STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young
Case 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,

Appellants,

v.

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

Defendants,

Of Whom

Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison are

Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

A. Camden Lewis
Keith M. Babcock
James M. Griffin
Ariail E. King
LEWIS, BABCOCK & GRIFFIN, LLP
1513 Hampton Street
Post Office Box 11208

Columbia, SC 29211
Telephone: 803-771-8000
Facsimile: 803-733-3541

ATTORNEYS FOR APPELLANTS

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I. Statute of Limitations

The main premise of Respondents' Brief is that the Accountants and Attorneys telling two thieving brothers that they were wrong somehow triggers the statute of limitations against the unknowing and innocent sisters (Appellants). The admissions of wrongdoing between the Accountants and Attorneys certainly cannot insulate them against suits by innocent victims.

A. Identity of Wrongdoer

Respondents ignore the fact that in South Carolina, a statute of limitations cannot begin to run until a plaintiff can identify the wrongdoer:

> under the [discovery] rule, one must know not only that he has been injured but also "what or who proximately caused that injury."

Rogers v. Efird, 284 S.C. 377, 378, 325 S.E.2d 541, 542 (1985). The injury alone is not sufficient; in a professional negligence action, the statute is only triggered by notice of a cause of action against another person. *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). As the court in *True* clearly stated: "knowledge of the injury alone does not, *a fortiorari*, give rise a suspicion of impropriety by [a professional]."[1] There is no indication here that the innocent sisters knew that the Accountant Kerrison and Dixon Hughes ("Accountants") were wrongdoers until the meeting of April 27, 2006, in which the Accountants and Attorneys[2] informed Kathleen Turner ("Kathleen") that Tom and Dan Stevenson ("Tom and Dan") had been stealing money

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[1]In that case, the statute of limitations did not start to run until client discovered that her attorney had failed to disclose a conflict of interest.

[2]The term "Attorneys" refers to Heyward Carter and his law firm.

from the trusts. This basic premise set forth by South Carolina has been recognized by other courts. See, e.g., *Spitler v. Dean*, 436 N.W.2d 308 (Wis. 1989)(defendant must be identified before cause of action accrues and statute of limitations is triggered); *Tarnowsky v. Socci*, 816 A.2d 728 (Conn. App. 2003)((knowledge of the identity of a tortfeasor is an essential element of a claim for negligently inflicted injuries); *Meyers v. Larreategui*, 509 N.E.2d 971 (Oh. App. 1986)(cause of action for medical practice does not accrue until patient knows the identity of the physician that harmed him).

The first time Appellants could have known that they might have a claim against the Accountants and the Attorneys was at the April 27, 2006 meeting, in which the Accountants and Attorneys advised Kathleen, the innocent sister (and the attorney-in-fact for her mother, Mrs. Stevenson) that Tom and Dan (the crooked brothers) had been stealing from the trusts. In other words, the cause of action against the Accountants and the Attorneys could not have accrued until that date.

Respondents argue that the statute began to run on one of three different dates.[3] They argue that the statute began to run on May 21, 2003, when Kathleen had a meeting with Tom and Dan at their mother's house and Tom allegedly informed Kathleen that he and Dan had taken "loans" from the trusts. (Resp. Brief, p. 5). According to Kathleen's testimony, Tom mumbled for a few minutes, but did not explain that he and Dan had been "borrowing" money from the trusts, and Dan said nothing at all. (R.p.__,Turner Dep., p. 64-67). By the testimony, neither the Defendant Accountants nor the Attorneys were even discussed at this meeting. Thus, even if at

[3]Two of the dates -- May 21, 2003 and April 19, 2006 -- are addressed in this section. The third date-- October 23, 2001 -- is addressed in Section I.C.

this May 2003 meeting Tom had told Kathleen that he and Dan had "borrowed" money from the trusts, there is no evidence that the Accountants and Attorneys were discussed at the meeting. The statute cannot begin to run until Appellants knew who had caused their injuries. *Rogers v. Efird, supra.* At the time of the meeting, there was no way to know of *any* professional's involvement in the "borrowing" or thefts from the trusts.

Respondents next argue that the statute began running on April 19, 2006, when Kathleen toured Tom's business. The events of this day are disputed and are not appropriate for summary judgment. Kathleen testified in detail about this day and explained that Tom gave her a tour of his business, but expressly denied that he ever told her of loans or monies "borrowed" from the trusts to invest in the business. (R.p. __, Turner Dep. 97:24 -98:9). Neither the Accountants nor the Attorneys were present at this meeting, and there was no discussion about them. Just as with the May 2003 meeting, there was no way for Kathleen to have identified the Accountants or the Attorneys as wrongdoers. Thus, the statute of limitations could not have been triggered against either Professional.

B. Misstatement of Facts

Throughout their brief, Accountants misstate the facts in an attempt to create an early start to the statute of limitations. For example, with regard to the May 21, 2003 meeting between Kathleen and Tom, the Accountants assert that, according to Tom's "uncontested testimony," he provided Kathleen with a written accounting of the trusts, including the monies he and Dan had taken. (Resp. Brief, p. 5). Yet Kathleen directly contradicted Tom, stating that while Tom had a piece of paper in his lap "I could not really see it." (R.p. __Turner Dep., Vol. 1., 67:5-20). She followed up by explaining, "he didn't show it to me and I didn't see it and he didn't leave it with

me." (R.p. __, Turner Dep. 76:17-23). Clearly, Tom's testimony is not "uncontested."

The Accountants also mischaracterize the facts in trying to refute that Kathleen's acknowledgment that she thought something was wrong with Tom indicated her worry about her brother personally. The Accountants claim that there is no evidence in the record that shows Kathleen was worried about her brother's well being or personal life. (Resp. Brief p. 14). However, Kathleen testified that "I didn't know if he had something to say, **something very grave about his family**...." (R.p. __Turner Dep. 77:12-13) (emphasis added). In other words, while Kathleen recognized something was wrong with Tom, she thought it might be a personal or family issue. This is, at the least, a factual issue that is not appropriate at summary judgment as Appellants are entitled to all inferences. See, *Medical Univ. of South Carolina v. Arnaud,* 360 S.C. 615, 602 S.E.2d 747 (2004)(In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party).

C. No imputation

Respondents also claim that on October 23, 2001, Accountant Kerrison told Attorney Carter (Mrs. Stevenson's lawyer) about the thefts by Tom and Dan. Respondents argue that since Carter was Mrs. Stevenson's attorney, his knowledge was attributed to her on that date, starting the statute of limitations. However, this case does not involve the imputation principle. When agents and third parties collude against the principal, the principal should not be charged with notice of the agent's actions. See, *Official Committee of Unsecured Creditors v. PricewaterhouseCoopers, LLP*, 607 F.3d 346 (3rd Cir. 2010) (Collusion between and agent and auditor makes imputation of the agent's conduct to its principal unavailable because the auditor

is aware that the agent will withhold information from the principal). As another court noted:

> Under fundamental principles of agency law, the agency relationship between an attorney and his client can be severed, with the result that the client is not constructively charged with his attorney's knowledge or actions, where counsel acts adversely to his client's interest or commits a serious breach of loyalty to his client.

Cadet v. Florida Dep't of Corrections, 12-14518, 2014 WL 341050 (11th Cir. Jan. 31, 2014).[4] In other words, when one participant in the cover up (Kerrison) tells another participant in the cover up (Carter) about the thefts and the two then tell the crooked parties (Tom and Dan) to stop stealing, they are acting adversely to the client's interest and there is no imputation.

In this case, Kerrison and Carter chose to protect the thieves, Tom and Dan, and hide the information from Mrs. Stevenson and Kathleen. Thus, Carter's knowledge cannot be imputed to either Mrs. Stevenson or Kathleen. Kerrison and Carter, instead of informing Mrs. Stevenson or Kathleen, met privately with Tom and Dan--the ones stealing the money-- to tell them to stop taking money from the trusts. (Kerrison Dep. 145:25-146:3; Carter dep. (9/24/08) 102:10-16). To further the cover up, they prepared promissory notes for Tom and Dan, in an attempt to "legitimize" the withdrawals as loans. (R.p. __, Kerrison Dep. 129:11-22; Carter Dep. (9/28/08) Ex. 33).

Furthermore, the Accountants had conflicts of interest and picked one client over another. As they admitted in the Answer to the Amended Complaint, the Accountants performed accounting services for Mrs. Stevenson (R.p. _, Ans. to Am Cmpt.) and prepared tax returns for Tom, Dan and Kathleen. (R.p. _, Kerrison Dep. 102:1- 105:18). The Accountants then chose to

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[4]There is no doubt that Carter committed a serious breach of loyalty to his client when he failed to tell Mrs. Stevenson or Kathleen of Tom and Dan's actions and instead, took action to protect Tom and Dan.

protect one set of clients (Tom and Dan) over the other their clients (Mrs. Stevenson and Kathleen) in cooperating with the Attorneys to hide the thefts and later preparing promissory notes to legitimize the thefts as loans.[5] Because of the conflicts of interest of both the Accountants and the Attorneys, and their secret, collusive conduct, the statute of limitations could not have begun to run on October 23, 2001.

II. Duty to Appellants

The Accountants argue that Appellants were not their clients[6] and that there is no duty owed to non-clients. However, Kathleen held Power of Attorney for Mrs. Stevenson since 2001. As they have throughout this matter, Accountants ignore the significance of this Power of Attorney. There is no dispute that Mrs. Stevenson was a client of the Accountants. The Accountants admitted in their Answer that they were accountants for Mrs. Stevenson and owed her a duty of care. Appellants alleged that:

> Defendants Kerrison and Dixon-Hughes served as accountants for the two subject Trusts and Jacquelin K. Stevenson.

(R.p.__ Am Cmpt. ¶42). The answer to that paragraph was "Admitted."[7] (R.p., Answer to Am.

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[5]The Accountants are disingenuous in claiming that Kerrison acknowledged that Mrs. Stevenson's bookkeeper, Pat Neopolitan, referred to the thefts as gifts. When asked if Pat referred to the withdrawals as "gifts", Kerrison replied "I don't remember." (R.p. _, Kerrison Dep. 121:21-122:3). In fact, the question was posed in several different ways and each time, Kerrison did not remember Pat using the word "gift" or "loan" to describe the withdrawals. (R.p. _, Kerrison Dep. 121:6-122:15).

[6]The Accountants assert that they only provided services to Tom and Dan, and Mrs. Stevenson (Resp. Brief, p. 20). However, Kerrison acknowledged that she had also performed services for Kathleen Turner for several years. Kerrison Dep. 104:2-105:4.

[7]The Accountant relationship with Mrs. Stevenson is even expressly acknowledged in their Brief. (Resp. Brief, p. 19).

Cmpt.). This duty of care extends to Kathleen who, as the holder of the power of attorney, stands in her mother's shoes. *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. App. 2000)("It has been said that *an attorney in fact is essentially an alter ego of the principal....*"); *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008)(a person acting as an attorney-in-fact under a POA is an agent, one who stands in the shoes of a principal).

The Accountants mistakenly rely on *Johnson v. Robert E. Lee, Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012), for the argument that the liability of accountants cannot be extended to a third party. In that case, the court refused to allow a fired bookkeeper to pursue a claim against the accounting firm hired to assist the bookkeeper's employer and the police in an investigation of missing money. The court found that the accountant was hired to assist the police in their investigation of the bookkeeper and then held that an accountant's duty did not extend to a third party absent a "statute, contract, relationship, status, property interest, **or some other special circumstance.**" *Id.*, 401 S.C. at 504, 737 S.E.2d at 514 (emphasis added). The court noted that the accountant's conduct was not designed to protect the bookkeeper.

In this case, there are "special circumstances" that would extend the Accountant's duty. Mrs. Stevenson had severe health problems and Kathleen served as her power of attorney, and stood in the shoes of her mother. In addition, Mrs. Stevenson was a client of the Accountants and the beneficiary of the trusts for which the Accountants prepared tax returns. Thus, their work was undertaken to protect Mrs. Stevenson, unlike the plaintiff in *Johnson* whose conduct was actually being investigated by the accountant.

Similarly, the other case upon which the Accountants primarily rely provides no support for their argument. The Accountants argue the holding in *Rydde v. Morris*, 381 S.C. 643, 675

S.E.2d 431 (2009) (a legal malpractice case) is applicable to accountants and supports their argument that their can be no duty to both the trustees and the beneficiaries without a conflict of interest.[8] It is unquestioned that there was a conflict of interest in the present case. Kathleen was the attorney-in-fact for her mother--the Accountants' client-- and had been since 2001. Thus, the duties the Accountants admittedly owed Mrs. Stevenson extend to Kathleen. By advising Tom and Dan on the cover-up, the Accountants undertook duties to the brothers creating the conflict of interest with their duties to Mrs. Stevenson and Kathleen. Under the ethics rules cited by the Accountants themselves, it is obvious they had an impermissible conflict of interest in representing the trusts/trustees and Mrs. Stevenson:

> In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

Code of Conduct ET 102.1(Am. Inst. of Certified Pub. Accountants 1988) (cited on p. 23 of Resp. Brief). Accountant Kerrison certainly did not act with integrity when she chose Tom and Dan over Mrs. Stevenson and Kathleen. Accountant Kerrison hid the facts from Mrs. Stevenson and Kathleen and cooperated with Attorney Carter in helping Tom and Dan cover up their thefts and in preparing promissory notes that attempted to legitimize the thefts as loans. Clearly, the Accountants had a duty to tell at least Mrs. Stevenson and Kathleen of the thefts. They breached

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[8]The *Rydde* court simply held that prospective beneficiaries could not sue an attorney for his failure to effect the drafting and execution of will prior to the decedent's death. Here, Appellants are much more than "prospective beneficiaries." They became vested remainder beneficiaries in the trusts upon their father's death in 1988, even if Mrs. Stevenson could spend corpus. 28 Am. Jur. 2d Estates § 249 (where creator of trust gives to another the power to prevent the remainderman from enjoying the property by consuming or diverting it, the remainder is **vested** subject to defeasance) (emphasis added).

this duty.[9]

III. Knowing Participation

The Accountants attempt to minimize their knowing participation in the thefts by Tom and Dan. The Accountants acknowledge that they had possession of the checkbook and that one of their employees supplied checks to Tom or Dan for the money they stole. The Accountants claim that since Tom and Dan could have simply gone to the bank to withdraw funds or request additional checks, there was no "causal link" between the Accountants' custody of the checkbook and Tom and Dan's actions. However, what Tom or Dan could have done (without the Accountants' knowledge and participation) is irrelevant. The facts are simple and the Accountants' participation obvious:

1. The Accountants met with the Attorneys and the thieves, Tom and Dan, to tell them to stop stealing rather than advise Mrs. Stevenson and Kathleen of the thefts; (R.p. __Kerrison Dep. 145:25-146:3; Carter dep. (9/24/08) 102:10-16).

2. The Accountants and Attorneys drafted a letter to clearly inform Appellants about

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[9]The Accountants also attempt to rely on 26 U.S.C. § 7216, for the argument that they were not permitted to disclose Tom and Dan's withdrawals to Mrs. Stevenson (or Kathleen). However, disclosure would not be barred under this law because Mrs. Stevenson falls under the "related taxpayer" exception that was fully discussed in Appellant's initial brief. While the Accountants argue that this exception only applies where the disclosure is needed for the related taxpayer's tax preparation, they ignore the fact that since Mrs. Stevenson was the beneficiary of the trusts, any alleged "loans" or "gifts" from the trusts to Tom and Dan were relevant to her tax preparation. Thus, she does fall within the "related taxpayer" exception and the Accountants were obligated to tell her (or Kathleen), about the monies taken by Tom and Dan. If the Accountant's interpretation of Section 7216 (and related regulations) is accepted, it would prevent an accountant from disclosing to a beneficiary a trustee's breach of fiduciary duties under any circumstances. Thus, an accountant would be forced to avoid her ethical duties and would be aiding and abetting the breaching trustee. That cannot be the congressional purpose and intent behind 7216, and indeed is likely one reason for the "related taxpayer" exception.

the improper withdrawals, but kept the letter a secret at Tom and Dan's request. (R.p. __, Carter Depo. (9/24/08) 139:3-15; Ex. 40, 42).

3. The Accountants cooperated with the Attorneys in drafting Promissory Notes that attempted to legitimize the thefts as loans; (R.p. __, Kerrison Dep. 129:11-22; Carter Dep. (9/28/08) Ex. 33).

4. The Accountants had possession of the checkbook and wrote checks to Tom and Dan upon request. (R.p. __, Kerrison Dep. 34:23-25; 75:6-16; Kerrison 2009 Dep. 12:6-20).

Furthermore, at the time that the Accountants were issuing these checks, one of the partners in the accounting firm, Harold Pratt-Thomas, had invested in one of Dan's businesses which was being funded by the stolen trust funds. (R.p. __, Kerrison Dep. 107:12-17). Thus, the Accountants knowingly allowed Dan to take trust funds to invest in his business, which also furthered the interest of Pratt-Thomas. The Accountants' actions clearly constituted knowing participation. See, e.g., *Smith v. Smitty Mcgee's, Inc.*, 24 Del. J. Corp. L. 297, 306 (1998) (wife/manager who wrote checks associated with husband's breach of fiduciary duties was evidence of knowing participation). The Accountants' attempt now to avoid responsibility by claiming that Tom and Dan could have stolen the money without the Accountants' assistance must be rejected.

IV. Damages

Incredibly, the Accountants take the position that because Mrs. Stevenson could have spent all of the trust funds, it was okay to allow Tom and Dan to steal from her. Respondents claim, as an additional sustaining ground, that Appellants had no legal right to the trusts' assets

because Mrs. Stevenson could have used the entire corpus of both trusts for her own benefit. Respondents then conclude that Appellants were not damaged and thus, judgment as matter of law was appropriate.

In support of this argument, Respondents cite *Church v. McGee*, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011), for the proposition that a claim for the object of a bequest arises when the legatee has a legal right to it.[10] However, the *Church* case does not apply here as it involved an estate with insufficient funds and the priority of creditors. The instant case is about trustees stealing from trusts and the Accountants and Attorneys hiding and furthering the thefts; thus, an affected beneficiary has suit for damages. See, *Fortune v. First Union Nat. Bank*, 371 S.E.2d 483 (N.C. App. 1988) (Trust beneficiary could maintain action in his individual capacity against trustee for damages, due to trustee's mismanagement of property trustee held in his fiduciary capacity); *Alioto v. United States,* 593 F.Supp. 1402, 1412 (N.D.Cal.1984) (in action where beneficiary has been damaged by trustee and third party, beneficiary may bring action against third party separately);); *Booth v. Security Mut. Life Ins. Co.,* 155 F.Supp. 755, 761 (D.N.J.1957) (where trustee transfers property in breach of trust with assistance of third parties, third parties are primarily liable to the beneficiary, rather than to the trustee; the right of the beneficiary against the third party is a direct right not derived through the trustee) .

Respondents ignore the fact that Kathleen, as holder of the Power of Attorney, stands in the shoes of her mother, whose estate was substantially reduced by the thefts. *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008). Furthermore, all three Appellants were appointed

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[10]Since Appellants' interests in the trusts were vested in 1988 upon the death of their father, they thus had a vested right in the trusts, unlike the plaintiff in *Church v. McGee*.

as successor trustees and there is no question that the trusts have been damaged, which allows the successor trustees to pursue this litigation. South Carolina law explicitly addresses the power of a successor trustee:

> Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee.

S.C. Code § 62-7-812. The trusts obviously have been injured as they have been depleted by the improper withdrawals. Appellants, as successor trustees, must act on behalf of the trusts to enforce the claims of the trusts for this depletion. "A substitute or successor trustee when appointed steps into the place of the former trustee." 76 Am. Jur. 2d Trusts § 237; *Boone v. Wachovia Bank & Trust Co.*, 163 F.2d 809, 173 A.L.R. 1285 (App. D.C. 1947). *See also, e.g., Pierce v. Lyman*, 3 Cal.Rptr.2d 236 (Cal. App. 1991)(A beneficiary/successor trustee could sue attorney for acting in furtherance of his or her own financial gain or making express misrepresentations to the beneficiaries.)

The actions of the Accountants and Attorneys in furthering Tom and Dan's thefts from trusts in which Appellants had a vested interest has caused resulting damages to Appellants. Expert George DuRant clearly opined that as result of the Accountants' breaches of fiduciary duties, Appellants have suffered substantial damages. DuRant Jan. 10, 2012 Report. Mr. DuRant considered the monies taken by Tom and Dan and created an analysis in which the monies plus interest were paid and converted to cash. DuRant Dep. 53:2-13. Mr. DuRant's analysis demonstrates the amount the Appellants would have received versus the amount they will receive under the Proposal for Distribution dated August 17, 2011. DuRant Dep. 53:14-19.

Furthermore, the extent of Appellants' damages is an issue of fact, and the Accountants'

argument does not provide an additional sustaining ground in favor of summary judgment.

V. Survival of Claims

Respondents argue that the claims against them are based on fraud and deceit and, relying on *Ferguson v. Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94 (2002) argue that the claims cannot survive Mrs. Stevenson's death. However, *Ferguson* does not apply to this case.

In the *Ferguson* case, the plaintiff sued the dealership claiming that the assessment of a closing fee and failure to disclose it were unfair acts. The Court held that:

> At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices.

Id., 349 S.C. at 565. However, in this case, the claims against the Accountants are based on the professional negligence, breach of fiduciary duties, and aiding and abetting the breach of fiduciary duties that allowed Tom and Dan to violate their duties as Trustees. Tom and Dan's duties are rooted in statute:

> Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article.

S.C. Code § 62-7-801. Furthermore, "[a] trustee shall administer the trust solely in the interests of the beneficiaries." S.C. Code § 62-7-802(a). In addition:

> A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust of the material facts necessary to protect their interests.

S.C. Code § 62-7-813.[11] Tom and Dan were in breach of these statutory duties and were assisted in those breaches by the Accountants and the Attorneys. Thus, the claims against the Accountants are not based on fraud but on their negligence, breach of fiduciary duties, and aiding and betting Tom and Dan's breaches.[12] The actions of the Accountants are clearly within the ambit of professional negligence and breach of fiduciary duty. As a result, Plaintiffs' claims survive the death of Mrs. Stevenson under S.C. Code § 15-5-90.[13]

More over, our courts allow evidence of fraudulent acts to support surviving claims. In *Brailsford v. Brailsford*, 380 S.C. 443, 450, 669 S.E.2d 342, 345-46 (S.C. Ct. App. 2008), the Court of Appeals rejected the argument that the fraud exception to survivability prevented a court from considering evidence of fraud on any other type of claim:

> We, however, do not read *Ferguson* to go so far as to deny the admission of evidence of fraudulent conduct to support an otherwise surviving claim.... to the extent the Order may be interpreted to suggest that causes of action which do survive William cannot be supported by evidence of the defendant's fraudulent and deceitful conduct, the Order is hereby modified.

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[11]Similarly, personal representatives are fiduciaries who must observe the standards of care applicable to trustees and must act "for the best interest of the successors of the estate." S.C. Code § 62-7-703.

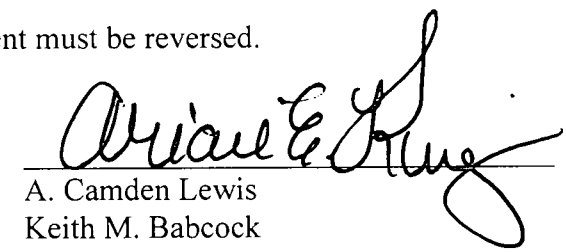
[12]The Accountants claim that survivability is crucial to a fraud case because the state of mind of the victim is an issue. Here, however, the claims in this case are rooted in negligence and breach of fiduciary duty. The state of mind of the victim (Mrs. Stevenson) is not an issue because whether a person breached a duty of care is an objective standard, and Plaintiffs' expert George DuRant has provided an opinion that the duty of care was breached. Furthermore, the Accountants do not deny that they did not disclose the withdrawals to Mrs. Stevenson or Kathleen as her attorney-in-fact. Thus, Mrs. Stevenson's state of mind is irrelevant in this case.

[13]S.C. Code 15-5-90 states: "Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding."

Id. Thus, any fraudulent conduct by Tom and/or Dan's can be considered evidence in determining Appellant's surviving claims of professional negligence and breach of fiduciary duty against the Accountants.

CONCLUSION

The Accountants have misstated facts, ignored Appellants' arguments, and cited inapplicable cases in an attempt to avoid responsibility for their actions -- actions which resulted in the loss of millions of dollars to Appellants. As set forth more fully in Appellants' Brief and herein, the lower court's grant of summary judgment must be reversed.



A. Camden Lewis
Keith M. Babcock
James M. Griffin
Ariail E. King
LEWIS, BABCOCK & GRIFFIN, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
Telephone: 803-771-8000
Facsimile: 803-733-3541

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PROOF OF SERVICE

I, Kathy A. Collins, secretary for the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served the **Initial Reply Brief of Appellants** upon opposing counsel, by mailing

a copy of same, postage prepaid and return address clearly indicated on said envelope, to said opposing counsel at the following addresses:

Frederick K. Sharpless, Esquire
Sharpless & Stavola, P.A.
Post Office Box 22106
Greensboro, North Carolina 27420

M. Dawes Cooke, Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
Post Office Drawer H
Charleston, South Carolina 29402

Kathy A. Collins

Columbia, South Carolina

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