-exempt property in the estate passes from the debtor to the bankruptcy court. *White v. Stump*, 266 U.S. 310, 313 (1924). Thus, under the relevant statutes and as a matter of practical necessity the bankruptcy court and trustee can identify property in the estate and exempt property excluded from the estate and thereby determine the property available to satisfy the claims of creditors.

In this case, there has been no bankruptcy petition filed nor has a bankruptcy estate been established. And when the Bank filed its judgments its doing so did not fix or establish any “estate” of the debtor available for creditors. Entry of a judgment serves to automatically attach a lien to real property owned by the debtor in a county in which the judgment is enrolled. S.C. Code §15-35-810. But otherwise the creditor, unlike the trustee in bankruptcy, acquires no interest in or control over

the debtor's property. The Bank is correct that a debtor in bankruptcy would be unable to use money in the bankruptcy estate to make an IRA contribution. But that is not because the law prohibits him from claiming exemptions after filing his petition, rather it is due to the fact that the trustee has control and technical ownership of the property in the estate. Because the Bank in this case acquired no interest in or control over Lindgren's money in consequence of filing its judgments, Lindgren, unlike a debtor in bankruptcy, was free to do as he wished with his money, subject only to fraudulent conveyance considerations.

Perhaps there are circumstances in which a filing date could become relevant. One could hypothesize a situation in which a creditor files and a debtor is served with supplemental proceedings, and the debtor then contributes to his IRA in response. In such a case the timing of the debtor's act could constitute extrinsic evidence of fraudulent intent leading to a finding that the IRA contribution was a fraudulent transfer excepted from the protection of the homestead exemption statute. *See Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985) (recording deed one day after entry of judgment was extrinsic fact sufficient to warrant a finding of intent to defraud on the part of the debtor). But the Bank's approach obviates any need for a case-by-case evaluation of the debtor's intent because, again, any post-judgment IRA contribution would be fraudulent *per se*. And if this is so, what purpose is served by the language in the homestead exemption statute explicitly excepting "the amount of a fraudulent conveyance into the individual retirement account"? *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (statute must be read so that no word, clause, sentence, provision or part is rendered surplusage, or superfluous). As a matter of statutory interpretation, the court should reject the Bank's argument that S.C. Code § 15-41-30(A)(13) protects only pre-judgment IRA contributions.

THE BANK HAS NOT ESTABLISHED
ELEMENTS OF ITS CLAIM FOR RELIEF
UNDER THE STATUTE OF ELIZABETH

The Bank next argues that the applicability of the fraudulent conveyance exception in the exemption statute is to be determined by reference to S.C. Code § 27-23-10, hereinafter the “Statute of Elizabeth,” and that the IRA contributions made by Lindgren were fraudulent as a matter of fact under the Statute of Elizabeth. Lindgren has argued that the potentially fraudulent nature of an IRA contribution should be evaluated under federal standards rather than the Statute of Elizabeth. [App. Br. of App/Resp. pp. 15 - 17] Lindgren does not abandon these arguments but will not repeat them here, and will proceed to an examination of the Bank’s claims for relief under the Statute of Elizabeth.

There is an established framework for analyzing fraudulent conveyances with respect to existing creditors under the Statute of Elizabeth depending upon the presence or absence of valuable consideration:

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.

Mathis v. Burton, 319 S.C. 261, 264, 460 S.E.2d 406, 408 (Ct. App. 1995) (quoting *Durham v.*

Blackard, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App.1993)).

In both the with-consideration and the without-consideration scenarios described in *Mathis v. Burton* the plaintiff must prove three elements. If a transfer is accompanied by consideration one of the elements a plaintiff must establish is actual intent to defraud on the part of the debtor. Where a transfer lacks consideration one of the elements a plaintiff must show is that the debtor failed to retain assets sufficient to satisfy the debt. Thus, in order to prevail on a Statute of Elizabeth claim under *Mathis v. Burton*, a creditor must establish by competent evidence either that the debtor intended to defraud one or more creditors or that the debtor failed to retain sufficient assets to pay his debts. The parties dispute whether an IRA contribution involves consideration. Resolution of the consideration issue is not necessary in this case because the Bank can establish neither of the two alternative elements of its claim. Lindgren in fact continues to own assets available for execution by the Bank and Lindgren's IRA contributions were not made with any intent to defraud the Bank or any other creditor.

THE BANK HAS NOT SHOWN THAT LINDGREN FAILED
TO RETAIN SUFFICIENT PROPERTY TO PAY HIS DEBTS

At the supplemental proceedings hearing, Lindgren described his ownership interests in companies owning: half a trailer park in Ridgeland, South Carolina; an office building on Hilton Head Island; an undeveloped parcel in Bluffton, South Carolina; a 35 acre mobile home park in Bluffton; and, a developed commercial parcel, also in Bluffton. [R. p. 130, line 23 - p. 131, line 2; p. 139, lines 14 - 25; p. 142, lines 1 - 15; p. 143, line 7 - p. 144, line 14; p. 145, lines 12 - 22] Collectively these properties are of sufficient value that they generate over a \$1 million in annual rents as reflected on Lindgren's personal tax returns. [R. p. 173, lines 20 -24] Lindgren also testified

to his ownership personally of 3 parcels of real estate: his personal residence, owned jointly with his wife; a golf cottage at Belfair Plantation in Bluffton; and, a vacation condominium unit in Vail, Colorado. [R. p. 196, lines 13 - 17; p. 195, lines 1 - 2; p. 150, line 20 - p. 151, line 5] Lindgren also testified that he is the sole shareholder of Rockmoor, Inc., a company formed to manage the operations of the various other entities in which Lindgren is involved. That company owns 10,000 shares of stock in Coastal States Bank. [R. p. 122, lines 4 - 17]

The Bank ignores these assets and instead remarks upon the jar of coins Lindgren keeps at his home and the fact that he drives a car owned by his wife. [Resp. Br. of Resp/App. p. 17] As to the substantial rental receipts reflected on Lindgren's tax returns the Bank notes that much of this was paid to LLCs not party to this action and that Lindgren actually experienced a net loss after accounting for expenses. [Resp. Br. of Resp/App. p. 15] What the Bank overlooks is that the significance of the rental receipts is not limited to their possible inclusion among the assets and property retained by the debtor under *Mathis v. Burton*. Rather, the rental receipts are evidence that the underlying real estate has substantial value, that the entities owning the real estate therefore have value and that Lindgren's membership interests in those entities likewise have value. Lindgren's membership interests in LLCs are assets potentially subject to execution by the Bank. See *Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 746 S.E.2d 26 (2013) (addressing remedy of a judgment creditor seeking to satisfy a judgment through the debtor's interest in an LLC); S.C. Code §15-39-410 (court may order any property of the judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment). The Bank has taken no steps against these assets or against Lindgren's other real and personal property.

In its discussion of this element of its claim under *Mathis v. Burton* - that the debtor failed

to retain sufficient funds to satisfy his debts - three times the Bank asserts that either Lindgren is unable to pay for lack of property or he has “chosen not to pay.” [Resp. Br. of Resp/App. p. 15] The fact that the judgments have not been paid is not disputed. But that fact alone does not lead to a finding that Lindgren has “chosen” not to pay. To “choose” means “pick out or select (someone or something) as being the best or most appropriate of two or more alternatives and “chosen” means “having been selected as the best or most appropriate.” The Oxford College Dictionary, Second Ed. (2007). There is no evidence in the record of alternatives, much less that Lindgren selected among them. Of course, he “chose” to contribute to his IRA, just as he chose to buy groceries, pay for his daughter’s college education and no doubt to incur myriad other expenses incident to a normal life, all of which, it is respectfully submitted, he had every legal right to do. As noted above at page 4, the Bank, unlike a trustee in bankruptcy, acquired no interest in Lindgren’s personal property in consequence of filing its judgments.

Even granting the Bank’s argument that Lindgren has, for whatever reason, simply chosen not to pay the Bank’s judgments, that should not be a substitute for the third element of without-consideration claim established in *Mathis v. Burton*. What the Bank suggests is that it matters not whether the debtor retained sufficient property because any time a judgment has not been satisfied it will be because the debtor “chose” not to pay it. Of course, fraudulent transfer cases only come before a court when a debt has not been paid. If the mere failure to pay is somehow transmuted into a choice not to pay that meets the *Mathis v. Burton* requirements, then there is simply no requirement that the creditor establish the debtor’s failure to retain sufficient assets. And if this were the law then any gratuitous transfer of property would be voidable by an unpaid creditor regardless of the existence of other assets from which the creditor could secure payment.

Since the Bank has failed to show that the debtor failed to retain assets or property to satisfy its judgments, it must meet the alternative with-consideration scenario under *Mathis v. Burton* and prove fraudulent intent on Lindgren's part. This the Bank cannot do.

LINDGREN'S IRA CONTRIBUTIONS WERE NOT MADE WITH FRAUDULENT INTENT

The Bank argues that Lindgren's IRA contributions met a number of "badges of fraud" that are "recognized indicia of fraud" described in *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973). [Resp. Br. of Resp/App. pp. 16-17] Before turning to the specifics it is worth noting that other than the existence of the judgments, Lindgren's knowledge thereof and the fact that IRA contributions were made, the Bank offered no evidence extrinsic to the transfers themselves tending to shed light on Lindgren's state of mind. No alleged badges of fraud were presented to the lower court or relied upon in its order. That the lower court erred in its finding of fraudulent intent is fully addressed in Lindgren's Appellant's Brief. That analysis will not be repeated here.

In its brief the Bank lists 6 factors that it sees as supporting a finding of fraudulent intent on Lindgren's part. [Resp. Br. of Resp/App. p. 17] Referring to the Bank's numbering of the factors, Lindgren: (2) transferred the funds to himself; (5) reserved the benefit of the funds to himself; and, (6) retained possession of the funds. Each of these "badges" is simply saying the same thing in different words and all are inherent in the nature of an IRA contribution.¹ Of course, Lindgren is the

¹

That this is so highlights the difficulty of evaluating whether IRA contributions are transfers and whether they involve consideration, effectively trying to put the square peg of an IRA contribution into the round hole of the Statute of Elizabeth. As set forth in Appellant's Brief, Lindgren submits that IRA contributions in actuality involve conversion of a non-exempt asset into an exempt asset and as such are uniformly approved by courts in the absence of extrinsic evidence

owner of his IRAs and when he contributed to his IRAs he retained the benefit and control, if not possession, of the funds in the account. All of these features necessarily resulted from the single act of making the IRA contribution. The court's task is not simply to tote up factors - it is to determine whether a transferor actually intended to defraud. But if one is required to keep count, then the Bank should get "credit" for only 1 "badge" not 3. And even that is suspect. After all the issue is whether the IRA contribution was fraudulently made. To say that the fact that the contribution was made is, by itself, evidence of why it was made, makes no sense.² These supposed "badges" should be disregarded.

The Bank suggests as its factor (3) that the IRA contributions were made while litigation was pending. This is not accurate. The Bank filed its confessions of judgment in 2011. Three and a half years later the Bank filed its petitions for supplemental proceedings. Only then was there an action pending, in the sense of active litigation. All of the IRA contributions were made in the interim. Even if an action is regarded as having been pending in some sense other than an active, ongoing lawsuit, there is no evidence that the IRA contributions were made in response to or in an effort to avoid the results of any litigation. This factor does not support a finding of fraudulent intent.

As its factor (4) the Bank argues that Lindgren failed to voluntarily disclose the contributions. The court in *Coleman v. Daniel* refers to this factor as "secrecy or concealment," and makes no reference to any duty of voluntary disclosure. Here there is no evidence that Lindgren sought to hide

of actual intent to hinder, delay or defraud creditors. [App. Br. of App/Resp. pp. 15 - 17]

2

Courts uniformly require extrinsic evidence of fraud, something beyond the mere fact of the transfers themselves, before finding a fraudulent conveyance in these circumstances. [App. Br. of App/Resp. pp. 9 - 14]

anything. It is true that he did not seek advance permission from the Bank to save for retirement. But he was under no duty to do so. When asked questions by the Bank at the supplemental proceedings hearing he answered them forthrightly and honestly. In fact, he voluntarily provided his tax returns and a personal financial statement long before he was served with the rule to show cause in this case and after the hearing he provided additional records requested by the Bank. This factor weighs in Lindgren's favor.

The remaining factor addressed by the bank as factor (1) is that Lindgren was indebted to the Bank at the time the IRA contributions were made. This is not in dispute. But the existence of the debt sought to be collected is not among the indicia of fraud listed in *Coleman v Daniel*. Of course, Lindgren was indebted to the bank, otherwise this case would not be before the court. The fact that the parties are here and Lindgren is claiming a lawful exemption should not be held against Lindgren as evidence of fraudulent intent on his part.

The Bank does not address *Coleman v. Daniel* factors militating in Lindgren's favor. Among them are the debtor's insolvency and transfer of the debtor's entire estate. There was ample evidence to establish Lindgren's ownership of assets as of the date of the hearing but none concerning the extent of any liabilities. At the evidentiary hearing the Bank had evidence of Lindgren's net worth - in the form of his personal financial statement - but chose not to put it in evidence, presumably because it did not support the Bank's position. The record does not support a finding that the debtor was insolvent or that he had transferred his entire estate. These factors weigh in Lindgren's favor.

Finally, the court in *Coleman v. Daniel* referred to departure from the usual method of business. This is the factor that in the circumstances of this case should be dispositive as most directly bearing upon the question of fraudulent intent. When an event occurs and is followed by an

act that softens the blow occasioned by the event, one can reasonably conclude that the act was intended to mitigate the consequences of the event. Likewise, when an event is anticipated but is preceded by an act that mitigates the harm foreseen as attendant to the event, again one concludes that the act was intended to avoid the consequences of the event. These ideas of cause and effect are so fundamental that they perhaps do not require recitation. But they are nevertheless important here as they demonstrate the lack of causal connection between the entry of judgments and Lindgren's retirement contributions. There is no evidence in this case that Lindgren made any sudden or otherwise inexplicable IRA contributions in anticipation of becoming indebted to the Bank. Nor is there any evidence that after the judgments were entered Lindgren made any new or different IRA contributions. The evidence is undisputed that Lindgren's behavior did not change in any way; except for one year of depressed income Lindgren consistently contributed to his IRAs in the maximum tax-deductible amount permitted by law. The Bank can say what it will as to whether Lindgren, as a judgment debtor, should be permitted to do this as a matter of law. But there is no basis in this record for the Bank to claim as a matter of fact that Lindgren's IRA contributions were causally connected in any way to the Bank's entry of judgments, much less that by making those contributions Lindgren intended to defraud the Bank.

Since the Bank has failed to show that Lindgren intended to defraud the Bank when he made his IRA contributions the Bank has failed to prove all elements of the with-consideration Statute of Elizabeth claim under *Mathis v. Burton*.

THE BANK'S INTERPRETATION OF THE EXEMPTION STATUTE WOULD VIOLATE PUBLIC POLICY

In the final section of its brief the Bank argues that an interpretation of the exemption statute

to protect only pre-judgment IRA contributions is consistent with public policy underlying the exemption statute. The Bank acknowledges that the public policy of the State of South Carolina is to “protect from creditors a certain portion of the debtor’s property,” citing *Scholtec v. Estate of Reeves*, 327 S.C. 551 , 560, 490 S.E.2d 603, 607 (1997), but the Bank nevertheless complains about the “inherent unfairness” of allowing Lindgren to set aside \$25,000 for retirement. [Resp. Br. of Resp/App. pp. 20, 22] The favorable income tax treatment and exemptions from creditors’ claims granted to retirement savings under both federal and state law make explicit the strong public policy encouraging and preserving such savings. The question becomes, what “portion” of a debtor’s property that is held in the form of IRAs is it the public policy of this State to protect? As noted in Lindgren’s Appellant’s Brief at pages 7 - 8, IRA account balances up to \$1,245,475.00 are currently exempt from creditors’ claims. The IRA contributions at issue in this case represent only two percent of the amount set aside for protection by the General Assembly. The Bank has no basis for complaint on public policy grounds.

In the final analysis the issue presented in these appeals is indeed one of public policy. To illustrate, assume a client meets with his lawyer and says: “For many years I’ve participated in my 401(k) plan at work and I’ve also put the maximum permissible amount into my IRA. Last year a judgment was entered against me. My accountant says I need to check with a lawyer to see if I can still put money in my 401(k) and my IRA. Well, can I?” What is the lawyer’s answer to be?

The Bank wants the answer to be “no.” According to the Bank, the lawyer must tell the client: “No, you can’t put money aside for retirement while you have an unsatisfied judgment against you. Well, actually you can, but if you do, and if the judgment holder finds out, he can get a court order seizing any money you put in your retirement plans after the judgment was entered.” Next question

from the client: “Would they find out about it?” Then the lawyer explains supplemental proceedings, that the judgment remains effective for 10 years, that the creditor could force the client into court at any time during that period and that the client would be obligated to disclose the information. The client responds: “That means that if I can’t pay the judgment I can’t put any money aside for retirement for the next 10 years.” The lawyer tells him that unfortunately there is a case in South Carolina right on point that holds exactly that.

Is this to be the law in South Carolina? Is this to be the case cited by our hypothetical lawyer? Lindgren posits different responses by the lawyer to same question. Concerning the 401(k), the lawyer would advise the client that, “yes, you can continue to participate in your 401(k); those funds are absolutely exempt from creditor claims in South Carolina.” As to the IRA, the answer would be: “It, depends.” The lawyer would tell the client that if he hasn’t had an IRA in the past the lawyer couldn’t advise him to open one now as that could be a problem. He would also tell the client that he shouldn’t put money into his IRA in excess of the tax-deductible amounts permitted on an annual basis as that too could be a problem. Finally, the lawyer would tell the client that the exemption only applies to IRA account balances up to a certain amount, that under current law is a million dollars plus. The client responds: “Well, I don’t have a million dollars in my IRA. All I want to do is continue to make the same IRA contributions that I’ve been making every year for a long time. Can I do that?” Lindgren submits that the opinion in this case should allow the lawyer to answer with an unequivocal “yes.”

There are a number of legal issues presented in this case. But at the end of the day, the manner in which our hypothetical lawyer is to respond to his client is a public policy decision. Lindgren submits that the General Assembly has already established the public policy answer in the

exemption statutes: the exemption for 401(k) plans is absolute and unlimited; and, the exemption for IRAs does not apply to balances in excess of the limit established by law or to amounts contributed with the actual intent or purpose to hinder, delay or defraud creditors.

CONCLUSION

Lindgren respectfully submits that this court should reverse the order of the lower court and hold that judgment debtors in South Carolina may, in the absence of fraudulent intent on their part, continue to make normal, customary contributions to an established IRA and benefit from protection from the claims of creditors under the exemption statute notwithstanding the existence of an unsatisfied judgment against them. Further, this court should find based on its review of the evidence that Lingren's IRA contributions were not fraudulent transfers excepted from the exemption statute.

Respectfully submitted



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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,

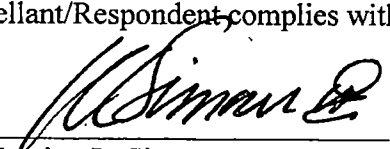
Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

CERTIFICATE OF COUNSEL

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



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April 19, 2016

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.,

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v.

Blue Ox, LLC and J. Chris Lindgren,

Defendants,

Of whom J. Chris Lindgren is the

Appellant/Respondent.

PROOF OF SERVICE

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 Reply 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:

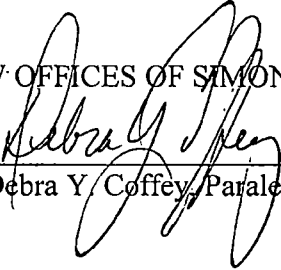
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This 19th day of April, 2016.

LAW OFFICES OF SIMONS & DEAN

BY: 

Debra Y. Coffey, Paralegal

Published Opinion
of the Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2015-002156

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5532
Heard October 3, 2017 – Filed January 31, 2018

AFFIRMED IN PART AND REVERSED IN PART

Keating L. Simons, III, of Simons & Dean, of
Charleston, for Appellant/Respondent.

Joey Randell Floyd, and Robert Crum Osborne, III, of
Bruner Powell Wall & Mullins, LLC, of Columbia, for
Respondent/Appellant.

KONDUROS, J.: In this cross-appeal, J. Chris Lindgren appeals the Master-in-Equity's ruling permitting First Citizens Bank and Trust Company, Inc. (the Bank) to attach postjudgment contributions made to his Individual Retirement Account (IRA) to satisfy the Bank's judgment against him. The Bank appeals the portion of

the Master's order finding postjudgment contributions Lindgren made to his 401(k) retirement plan were exempt from execution. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

J. Chris Lindgren is the sole member of Blue Ox, LLC. Lindgren signed confessions of judgment in 2013, individually and on behalf of Blue Ox, totaling approximately \$113,000 after Blue Ox defaulted on loan payments owed to the Bank. Blue Ox is now defunct, and Lindgren failed to pay the judgment. The Bank instituted supplemental proceedings against Lindgren, which are the subject of this appeal. The Bank argued postjudgment contributions made by Lindgren to his IRA, 401(k) plan, and a College Savings Plan were fraudulent transfers and therefore not subject to the protection typically afforded IRAs and 401(k) accounts under section 15-41-30(A)(13) and (14) of the South Carolina Code (2005), commonly referred to as the Homestead Exemption Act.

Lindgren submitted the chart below at the supplemental proceedings to show his pattern and practice of contributing to his retirement accounts. Lindgren testified he changed from a traditional IRA to a Roth IRA in 2014. He also explained he did not contribute to his IRA or 401(k) plan in 2010 and 2011 respectively because of a downturn in the economy and his earnings at that time.

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 testified to being a member or the sole member in numerous limited liability companies (LLCs) doing various types of business but primarily involved in real estate. He also testified to contributing money postjudgment to a 529 College Savings Plan for his daughter's college tuition.

With regard to Lindgren's postjudgment IRA contributions, the Master agreed with the Bank that the issue should be analyzed within the framework established by cases considering the Statute of Elizabeth, section 27-23-10(A) of the South Carolina Code (2007). As a result, the Bank did not have to demonstrate Lindgren intended to defraud creditors because the postjudgment contributions were made without consideration and he failed to retain sufficient assets to pay his debt. However, the Master went on to address Lindgren's intent and concluded the transfers were made to defraud, hinder, or delay creditors because Lindgren knew he owed the judgments and made the contributions into accounts generally exempt from execution by creditors.¹

With regard to Lindgren's postjudgment 401(k) contributions, the Master's order stated "Lindgren has submitted an Affidavit in an effort to show/establish a 'pattern' of contribution to his retirement account for a number of years. Having carefully reviewed and considered Lindgren's Affidavit, this [c]ourt finds that the voluntary postjudgment transfer to the 401(k) are not subject to execution by [the] Bank." The order later found "With regards to the 401(k), I find that the statute, [section 15-41-30(A)(14) of the South Carolina Code], precludes execution of the 401(k) plan."

This cross-appeal followed.

STANDARD OF REVIEW

"Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "Our scope of review for a case heard by a Master permits us to determine facts in accordance with our

¹ The Master also concluded the contributions to the College Savings Plan were made to hinder or delay creditors. However, the Master did not rule the funds were subject to execution as the account was empty—presumably because it was used to pay Lindgren's daughter's tuition. Therefore, any issues relating to the 529 College Saving Plan are not the subject of this appeal.

own view of the preponderance of the evidence." *King v. James*, 388 S.C. 16, 24, 694 S.E.2d 35, 39 (Ct. App. 2010). Furthermore, fraudulent conduct generally requires proof by clear and convincing evidence. *See Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) ("Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence."); *Gordon v. Lancaster*, 419 S.C. 48, 59, 795 S.E.2d 857, 863 (Ct. App. 2016) ("The evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard.").

LAW/ANALYSIS

I. Lindgren's Issue on Appeal—Postjudgment Contributions to IRA

Lindgren contends the Master erred in finding his postjudgment contributions to his IRAs were not exempt from execution when the Bank failed to establish such contributions were made with the intent to defraud his creditors. We agree.

The relevant portion of section 15-41-30(A) (2005) is subsection (13), which provides:

(A) The following real and personal property of a debtor domiciled in this [s]tate 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 *A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan.*^[2]

(emphasis added).

² A new version of section 15-41-35(A)(13) became effective in May of last year. However, the part of the subsection relevant to our analysis remains the same as when the supplemental proceedings took place.

In determining whether Lindgren's postjudgment contributions constituted fraudulent conveyances so as to remove them from the protection afforded by subsection (13), the Master turned to the Statute of Elizabeth. It provides:

(A) 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 . . . 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.

S.C. Code Ann. § 27-23-10(A) (2007).

South Carolina jurisprudence has established a framework for how the Statute of Elizabeth should be applied.

In interpreting [the Statute of Elizabeth], our courts have held that conveyances shall be set aside under two conditions. 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.

Durham v. Blackard, 313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993).

Lindgren maintains consideration of subsection (13) of the Homestead Exemption Act does not mandate analysis under the Statute of Elizabeth and the cases interpreting it. We agree. When a debtor moves money into an IRA, that money still belongs to the debtor. The money is converted into a protected asset, but *ownership* is not gifted, transferred, granted, or otherwise conveyed to another party. Therefore, the Statute of Elizabeth is not applicable as it concerns gifts, grants, alienations, bargains, transfers, and conveyances.

To further illustrate why analysis under the Statute of Elizabeth is ill-fitting in this scenario, the initial question that would be presented in such an analysis is whether consideration was or was not given for the transfer. *See Durham*, 313 S.C. at 437, 438 S.E.2d at 262 (directing differing analyses after the initial question of consideration is determined). In the specific case of IRAs, the contribution is *never* made for valuable consideration.³ Consequently, the remaining factors to be considered would be whether (1) the grantor was indebted to the creditor 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 creditor in full. *Id.* Consideration of these factors would likely render *any* postjudgment contribution to an IRA fraudulent as a matter of course. However, if the legislature intended that result, without consideration of actual fraudulent intent, it is unclear from the statute. Because the exemptions in the Homestead Act are to be construed in favor of the debtor, we conclude the Bank must demonstrate an actual intent to defraud by Lindgren in order to remove the disputed contributions from the protection

³ Lindgren argues consideration was given for the contributions, but that argument is strained and without merit. Lindgren may receive certain managerial or financial services from the IRA fund manager, but he compensates for those with fees, not by payment of the contribution to the fund manager. Furthermore, he does not exchange his contribution for certain tax advantages. The advantages are simply the result of a particular type of plan created by the government to reward retirement saving.

afforded by subsection (13).⁴ See *In re Holt*, 497 B.R. 817, 825 (Bankr. D.S.C. 2013) ("As a general proposition, the exemptions provided under South Carolina law are construed liberally in favor of debtors.") (citing *Ex parte Morrow*, 183 S.C. 170, 190 S.E. 506, 508 (1937)); *In re Riley*, 486 B.R. 711, 716 (Bankr. D.S.C. 2013) (providing exemptions under South Carolina law are generally construed liberally in favor of debtors).

Although it was unnecessary to his ruling, the Master concluded Lindgren's actions in contributing to his IRAs were fraudulent because "Lindgren had full knowledge of the fact that he owed First Citizens a substantial amount of money In spite of that fact, Lindgren was aggressively moving money into his IRAs and an education account—all of which might have some limited protections under the Homestead Exemption statutes." The Master concluded this provided evidence of fraudulent intent sufficient to preclude application of the exemption. We disagree.

In determining whether a transaction is tainted by a fraudulent intent to hinder or delay creditors, the court will consider whether certain "badges of fraud" are present.

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.

⁴ This conclusion comports with the general rule in bankruptcy that conversion of an exempt asset to a non-exempt asset is not in and of itself a fraudulent act. See *In re Jones*, 397 B.R. 765, 770 (Bankr. D.S.C. 2008) ("For fraudulent intent to be found, there must appear in evidence some facts or circumstances which are extrinsic to the mere facts of conversion of non-exempt assets into exempt and which are indicative of such fraudulent purpose.") (quoting *In re Addison*, 540 F.3d 805, 814 (8th 2008)).

Coleman v. Daniel, 261 S.C. 198, 209-10, 199 S.E.2d 74, 79-80 (1973) (quoting 37 Am. Jur. 2d *Fraudulent Conveyances* § 10 (1968)).

An inference of fraud may be warranted when multiple badges of fraud are present. *Id.* at 210, 199 S.E.2d at 80. "A badge of fraud creates a rebuttable presumption of intent to defraud." *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999).

We acknowledge several badges of fraud are present in this case. Lindgren did not possess sufficient personal assets to pay the debt,⁵ Lindgren reserved the benefit of the IRA contributions for himself, and he was obviously aware of the outstanding judgment against him at the time the postjudgment contributions were made. However, the contributions were limited in amount, were not secretive in nature, and most tellingly, were in line with his long-standing pattern of investing in his retirement—conduct that is encouraged by the very existence of the exemption. Overall, these factors rebut the presumption of fraudulent intent under the particular facts of this case and preclude a clear and convincing finding of fraudulent intent. Accordingly, we reverse the Master's finding Lindgren's postjudgment contributions to his IRAs were fraudulent conveyances as contemplated by section 15-41-35(A)(13).

II. The Bank's Issue on Appeal—Postjudgment Contributions to 401(k) Plan

The Bank contends the Master erred in finding Lindgren's postjudgment contributions to his 401(k) plan are not subject to execution. We disagree.

Section 15-41-30(A)(14) provides:

⁵ On appeal, Lindgren suggests the record does not support the Master's finding he did not retain sufficient assets to satisfy the judgment. However, this argument is disingenuous. Lindgren primarily utilized LLCs to conduct his business. Unless the Bank attempts to pierce the corporate veil, the assets of the LLCs are not subject to execution for Lindgren's personal liability. 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.

The following real and personal property of a debtor domiciled in this [s]tate is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding:

....

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

"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. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). "We are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words [that] the [l]egislature saw fit not to include." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985).

The plain language of subsection (14) does not provide for any exception to the exemption for 401(k) plans. To impute an exception would require us to read language into the statute that is not there. Furthermore, the legislature knew how to provide for an exception had it desired to do so as evidenced by the "fraudulent conveyance" exception in the preceding subsection. Therefore, the Master's ruling as to the postjudgment 401(k) contributions is affirmed.

CONCLUSION

In sum, we reverse the Master's finding Lindgren's postjudgment contributions to the IRAs are subject to execution and affirm the Master's finding Lindgren's postjudgment contributions to his 401(k) plan are exempt from execution.

AFFRIMED IN PART AND REVERSED IN PART.

SHORT and GEATHERS, JJ., concur.

Petition for Rehearing
of *Respondent-Appellant*

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-in-Suit

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SC Court of Appeals

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 PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondent/Appellant First Citizens Bank (the Bank) petitions the Court for rehearing of case number 2015-002156. The Court heard oral arguments in this matter on October 3, 2017 and issued its published decision, Opinion Number 5532, on January 31, 2018. Respondent/Appellant requests that the Court reverse its positions in the opinion.

The Bank respectfully asserts that the Court overlooked or misapprehended material points of fact or law in its decision. The Bank respectfully avers that the decision will have inadvertent negative outcomes and create imprudent public policy. The Bank respectfully argues that the Court's decision will have the unintended consequence of shielding beyond a fair and just point otherwise executable assets from parties who are entitled by law to be repaid.

The Bank states its arguments with particularity in the accompanying memorandum. The Bank asks that Court vacate its prior opinion and consider the arguments set forth by Respondent/Appellant.

Respectfully submitted,

BRUNER, POWELL, WALL & MULLINS, LLC



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February 12, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-in-Equity

RECEIVED

FEB 12 2018

SC Court of Appeals

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

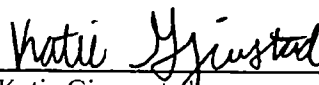
PROOF OF SERVICE

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

APPENDIX 0452

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** Also Admitted in District of Columbia

February 12, 2018

VIA HAND-DELIVERY

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

RECEIVED
FEB 12 2018
SC Court of Appeals

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

Katie Gjennestad

CJC/kg

Enclosures

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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FEB 12 2018

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

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

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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 exploitation¹ 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.

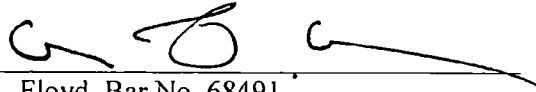
“The primary source of the declaration of the public policy of the State is the General Assembly; the Courts assume this prerogative only in the absence of legislative declaration.” *Citizens’ Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925). In this case, the Court’s opinion is broader 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 hand 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]

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February 12, 2018
Columbia, South Carolina

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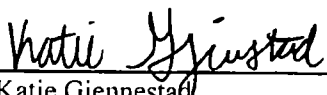
PROOF OF SERVICE

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
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147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412

February 12, 2018
Columbia, SC


Katie Gjennestad

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APPENDIX 0468

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** Also Admitted in District of Columbia

February 12, 2018

VIA HAND-DELIVERY

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

RECEIVED
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With my highest regards, I am,

Sincerely,

Katie Gjennestad

Katie Gjennestad

CJC/kg

Enclosures

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

Denial of Petition for Rehearing

The South Carolina Court of Appeals

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

v.

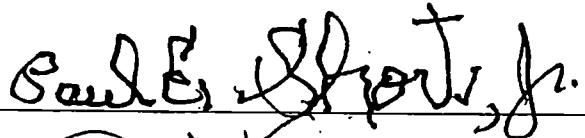
Blue Ox, LLC, and J. Chris Lindgren, Defendants,

Of whom J. Chris Lindgren is the Appellant.

Appellate Case No. 2015-002156

ORDER

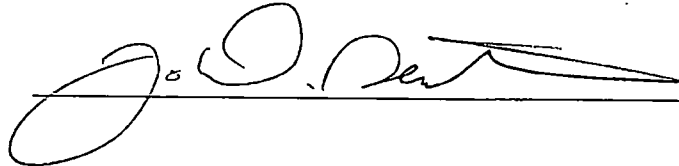
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:
Joey Randell Floyd, Esquire
Keating L. Simons, III, Esquire

FILED

April 26, 2018

Robert Crum Osborne, III, Esquire
Chelsea Jaqueline Clark, Esquire
The Honorable Marvin H. Dukes, III