STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A. No.: 2011-CP-10-400

Jacquelin S. Bennett, Genevieve S. Felder and Kathleen S. Turner, individually, as Co-Trustees and beneficiaries of the Marital Trust and the Qualified Terminable Interest Trust created by the Thomas Stevenson Will, and Jacquelin S. Bennett, and Kathleen S. Turner, as Co-Personal Representatives on behalf of the Estate of Jacquelin K. Stevenson,

Plaintiffs,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison.

Defendants.

Order Granting Defendants Dixon Hughes PLLC and Lynne Kerrison's Motion for Summary Judgment

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This summary judgment motion heard on April 29, 2013. Plaintiffs were represented by counsel, Keith Babcock and Defendants Dixon Hughes PLLC and Lynne Kerrison, by M. Dawes Cooke and Frederick K. Sharpless.

The court has considered the oral arguments of counsel and the arguments and authorities submitted in writing by the parties. The court also reviewed the pleadings, affidavits, depositions, admissions and documents submitted by the parties and of record.

After review and consideration, the court finds there is no genuine issue of material fact and that defendants Lynne Kerrison and Dixon Hughes PLLC are entitled to summary judgment for the following reasons:

PARTIES AND PROCEDURAL HISTORY

This lawsuit was filed on April 24, 2009, by:

(1) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder in their individual capacity;

(2) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder as trustees;

(3) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder as beneficiaries of the Marital and QTIP trusts created by the will of their father, Thomas Stevenson; and

(4) Kathleen Turner and Jacquelin Bennett as personal representatives of the estate of their mother, Jacquelin K. Stevenson.

The defendants were Heyward Carter, Jr., Evans Carter Kunes & Bennett, PA, Douglas Capital Management, Inc., Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., PA, and Lynne L. Kerrison.[1] On December 14, 2011, plaintiffs moved to amend their complaint to include a claim for aiding and abetting a breach of fiduciary duty. The court allowed the amendment by order dated May 17, 2012, and it was filed May 31, 2012. In this lawsuit, the plaintiffs, residual beneficiaries of two trusts created by their father's will, seek to hold defendant-accountants liable for failing to tell them that their brothers, then trustees of the trusts, engaged in self-dealing transactions. Plaintiffs seek damages in excess of six million dollars.

FINDINGS OF FACT

Mr. Thomas Stevenson, Jr. died in June of 1988. Mr. Stevenson's will created two testamentary trusts: the "Jacquelin K. Stevenson Marital Trust" ("marital trust") and a "Qualified Terminable Interest Property Trust" ("QTIP trust") (together the "trusts"). Thomas Stevenson, Jr.'s widow, Jacquelin K. Stevenson, was the sole lifetime beneficiary of both trusts. The residual beneficiaries of the QTIP trust were Mr. Stevenson's children: Thomas Stevenson, III, Daniel Stevenson, II, Kathleen S. Turner,

[1] The claims against Douglas Capital Management were later dismissed.

Jacquelin S. Bennett, and Genevieve S. Felder. Neither trust instrument provided any means by which trust assets could be distributed to any of the residual beneficiaries during Jacquelin K. Stevenson's lifetime. By 1999, the only remaining living co-trustees were Thomas and Daniel Stevenson. (Amend. Compl. ¶ 15.)

On January 4, 2001, Mrs. Stevenson executed a power of attorney in favor of Kathleen Turner and Daniel Stevenson that was not durable. Mrs. Stevenson remained competent until at least February 18, 2003, when she executed a second, durable, power of attorney in favor of Kathleen Turner and Daniel Stevenson. On September 17, 2007, Mrs. Jacquelin K. Stevenson passed away.

In1997 Lynne Kerrison, then with Pratt-Thomas Gumb & Company, PA, a public accounting firm, began preparing tax returns for Mrs. Jacquelin K. Stevenson and for the two subject trusts. (July 13, 2011 Dep. of Lynne Kerrison, 74.) At the time, tax preparation was her only engagement related to the trusts. Pat Neapolitan, an employee of Jacquelin Stevenson who was not associated with the defendants, kept the books and wrote and signed checks for the trusts. (July 13, 2011 Dep. of Lynne Kerrison, 27, 37.) Ms. Neapolitan provided Ms. Kerrison with the information necessary to complete the tax returns. (July 13, 2011 Dep. of Lynne Kerrison, 30.) In 2001, while reviewing information received from Ms. Neapolitan, Ms. Kerrison noticed checks written to Daniel Stevenson from the trusts and contacted Ms. Neapolitan to discuss the checks. (July 13, 2011 Dep. of Lynne Kerrison, 30, 121.) Ms. Kerrison was concerned about how those distributions should be characterized for tax purposes. (July 13, 2011 Dep. of Lynne Kerrison, 116, 122.) Ms. Neapolitan expressed no concern that the checks written were improper and may have characterized the withdrawals as "gifts." (July 13, 2011 Dep. of Lynne Kerrison, 118-123.)

Despite Ms. Neapolitan's assurances, Lynne Kerrison contacted Heyward Carter, Mrs. Stevenson's attorney, (in the fall of 2001) to tell him about the transactions. (July 13, 2011 Dep. of Lynne Kerrison, 45-46, 67; July 14, 2011 Dep. of Heyward Carter, 38.)

On October 23, 2001, Daniel Stevenson, Thomas Stevenson, Heyward Carter and Lynne Kerrison met to discuss the transactions. (July 13, 2011 Dep. of Lynne Kerrison, 146; July 14, 2011 Dep. of Heyward Carter, 46.) Lynne Kerrison had no dealings at all with plaintiff Kathleen Turner about her mother's finances. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158.)

On May 21, 2003, Thomas and Daniel Stevenson met with Kathleen Turner at their mother's Meeting Street home. (November 9, 2011 Dep. of Kathleen Turner, 62.) At that meeting, according to Kathleen Turner, Thomas Stevenson "mumbled" and "looked at a piece of paper." (November 9, 2011 Dep. of Kathleen Turner, 62-72.) Ms. Turner "thought something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, 82.) Tom Stevenson testified that he provided her with a written accounting of the trust assets, including the loans made to him, to Dan, and their businesses, and clearly described it. (February 13, 2013 Dep. of Thomas Stevenson, 77-87.)

In early 2006, Ms. Kerrison again spoke with Heyward Carter about Thomas and Daniel Stevenson's continued withdrawals. (July 13, 2011 Dep. of Lynne Kerrison, 123, 129.) On April 19, 2006, Kathleen Turner met with Thomas Stevenson. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 170.) Thomas Stevenson again informed Kathleen Turner that he and Daniel Stevenson had removed money from the trusts. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 171.) On April 27, 2006, yet another meeting was held where Kathleen Turner received additional information about her brothers' actions as trustees. (November 9, 2011 Dep. of Kathleen Turner, 112-113; July 14, 2011 Dep. of Heyward Carter, 77-78.)

In their complaint and amended complaint, plaintiffs contend that Lynne Kerrison and Dixon Hughes, while providing accounting services to Mrs. Stevenson and the two subject trusts, breached a duty by failing to inform the *plaintiffs* (not Jacquelin

Stevenson) of the alleged "improper self-dealing withdrawals" made by trustees Thomas Stevenson, III and Daniel Stevenson, II. (Amend. Compl. ¶ 24.)[2] Plaintiffs further allege that money "improperly taken from the Trust and Estate" was used by Thomas and Daniel Stevenson to fund other companies that were also clients of Dixon Hughes, creating a conflict of interest. (Amend. Compl. ¶ 25.) From these factual allegations, plaintiffs pursue three legal theories against Lynne Kerrison and Dixon Hughes: professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty.

CONCLUSIONS OF LAW

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C. Rule of Civil Procedure 56(c). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 788, 199 (S.C. Ct. App. 1998).

I. PLAINTIFFS BROUGHT THIS LAWSUIT OUTSIDE THE APPLICABLE STATUTE OF LIMITATIONS

S.C. Code Ann. § 15-3-530(5) provides a three-year statute of limitations for negligence, professional malpractice, and breach of fiduciary duty claims. Pursuant to S.C. Code Ann. § 15-3-535, all actions initiated under S.C. Code Ann. § 15-3-530(5) "must be commenced within three years after the person knew or by exercise of reasonable diligence should have known that he had a cause of action." Under the "discovery rule," the statute of limitations begins to run "when a person could or should have known through the exercise of reasonable diligence, that a cause of action might

[2] The matter against the former trustees, Thomas Stevenson, III, and Daniel Stevenson, II, was disposed of in another action. *Jacquelin S. Bennett, et al v. Thomas Stevenson, et al*, 2008-CP-10-0806. A settlement agreement was reached between the plaintiffs and Thomas Stevenson and a judgment for actual and punitive damages was entered against Daniel Stevenson.

exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or the facts giving rise thereto." *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789, 1998 WL 195907 (Ct. App. 1998). *See also*, *Burgess v. American Cancer Society,* 300 S.C. 182, 386 S.E.2d 798 (S.C. Ct. App. 1989). "The date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (S.C. 1995). "Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (S.C. 1996).

Based on the undisputed evidence, the applicable three-year statute of limitations expired before plaintiffs filed suit. Plaintiffs filed their complaint on April 24, 2009. The undisputed facts show that the statute of limitations ran on plaintiffs' claims on: (1) October 2004, three years after Heyward Carter, Jacquelin Stevenson's attorney, was notified of the withdrawals; alternatively, (2) May 21, 2006, three years after Kathleen Turner initially met with her brothers; alternatively, (3) April 19, 2009, three years after Thomas Stevenson informed Kathleen Turner that he and Daniel Stevenson removed money from the trust; or alternatively, Therefore, this action was instituted after the expiration of the statute of limitations governing all claims alleged by the plaintiffs.

1. October 2004

It is undisputed that Ms, Kerrison told Heyward Carter, attorney for Jacquelin K. Stevenson, of the trustee's withdrawals by October, 23, 2001. "In general, notice to an attorney is notice to his client." *Wardlaw v. B. Troy Oil Mill,* 74 S.C. 368, 54 S.E. 658 (S.C. 1906). Furthermore, the "acts and omissions of an attorney are directly attributable to the client." *Clark v. Clark*, 271 S.C. 21, 23, 244 S.E.2d 743, 744 (S.C. 1928). "Just as a party cannot obtain relief from the consequences of his own neglect, he is without relief when the neglect is that of his attorney." *Id. See also*, *Dorman*, 331

S.C.179, 500 S.E.2d 786 (the question of whether a plaintiff received actual notice of facts giving rise to a cause of action was "irrelevant" where the plaintiff's attorney had knowledge of those facts). *See also Crystal Ice Company of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (S.C. 1979). Plaintiffs argue that the "adverse interest" exception discussed in *Crystal Ice of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979) applies so as to avoid imputation of Mr. Carter's knowledge to Jacquelin K. Stevenson, and attempt to limit the *Dorman* holding to a situation where notice to the attorney is combined with other evidence of knowledge. The court, however, finds the following language from *Dorman* controlling:

> The Dormans maintain, however, that they never received a copy of Buist's letter. Nevertheless, the question of whether they actually received the letter is irrelevant, for knowledge of the information in Buist's letter was imputed to the Dormans through their agent, attorney C.J. Manos. *See Crystal Ice Co. of Columbia, Inc., v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (1979) ("It is well established that a principal is affected with constructive knowledge of all material ***186** facts of which his agent receives notice while acting within the scope of his authority"). *Faulkner v. Millar,* 319 S.C. 216, 460 S.E.2d 378 (1995) (notice to an attorney is notice to the client).

Dorman v. Campbell, 331 S.C. 179, 185-86, 500 S.E.2d 786, 789, 1998 WL 195907 (Ct. App. 1998). The court held that whatever knowledge the attorney acquired was imputed to the clients. In this case, if the information given Carter in October, 2001 was sufficient to place an objectively reasonable person on notice of the fact of injury, then plaintiffs claims are barred.

Plaintiffs concede that Ms. Kerrison informed Mr. Carter of the withdrawals, and of her concern, in October, 2001 (See Plaintiffs brief, p. 5). The facts as to the notice to Mr. Carter are thus undisputed. (See also, July 14, 2011 Dep. of Heyward Carter, 24, 38, 46.) Because Heyward Carter, as the attorney for Jacquelin Stevenson, had actual knowledge of Thomas and Daniel Stevenson's actions, specifically, of their self-dealing

loans or withdrawals of trust funds, the statue of limitations began to run no later than October 23, 2001. The statute of limitations therefore ran October 23, 2004, years before this lawsuit was filed. Plaintiff's claims are barred.

2. May 21, 2006

Even if not barred as of October 23, 2004, the undisputed facts show that Kathleen Turner, at that time attorney-in-fact for Jacquelin K. Stevenson, knew of sufficient facts to place an objectively reasonable person on notice no later than May 21, 2003. As Mrs. Stevenson's co-power of attorney, Kathleen Turner acted as Mrs. Stevenson's agent and fiduciary. *In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 856 (S.C. Ct. App. 2001); *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (S.C. 1979) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority.") According to her own testimony, Kathleen Turner met with Thomas Stevenson on May 21, 2003. (November 9, 2011 Dep. of Kathleen Turner, 62.) At that meeting, according to Kathleen Turner, Thomas Stevenson "mumbled" and "looked at a piece of paper" while Daniel Stevenson "hovered." (November 9, 2011 Dep. of Kathleen Turner, 62-72.) She admitted that she knew "something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, 82.) A paper was actually given to her, which disclosed the loans that had been made. (February 13, 2013 Dep. of Thomas Stevenson, 77-82.)

Plaintiffs argue that Ms. Turner's testimony concerning the meeting, in which she claimed not to have heard or understood what her brothers were telling her, creates an issue of fact that may only be resolved by a jury. The court need not resolve whether any failures in hearing or communication between the Stevenson family members require a trial as to the adequacy of notice to Ms. Turner, because Ms. Turner herself testified that she knew that "something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, 82.) This meeting was therefore sufficient to put Kathleen Turner

on inquiry notice, which had she pursued the issue, would have revealed her brother's alleged wrongdoing. *Burgess v. Am. Cancer Soc., S. Carolina Div., Inc.*, 300 S.C. at 185, 386 S.E.2d 7at 799. Ms. Turner's claimed subjective ignorance of existing facts and circumstances is unavailing; the law provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence," they are charged with the knowledge that they would have acquired. Therefore, even if it had not run on October 23, 2004, the statute of limitations ran no later than May 21, 2006. *Burgess v. Am. Cancer Soc., S. Carolina Div., Inc.*, 300 S.C. at 185, 386 S.E.2d at 799.

3. April 19, 2009

Yet another event occurred more than three years before this action was filed, which Plaintiffs' admitted gave them notice of their brother's alleged wrongful conduct. On April 19, 2006, Kathleen Turner met with Thomas Stevenson. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 170.) During that meeting, Thomas Stevenson informed Kathleen Turner that he and Daniel Stevenson removed money from the trusts. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 170.) As of April 19, 2006, Ms. Turner had actual knowledge that Thomas and Daniel Stevenson had taken money from the trusts and, necessarily, that she had not been previously informed by Lynne Kerrison of these withdrawals. As such, the statute of limitations for any claims based on the removal of money from the trusts by Thomas and Daniel Stevenson ran on April 19, 2009. As previously discussed, Ms. Turner's knowledge is imputed to Mrs. Stevenson and her successors-in-interest.

Plaintiffs seek to contradict the admissions through Ms. Turner's deposition testimony. However, plaintiffs' are bound by their admissions, and having admitted that Ms. Turner met with Tom Stevenson on April 19, 2006, and that he told her that day that he had removed money from the trusts, the issue is removed from consideration by the

trier of fact. See SCRCP 36; *Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 556 S.E.2d 718 (Ct. App.2001); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 647, 579 S.E.2d 151, 155, 2003 WL 1192940 (Ct. App. 2003). If not earlier, the statute of limitations ran on plaintiffs' claims on April 19, 2009, 5 days before this action was filed.

4. Conclusion Regarding Statute of Limitations

Because he was her attorney, Mr. Carter's knowledge is imputed to Ms Stevenson. The knowledge of Kathleen Turner, as Mrs. Stevenson's attorney-in-fact, is also imputed to Mrs. Stevenson. All of plaintiffs' claims stem from alleged losses suffered by Mrs. Stevenson during her lifetime.[3] Because the statute began to run during Mrs. Stevenson's lifetime, the claims of plaintiffs as Mrs. Stevenson's successors-in-interest also began to run at that time. All claims in this action were therefore barred before it was filed.

II. LYNNE KERRISON AND DIXON HUGHES DID NOT BREACH ANY DUTY OWED TO THE PLAINTIFFS

Plaintiffs' Fourth and Fifth causes of action are for professional negligence and for breach of fiduciary duty. "Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Ellis by Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (S.C. 1996). *See also, Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011), *reh'g denied* (Nov. 17, 2011) ("The determination of the existence of a duty is solely the responsibility of the court. Whether the law recognizes a particular duty is an issue of law to be decided by the Court.") "Ordinarily, the common law imposes no

[3] None of the alleged wrongdoing occurred after Mrs. Stevenson's death. Plaintiffs' rights as beneficiaries under the estate and the subject trusts accrued only after Mrs. Stevenson's death. *Bemis*, 170 S.C. 432, 170 S.E. 475, 476 (1933) ("The right to inherit, during the life of an ancestor, does not exist."). Before Mrs. Stevenson's death, plaintiffs held only the inchoate expectation of a future interest in the marital trust, subject to Mrs. Stevenson's use of the trust assets, power of appointment and testamentary wishes. Plaintiffs held no interest in their mother's assets. All of her personal assets and both trusts could have been exhausted for her benefit.

duty on a person to act." *Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 737 S.E.2d 512, 514 (S.C. Ct. App. 2012). "In other words, a person has no duty to protect another from harm inflicted by a third person." *Rayfield v. S. Carolina Dept. of Corr.*, 297 S.C. 95, 100-01, 374 S.E.2d 910, 913 (S.C. Ct. App. 1988). Because neither an accountant-client relationship nor a fiduciary relationship existed between the plaintiffs and defendants with regards to the subject trusts, the Court concludes that Lynne Kerrison and Dixon Hughes had no duty to plaintiffs to disclose any malfeasance perpetrated by the trustees.

1. The Plaintiffs were not Lynne Kerrison's and Dixon Hughes' clients.

The undisputed facts show that plaintiffs were not the clients of Dixon Hughes or Lynne Kerrison for the purposes of performing accounting services for the trusts, and therefore, defendants owed no professional duty to the plaintiffs. "An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Doe v. Greenville County School District*, 375 S.C. 63, 72, 651 S.E.2d 305, 309-310 (S.C. 2007). "Without a duty, there is no actionable negligence." *Id.* South Carolina recognizes that "a public accountant who fails to perform in accordance with the accepted professional standards may be liable in tort to his *client* for his negligence." *Folkens v. Hunt*, 290 S.C. 194, 200, 348 S.E.2d 839, 842-43 (S.C. Ct. App. 1986) (emphasis added).[4] South Carolina law does not mandate that accountants for trusts owe a professional duty to non-client prospective beneficiaries. *C.f. Rydde v. Morris,* 381 S.C. 643, 675 S.E.2d 431 (S.C. 2009) (finding that an attorney had no duty to non-client prospective beneficiaries of a will which was not properly

[4]As this is not a case for negligent misrepresentation, the holding of *ML-Lee Acquisition Fund, L.P.D. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (S.C. 1997), allowing claims by non-clients against accountants does not apply. Other courts have found that negligent misrepresentation is the only appropriate claim for persons who are not clients of an account for professional malpractice. *See e.g. White v. BDO Seidman, LLP*, 249 Ga. App. 668, 670, 549 S.E.2d 490, 492 (2001)("Georgia law, however, provides only one cause of action to persons who are not clients of an accounting firm but who wish to sue the firm and any of its accountants for professional malpractice: an action for negligent misrepresentation.")

executed.) Without evidence of an accountant-client relationship, plaintiffs' claims for professional negligence, as beneficiaries of the trusts, or those on behalf of the estate of Jacquelin Stevenson as a beneficiary of the trusts, must fail because accountants do not owe a duty to non-client trust beneficiaries.

Plaintiffs allege in their complaint that "Defendants Kerrison and Dixon-Hughes served as accountants for the two subject trusts and Jacquelin K. Stevenson." (Amend. Compl. ¶ 42.) Thus, the complaint outlines engagements between Lynne Kerrison and Dixon Hughes, and three separate and distinct clients: (1) trustees of the marital trust; (2) the trustees of the Q-TIP trust and (3) Mrs. Jacquelin K. Stevenson. Plaintiffs have presented no evidence that they, the residual trust beneficiaries, were the clients of Lynne Kerrison or Dixon Hughes in connection with the engagement to perform accounting services for the trusts. In fact, plaintiffs admit that they did not meet with Lynne Kerrison, discuss the trust finances with Lynne Kerrison or make any requests for trust information between 1999 and 2005. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158; Plaintiff Genevieve S. Felder's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, , 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158; Plaintiff Jaquelin S. Bennet's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158.). There was simply no communication, or engagement, sufficient to support even a negligent misrepresentation claim by a non-client.

The only clients to whom Lynne Kerrison and Dixon Hughes provided accounting services related to the trusts were Thomas and Daniel Stevenson, the co-trustees of the trust.

2. There is no duty on an accountant to disclose client information to non-clients.

Because no accountant-client relationship existed between defendants Lynne Kerrison and Dixon Hughes and plaintiffs as beneficiaries of the trusts, plaintiffs' claims for professional negligence must fail. South Carolina law does not require accountants to disclose information about their clients to non-clients. *ML-Lee Acquisition Fund, L.P.D. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (S.C. 1997). In *ML-Lee,* the Supreme Court addressed whether or not an accountant held a duty to disclose an overstatement in inventory to a non-client investor after they learned of it. *Id.* Reversing the Court of Appeals, the South Carolina Supreme Court found that because the law of the case showed that ML-Lee "as not Accountant's client" the accountant did not have a duty to disclose information about its client to a non-client. *Id.*

In *ML-Lee,* the South Carolina Supreme Court also adopted §552 of the Restatement of Torts (1977). *Id.* This limited exception allows non-clients who justifiably rely on information affirmatively communicated by an accountant to recover from an accountant who fails to exercise reasonable care or competence in obtaining or communicating information. *Id.* Though *ML-Lee* created a limited duty of care by accountants to non-clients, the Court expressly limited this duty to cases involving an affirmative negligent misrepresentation. *Id.* The Court specifically refused to create a duty to disclose information to non-clients, holding that § 552 of the Restatement of Torts "imposes no duty to *disclose* information." *Id.*, 327 S.C. at 241, 489 S.E.2d at 472 footnote 3 (emphasis in original).

Likewise, in *Johnson v. Robert E. Lee Academy, Inc.*, 401 S.C. 500, 737 S.E.2d 512 (S.C. Ct. App. 2012), the Court of Appeals declined to extend the liability of an accountant to third-parties in a case not involving negligent misrepresentation. In *Johnson*, an accounting firm was hired by Robert E. Lee Academy after the school

bookkeeper discovered funds missing. *Id.* at 513. Affirming the trial court's grant of summary judgment, the Court of Appeals recognized that an "affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance" and "the common law imposes no duty on a person to act." *Id.* at 514. Because the accountant did not render a service to the plaintiff and his actions were not taken for her protection, no duty was owed to her. *Id.*

The court notes that courts of other states have disallowed actions by beneficiaries against accountants serving the trustee and have refused to hold accountants liable for failing to disclose the malfeasance of trustees to trust beneficiaries. *See Blair v. ING,* 95 Hawaii 247, 268-69, 21 P.3d 452, 473-74 (Hawaii 2001)(An accountant engaged to prepare tax returns owed no duty to trust beneficiaries); *Witzman v. Lehrman, Lehrman & Flome,* 601 N.W.2d 179, (Minn. 1999) (holding that absent evidence of aiding and abetting a breach of trust, an accountant does not owe a duty of care to the beneficiary of the trust); *Gillespie v. Seymour,* 14 Kan. App. 2d 563, 796 P.2d 1060 (Kan. App. 1990) *rev. on other grounds*, *Gillespie v. Seymour,* 250 Kan. 123, 823 P.2d 782 (Kan. 1991) (beneficiaries failed to state a claim based for the negligence against accountants because accountants owed no duty to non-client beneficiaries and had no reason to believe that any services they performed would be relied on by non-client beneficiaries, further finding that no fiduciary relationship existed between accountants and beneficiaries of a trust). *See e.g.*, *Morin v. Trupin*, 711 F. Supp. 97 (S.D.N.Y. 1989) (accountants are not required "to blow the whistle on their clients"). These courts determined that allowing a beneficiary to sue a trustee or personal representative's attorney or accountant could subject those

professionals to impermissible conflicts of interest, as the professional would hold duties to parties with potentially divergent interests.[5]

Recognizing the conflict of interest that such a duty would create, the South Carolina Supreme Court, in *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009) determined "not to impose a duty on an attorney in favor of a prospective beneficiary." *Rydde,* 381 S.C. at 645, 675 S.E.2d at 432-33. In *Rydde*, the prospective beneficiaries of an unprepared will filed a malpractice suit against the decedent's attorney for failing to draft and execute a will. The beneficiaries "filed this legal malpractice action under various theories, all of which were premised on the position of a duty of Morris [the attorney] in favor of the non-client prospective beneficiary." *Rydde,* 381 S.C. at 645, 675 S.E.2d at 432-33. The Supreme Court upheld the trial court's dismissal under rule 12(b)(6) of the South Carolina Rules of Civil Procedure, finding that the beneficiary's complaint failed to state facts sufficient to constitute a cause of action. *Id.* The Court held that a plaintiff in a legal malpractice action must show an attorney-client relationship, because to hold otherwise would create an impermissible conflict of interest between the duties to the client and to the non-client beneficiaries. *Id.*

The policy concerns expressed in *Rydde* regarding conflicts of interests are applicable to accountants as well as attorneys. An accountant for a trust holds a duty to the trustee to perform services in accord with the trustee's authority as the holder of legal title to the property contained in the trust. Without legal title, the trust beneficiaries hold no right under the law to participate in the administration of the trust. The adoption of a joint duty to both the trustees and beneficiaries would create the danger of a conflict of interest. In a case where a trustee is in conflict with a beneficiary, or where one or more of the beneficiaries are conflict with each other, an accountant owing a duty to

[5] The nature of this conflict lies in the legal obligations and interests of a trustee, as opposed to those of a beneficiary. A trustee is in a fiduciary relationship and is obligated to act in the best interest of the beneficiaries *as a whole*, while a beneficiary's only obligation is to his *own interest*.

both the trustee(s) and each beneficiary individually would be in an untenable position. It is this sort of conflict that the *Rydde* court sought to avoid. *Id.*

Implicit in plaintiffs' theory of recovery is the requirement that this court impose a duty on accountants to: (1) review all confidential information received in the preparation of tax returns for indications that client is committing harm to some third-party; (2) identify any and all third parties who the confidential information may indicate are being harmed by the actions of their clients; and (3) disclose the confidential information received from the client to the third parties, or face potential civil liability. No statute or common law in South Carolina supports this proposition. *See also ML-Lee Acquisition Fund, L.P.D. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (S.C. 1997). Not only has such a duty never been recognized, a common-law duty requiring accountants to disclose confidential client information to non-clients would directly conflict with existing federal law.

26 U.S.C. § 7216, prohibits "any person who is engaged in the business of preparing, or providing services in connection with the preparation of" federal tax returns from disclosing any information "furnished to him for, or in connection with, the preparation any such return" and imposes criminal sanctions for a violation of this prohibition. The legislative history of the bill clearly indicates that Congress sought to keep tax preparers from disclosing or making available information received during the preparation of tax returns by providing for criminal penalties. Congress allowed only three exceptions to the general rule. H.R. CONF. REP. 92-708, Amendment no. 69 (1971) ("under the conference agreement, a criminal penalty is provided if a person engaged in the business of preparing returns and declarations (or who does so for compensation), or in providing services in connection with the preparation of returns and declarations, discloses any information furnished to him for the preparation of a return or declaration

or uses any such information other than for the preparation of such return or declaration").[6]

Any common-law duty to disclose taxpayer information to third parties would therefore be preempted by 26 U.S.C. §7216. "If a state statute, administrative rule, or common law cause of action conflicts with a federal statute, it is incontestable that the state law has no efficacy." *Jamison v. Ford Motor Company*, 373 S.C. 248, 264, 644 S.E.2d 755, 763 (S.C. Ct. App. 2007). "Such a conflict arises when either compliance with both laws is impossible or when the state law frustrates the federal purpose and creates an obstacle to the fulfillment of federal objectives." *Professional Samplers, Inc. v. South Carolina Employment Security Commission*, 334 S.C. 392, 397, 513 S.E.2d 374, 377 (S.C. Ct. App. 1999). The disclosures that plaintiffs seek to mandate are exactly the disclosures that 26 U.S.C. § 7216 prohibits.

3. Any duty to disclose was satisfied by the October 21, 2001 notice to Heyward Carter, Mrs. Stevenson's attorney

In arguing for a duty to disclose, plaintiffs offer only the affidavit of their expert witness, George Durant. In his affidavit, Mr. Durant opines: "[T]he standard of care for certified public accountants required Ms. Kerrison and Dixon Hughes, PLLC immediately to give notice of the improprieties to Ms. Turner in her capacity as co-holder of the power-of-attorney for Mrs. Stevenson, the beneficiary of the two trusts." While the specifics of the professional duty owed may be an appropriate subject for expert testimony, whether a duty is owed at all to a given person (not a client) is clearly a question of law for the court:

> The determination of the existence of a duty is solely the responsibility of the court." *Miller,* 329 S.C. 310, 494 S.E.2d 813 (citing *Ellis v. Niles,* 324 S.C. 223, 479 S.E.2d 47

[6] In addition to the three original exceptions to the general rule that tax information may not be disclosed (court orders, preparation of state taxes, and disclosures required by the Internal Revenue Code) in 1989 Congress allowed tax information to be disclosed for the purposes of "quality or peer reviews." 26 U.S.C. § 7216 (b) (3).

> (1996)). Whether the law recognizes a particular duty is an issue of law to be decided by the Court. *Id.* (citing *Carson v. Adgar,* 326 S.C. 212, 486 S.E.2d 3 (1997)). An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Carson.* Ordinarily, the common law imposes no duty ***457** on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care. *Id.* (citing *Russell v. City of Columbia,* 305 S.C. 86, 406 S.E.2d 338 (1991))

Hendricks v. Clemson Univ., 353 S.C. 449, 456-57, 578 S.E.2d 711, 714, 175 Ed. Law Rep. 344, 2002 WL 32060447 (2003). But even if Mr. Durant's testimony as to the existence of a duty to disclose were credited, the court is of the opinion that that duty was satisfied, as a matter of law, through the disclosure to Mr. Carter, also Mrs. Stevenson's agent.

4. No fiduciary duty was owed to Plaintiffs by Dixon Hughes, PLLC or Lynne Kerrison

As their Fifth Cause of Action, Plaintiffs asserted a claim against Ms. Kerrison and Dixon Hughes, PLLC for breach of fiduciary duty. Absent a fiduciary duty there can be no breach. Whether a fiduciary relationship exists between two people is an equitable issue for the judge to decide. *Hendricks v. Clemson Univ.,* 353 S.C. 449, 458-59, 578 S.E.2d 711, 715 (2003) (citing *Island Car Wash, Inc. v. Norris,* 292 S.C. 595, 358 S.E.2d 150 (Ct.App.1987); *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473, 2004 WL 1439151 (Ct. App. 2004)

South Carolina does not recognize a per se fiduciary relationship between accountant and client. In order to determine whether a fiduciary relationship exists, the courts must look to particulars of the relationship between the parties. *Pitts v. Jackson National Life Insurance Company*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (S.C. Ct. App. 2002). A "confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith with due regard to the interest of the one imposing the confidence." *Island*

Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (S.C. Ct. App. 1987). Furthermore:

> The term fiduciary implies that one party is in a superior position to the other and that *such* a position enables him to exercise influence over one who reposes special trust and confidence in him. As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.

Burwell v. South Carolina National Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (S.C. 1986) (internal citations omitted) (no fiduciary duty between bank and depositor). The courts have thus usually "reserved imposition of fiduciary duties to legal or business settings often in which one person entrusts money to another." *Hendricks v. Clemson University*, 353 S.C. 449, 579 S.E.2d 711 (S.C. 2003) (finding no fiduciary relationship between adviser and student).

The undisputed evidence shows that no fiduciary relationship existed between any of the plaintiffs and Lynne Kerrison and Dixon Hughes. Plaintiffs did not meet with Lynne Kerrison during the relevant time frame or discuss the status of the trusts with her. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158; Plaintiff Genevieve S. Felder's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158; Plaintiff Jacquelin S. Bennet's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158.) Lynne Kerrison did not meet Jacquelin Stevenson, but instead communicated with Pat Neapolitan, Heyward Carter, and the trustees regarding preparation of the tax returns for Mrs. Stevenson and the trusts. (July 13, 2011 Dep. of Lynne Kerrison, 30, 40, 46, 110-113.) Ms. Kerrison did not sign checks for Mrs. Stevenson or the trusts. (July 13, 2011 Dep. of Lynne Kerrison, 75.) She had no control over Mrs. Stevenson's assets or

the assets of the estate. Ms. Kerrison, as an accountant, was never in a position to bind the trust or Mrs. Stevenson in any way or to take advantage of the plaintiffs for her own benefit. Plaintiffs offered no evidence from which the court could conclude that a relationship of "trust and confidence," or indeed, any relationship at all, existed between Ms. Kerrison, Dixon Hughes, PLLC and the plaintiffs. From these facts, it is impossible to infer a fiduciary relationship.

5. Conclusion Regarding Duty of Accountant

Plaintiffs' claims for professional negligence and breach of fiduciary duty are predicated on the theory that Lynne Kerrison and Dixon Hughes held an affirmative duty to inform the plaintiffs of the alleged malfeasance of Thomas and Daniel Stevenson, or that a fiduciary relationship existed between plaintiffs and Ms. Kerrison and Dixon Hughes, PLLC. Under *ML-Lee* and *Johnson*, the duties accountants owe to non-client third parties are limited to cases of negligent misrepresentation. There is no evidence of a fiduciary relationship. Because Lynne Kerrison and Dixon Hughes owed no duty to the plaintiffs relating to the administration of the trusts, and alternatively because any duty supported by their expert's testimony was satisfied, their claims for Professional Negligence and Breach of Fiduciary Duty must fail.

III. PLAINTIFFS CANNOT SHOW THAT DEFENDANTS LYNNE KERRISON AND/OR DIXON HUGHES KNOWINGLY PARTICIPATED IN ANY BREACH OF FIDUCIARY DUTY PERPETRATED BY THOMAS AND DANIEL STEVENSON

Plaintiffs Sixth Cause of Action is for aiding and abetting a breach of fiduciary duty. "The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Entm't, Inc. v. Ware,* 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). The gravamen of a claim for aiding and abetting a breach of fiduciary duty is "the defendant's knowing participation in the fiduciary's breach." *Future Group, II v. Nationsbank,* 324 S.C. 89, 99, 478 S.E.2d 45,

50 (1996). Plaintiffs offered no evidence that defendants Lynne Kerrison and Dixon Hughes knowingly participated in the alleged breach by the trustees or were aware of any improper transfers before the time they were made. Plaintiffs sole argument in support of their contention that there was "knowing participation," was to point to deposition testimony that for some period of time the accounting firm or Ms. Kerrison had custody of the trust account checkbook (though no authority to sign the checks) and would provide the trustees with checks that they then used to make improper withdrawals (along with periodically providing checks to the plaintiffs). Beyond showing Ms. Kerrison's and the firm's admitted knowledge of the trustee's actions, plaintiffs offered no evidence of participation in the trustees' breaches of duty, or of any other affirmative act on the part of Ms. Kerrison or the firm. Plaintiffs' argument largely rested on a contention, belied by the notice given to Mr. Carter, that Ms. Kerrison and the firm aided and abetted the breaches through "inaction." (Plaintiffs brief, p. 16).

Absent some evidence of active participation in the alleged malfeasance of the trustees, plaintiffs' claim for aiding and abetting a breach of fiduciary must fail. *See e.g., Gordon v. Busbee*, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (S.C. Ct. App. 2012)

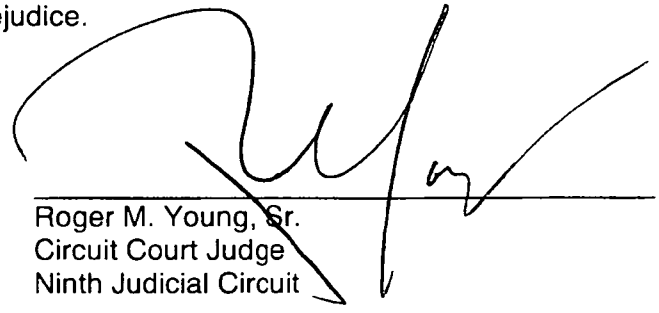
SUMMARY OF CONCLUSIONS OF LAW

Taking the facts in a light most favorable to the plaintiffs, there is no genuine issue of material fact and defendants Lynne Kerrison and Dixon Hughes are entitled to summary judgment. First, plaintiffs brought this lawsuit outside the three-year statute of limitations period. Second, South Carolina has no recognized cause of action for an accountant's failure to disclose information to a non-client, and the creation of a common law duty requiring accountants to disclose confidential information to non-clients contradicts federal law. Defendants Lynne Kerrison and Dixon Hughes therefore owed no duty of care to the beneficiaries in the performing accounting services for the

trusts. Third, plaintiffs provide no evidence that defendants Lynne Kerrison and Dixon Hughes knowingly participated in the trustees' alleged breach.

THEREFORE, it is ordered, adjudged and decreed that:

The defendants Dixon Hughes PLLC and Lynne Kerrison's motion for summary judgment is **GRANTED**, and the claims against Dixon Hughes PLLC and Lynne Kerrison are dismissed with prejudice.



Roger M. Young, Sr.
Circuit Court Judge
Ninth Judicial Circuit

7/3, 2013
Charleston, SC