THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Master-in-Equity

Appellate Case No.: 2018-000879

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.

RESPONDENT'S RETURN TO PETITION FOR CERTIORARI

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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 ("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. [R. pp. 3, 4] The supplemental proceedings hearing was held before the Honorable Marvin H. Dukes, III, master-in-equity for Beaufort County, on September 2, 2014. [R. pp. 97 - 208]

During the hearing Lindgren testified that between the entry of the judgments and the date of the hearing he had made contributions to two individual retirement accounts (IRAs) and that his employer had made contributions to his 401(k) account. The Bank moved that these retirement contributions be set aside as fraudulent transfers. [R. p. 155, lines 4 - 21] Lindgren opposed the motion on the ground that the funds were exempt from creditors' claims. [R. p. 155, line 23 - p. 156, line 16] After receiving memoranda, and arguments and an affidavit from Lindgren Judge Dukes granted the Bank's motion with regard to the IRAs and denied the motion with regard to the 401(k) plan. [R. p. 11] Judge Dukes concluded that the IRA contributions made after entry of the judgments were fraudulent transfers under the Statute of Elizabeth and were therefore excepted from protection under the Homestead Exemption Act. However, he concluded that the contributions to the 401(k) plan were exempt from execution under the Act. Accordingly, Judge Dukes issued an order whereby Fidelity Investments was ordered to pay the Bank $18,500.00 from Lindgren's IRA account and $6,500.00 from Lindgen's Roth IRA. [R. p. 11] Both parties appealed. Judge Dukes later entered a

consent order for stay of execution to preserve the status quo pending the outcome of these appeals. [R. p. 24]

It is undisputed that 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] It is also undisputed that since 1992 and up until 2014, when his employment terminated, 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) plan in every year but one during that period. A table depicting Lindgren's retirement contributions from 2006 to 2014 was submitted by affidavit and is reproduced in the opinion of the Court of Appeals. [App. p. 440]

The Court of Appeals held that a creditor must demonstrate actual intent to defraud on the part of the debtor to set aside post-judgment contributions to an IRA. [App. pp. 444 - 445] The Court of Appeals further held that the evidence, in particular Lindgren's pattern of regular retirement contributions, precludes a clear and convincing finding of fraudulent intent. [App. p. 446] Accordingly, the Court of Appeals reversed Judge Dukes' ruling permitting execution on the IRA accounts. As to the 401(k) plan contributions, the Court of Appeals held that the plain language of subsection (14) of the Homestead Exemption Act, which provides the exemption for 401(k) plans, does not provide for any exception. [App. p. 447] Accordingly, the Court of Appeals affirmed Judge Dukes' ruling denying execution on the 401(k) plan.

It is Lindgren's position that the Court of Appeals correctly decided the case and that review by certiorari is unnecessary. In the event this Court grants review Lindgren respectfully submits the counter-statement of the questions presented for review set forth below.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals correctly determined that a judgment creditor is required to prove the debtor's actual intent to defraud in order to remove the debtor's post-judgment individual retirement account contributions from protection afforded by subsection (13) of the Homestead Exemption Act?

II. Whether the Court of Appeals correctly found that the debtor's post-judgment individual retirement account contributions were not made with fraudulent intent?

III. Whether the Court of Appeals correctly determined that there is no fraudulent conveyance exception to the exemption provided for 401(k) plans in subsection (14) of the Homestead Exemption Act?

ARGUMENT

I. A judgment creditor is required to prove the debtor's actual intent to defraud in order to remove the debtor's post-judgment individual retirement account contributions from protection afforded by subsection (13) of the Homestead Exemption Act.

This is a "conversion case" not a "fraudulent conveyance case." Lindgren has not gifted his property, nor has he conveyed it to someone else for less than valuable consideration. What he has done, with respect to his IRA contributions, is to convert property not exempt from creditor claims, i.e., cash in a checking account, to property that by statute is exempt from creditor claims, i.e., investments in an IRA account. There are a number of reported decisions of cases involving fraudulent conveyances in South Carolina. There are none dealing with the conversion of assets from non-exempt to exempt. Cases from other jurisdictions recognize the principle that as a general matter it is permissible for a debtor to convert assets to take advantage of statutory exemptions. Further, a creditor challenging a particular transaction as fraudulent must show extrinsic evidence of fraud, that is to say, evidence of fraudulent intent beyond the mere fact of the transfer, in order to prevail.

"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). It is against this background and in light of these authorities that this case should be decided.

The outcome of the case insofar as it relates to Lindgren's IRA contributions turns upon the proper interpretation of subsection (13) of the Homestead Exemption Act, which creates an exemption for a debtor's individual retirement accounts, but provides 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 Ann. § 15-41-30(A)(13)(2005). In analyzing whether Lindgren's IRA contributions were fraudulent under the Homestead Exemption Act the Master looked to the Statute of Elizabeth, S.C. Code Ann. § 27-23-10(A)(2007). Lindgren argued, and the Court of Appeals agreed, that this was error.

The Court of Appeals noted that when Lindgren moved his money into his IRA accounts it was still his money. "The money is converted into a protected asset, but *ownership* is not gifted, transferred, granted, or otherwise conveyed to another party." (emphasis in original) Because ownership had not changed the Statute of Elizabeth did not apply. [App. p. 444]

This conclusion about ownership is consistent with the Bank's characterization of the IRA contributions in its brief:

> 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. [App. p. 405]

At oral argument before the Court of Appeals the Bank again argued that what Lindgren had done was move his money from one pocket to another pocket. In an exchange with Judge Short the Bank's counsel agreed that the money was still in the same pants and conceded that "you [referring to the debtor] still have possession" and "its still your money and you can still do whatever you want to do with it." In light of this discussion it's not surprising that the Court of Appeals reached the conclusion it did regarding ownership of the money in question.

In its Petition for Writ of Certiorari the Bank argues that the money in Lindgren's IRA accounts was no longer owned by him but instead was owned by the institution in which the money was deposited, citing *Johnson v. Serv. Mgmt.*, 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995) and *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933). [Petition, pp. 10, 14] This argument was first raised in the Bank's Petition for Rehearing before the Court of Appeals and is not preserved for review. Rule 242(d)(2), SCACR; Toal, Walker and Baker, *Appellate Practice in South*

Carolina, p. 210 (3rd ed. 2016)(preserving an issue for review by the Supreme Court requires: 1) that the issue must have been raised in the initial arguments to the Court of Appeals and 2) the issue must have been raised in the petition for rehearing before the Court of Appeals).

Should this Court consider the argument, the cases relied upon by the Bank on this point do not apply to Lindgren's IRAs. Together they stand for the proposition that a creditor cannot directly levy upon a debtor's bank account but must instead go through supplemental proceedings. In reaching this conclusion the courts noted that the relationship between a general depositor and his bank is one of creditor and debtor. As stated in *Johnson*, "...money deposited, unless put into a special account or specifically designated to be kept separate, becomes the property of the bank and goes into its general account." 319 S.C. at 168, 459 S.E.2d at 902. Lindgren submits that an IRA is a special, separate account. *See Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975)(bank liable for conversion for failure to deliver check representing funds on deposit in plaintiff's Christmas Club account).

Even if ownership of funds in an IRA is deemed to be changed for some purposes, such as requiring a creditor to go through supplemental proceedings, that does not require a conclusion that a transfer or conveyance has occurred for purposes of the Statute of Elizabeth. As noted by the Court of Appeals, analysis under the Statute of Elizabeth is "ill-fitting" here because an IRA contribution "is *never* made for valuable consideration." (emphasis in original) [App. p. 444] In consequence, analysis under the Statute of Elizabeth "would likely render *any* postjudgment contribution to an IRA fraudulent as a matter of course." (emphasis in original) [*Id.*] This is indeed exactly what the Bank contends the law should be: "A proper interpretation of section 15-41-30(A)(13), [is] one which only exempts pre-judgment contributions to IRAs and any earnings accruing on those prejudgment

contributions ..." [App. p. 413] [1]

Because it is not clear from the statute that the legislature intended such a result without consideration of fraudulent intent, and because the exemptions provided by the Homestead Exemption Act are to be construed in favor of the debtor, the Court of Appeals concluded that a creditor must demonstrate actual intent to defraud by the debtor. [App. p. 444] Lindgren submits that the Court of Appeals reached the correct result, but also submits that a requirement for proof of fraudulent intent is grounded in the language of the statute.

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, 2016, IRA account balances up to $1,283,025.00 are exempt from creditors. [2] This

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[1] The Bank's counsel conceded as much at oral argument in an exchange with Judge Konduros.

[2] Notice published by the Judicial Conference of the United States, dated February 22, 2016, at 81 Fed. Reg. 8,748.

number is indicative of the strong public policy in favor of protecting debtors' retirement savings.

These references to federal law in South Carolina's homestead 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 substantive standard for evaluating claims that contributions to individual retirement accounts are fraudulent transfers. Thus, under the amended homestead 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. And as noted above, under federal bankruptcy law, a transfer is fraudulent only if made "with actual intent to hinder, delay, or defraud." 11 U.S. Code §548(a)(1)(A).

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

judge erred in denying discharge to the debtor.

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

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

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

In footnote 4 to its opinion the Court of Appeals observed that its conclusion - requiring the creditor to demonstrate actual intent to defraud - "comports" with the line of cases just discussed, citing *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 Cir. 2008)). [App. p. 445] Lindgren submits that this

Court, should it grant review, should go further than the Court of Appeals and hold that as a matter of statutory construction, extrinsic evidence of actual fraudulent intent is required because subsection (13) of the Homestead Exemption statute expressly incorporates federal bankruptcy law by reference. This approach is not only correct, it also eliminates the need to grapple with thorny issues of "transfer" and "consideration" which must be faced when trying to force the square peg of an IRA contribution into the round hole of the Statute of Elizabeth.

In language that can most charitably be described as excessive, the Bank suggests that the Court of Appeals has enabled debtors to "perpetuat[e] abuses of the financial system." [Petition, p. 19] It's worth noting that all the Court of Appeals has done in its construction of the Homestead Exemption Act is to require the Bank to prove the fraud in the alleged fraudulent conveyance. The Bank's professed worries over potential abuse are misplaced. Courts requiring creditors to demonstrate actual fraudulent intent, and to do so with extrinsic evidence beyond the mere fact of the challenged transaction, have had no difficulty detecting and dealing with debtors who attempted to abuse the system.

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 and 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, 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).

This case presents none of the abusive or excessive features of the cases just discussed. Rather, as the Court of Appeals found, Lindgren's IRA 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." [App. p. 446]

The Court of Appeals ruled correctly in requiring the Bank to prove actual intent to defraud on the part of Lindgren in order to overcome the homestead exemption for his post-judgment IRA contributions.

II. The debtor's post-judgment contributions to his individual retirement accounts in this case were not made with fraudulent intent.

Because this is an appeal from a case heard by a master in equity the Court of Appeals was permitted to determine the facts in accordance with its view of the preponderance of the evidence. *King v. James*, 388 S.C. 16, 24, 694 S.E.2d 35, 39 (Ct. App. 2010). In accordance with this scope of review the Court of Appeals considered the facts of record and found: "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." [App. p. 446] In its Petition the Bank states that it "disputes the finding of the Court of Appeals that there was no actual intent by Respondent to evade his creditors." [Petition, p. 9] However, beyond this cursory statement the Petition includes no question for review presenting an assertion that the Court of Appeals erred in its view of the preponderance of the evidence, nor does the Petition present argument on the point. It is not clear to Lindgren that the Bank has properly raised this issue to this Court under Rule 242(d)(2), SCACR. Or perhaps the Bank has intentionally abandoned its argument that Lindgren acted with actual fraudulent intent, choosing to rely on its argument that proof of fraudulent intent is not required. Lindgren will nevertheless argue the issue and show that the Court of Appeals correctly found that Lindgren's IRA contributions were not made with fraudulent intent.

In determining whether Lindgren's IRA contributions were made with intent to hinder or delay creditors the Court of Appeals looked for the presence of "badges of fraud" in accord with *Coleman v. Daniel*, 261 S.C. 198, 209-10, 199 S.E.2d 74, 79-80 (1973). Lindgren agrees that this is the appropriate analysis and with the conclusion of the Court of Appeals that the facts of the case preclude a clear and convincing finding of fraudulent intent on Lindgren's part. However, should this Court grant the Petition, Lindgren submits additional arguments in support of the ultimate conclusion reached by the Court of Appeals.

As noted above, this is a "conversion case" not a "fraudulent conveyance" case. What Lindgren has done is convert cash, which was not exempt from creditor claims, to IRAs, which are exempt from creditor claims. As argued in the preceding section of this Return, Lindgren submits that this Court should take this occasion to adopt the reasoning and holding of *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir.1926) *quoting Crawford v. Sternberg*, 220 F. 73 (8th Cir.

1915) and other like cases, that: "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" and that 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. In this case there is no such evidence. All the Bank has shown is that Lindgren knowingly made his IRA contributions at a time he was indebted to the Bank.

This Court should also take this occasion to hold that certain of the "badges of fraud" recognized in *Coleman v. Daniel*, 261 S.C. 198, 209-10, 199 S.E.2d 74, 79-80 (1973) are not applicable in conversion cases, such as this one involving IRA contributions, because they are unhelpful in determining the debtor's intent.

The first three and the last two factors listed in *Coleman v. David*: insolvency or indebtedness of the transferor; lack of consideration for the conveyance; relationship between the transferor and the transferee; the reservation of benefit to the transferor; and, the retention by the debtor of possession of the property, will always be present where a debtor makes an IRA contribution.[3] Thus, they are unhelpful in distinguishing a fraudulent contribution from a non-fraudulent one. Further, a finding of fraudulent intent based on these factors would be inconsistent with a rule requiring extrinsic evidence of fraud beyond the mere fact of the transfer. The remaining "badges" identified

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[3] That this is so again 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.

in *Coleman v. David* could shed light on a debtor's intent. But in this case all of these tend to show an absence of fraudulent intent on Lindgren's part.

There was no pending or threatened litigation. 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.

There was no secrecy or concealment. There is no evidence that Lindgren sought to hide 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 IRA contributions did not effect a transfer of the debtor's entire estate. Each of the IRA contributions was in the limited amount permitted by federal income tax law. There is no evidence upon which to base a conclusion that these limited, annual IRA contributions comprised Lindgren's entire estate. There was ample evidence to establish Lindgren's ownership of assets, principally consisting of membership interests in various limited liability companies, but none concerning the extent of any liabilities. At the 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 simply does not support a finding that the debtor was insolvent or that he had transferred his entire estate.

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. 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 a debtor should be legally permitted to put aside money for retirement after a judgment is taken against him. But there is no basis in this record to find as a matter of fact that Lindgren's IRA contributions were causally connected in any way to the Bank's entry of judgments or that by making those contributions Lindgren intended to defraud the Bank.

The Court of Appeals correctly found that Lindgren's post-judgment IRA contributions were not made with fraudulent intent.

III. There is no fraudulent conveyance exception to the exemption provided for 401(k) plans in subsection (14) of the Homestead Exemption Act.

The 401(k) Plan sponsored by Lindgren's former employer is a qualified ERISA retirement plan. [R. p. 275, ¶ 3] As such, it is exempt from creditors' claims under subsection (14) of 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).

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." 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).

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 Act includes 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 in its Petition that the words "or other plan" in subsection (13) were intended by the legislature to encompass all retirement plans, including the ERISA-qualified plans dealt with in the subsequent subsection of the statute. [Petition, p. 18] Lindgren disagrees. 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."

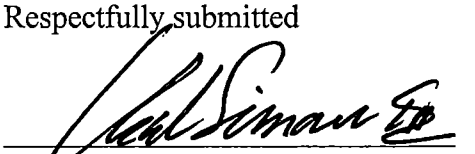
The Bank suggests it would be "very odd if the Legislature intended that creditors could execute upon fraudulent conveyances to an IRA, but not a 401(k)." [Petition, p. 18] Again, Lindgren disagrees. A 401(k) Plan is different from an IRA in ways that explain the difference in treatment established by 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(2005). Thus, 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 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 Court of Appeals correctly determined that: "The plain language of subsection (14) does not provide for any exception to the exemption for 401(k) plans" and that "Lindgren's postjudgment contributions to his 401(k) plan are exempt from execution." [App. p. 447]

CONCLUSION

Respondent respectfully submits that the Court of Appeals correctly decided the case and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted



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June 11, 2018
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 13 2018
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Master-in-Equity

Appellate Case No.: 2018-000879

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

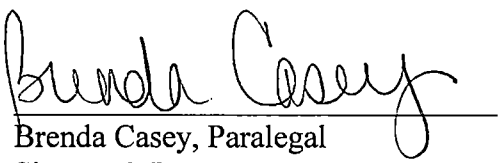
v.

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

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

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Certiorari by depositing a copy of it in the United States Mail, postage prepaid on June 11, 2018, addressed to their attorneys of record, Joey R. Floyd, Esquire and Chelsea J. Clark, Esquire; Bruner, Powell, Wall & Mullins, LLC, PO Box 61110, Columbia, South Carolina 29260, Attorneys for Petitioner.



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June 11, 2018