THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Roger M. Young
Case No. 2011-CP-400

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SC Court of Appeals

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.; 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.

FINAL BRIEF OF THE RESPONDENTS DIXON HUGHES AND LYNNE L. KERRISON

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COUNTERSTATEMENT OF THE CASE

A. 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 C. Stevenson, Jr.; and

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

(R. p. 0031).

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] (Id.) 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. (R. p. 0088-0096). In this lawsuit, the Plaintiffs, residual beneficiaries of two trusts created by their father's will, seek to hold defendant-accountants liable for telling their mother, but not them, that their brothers, while trustees of the two trusts, engaged in self-dealing transactions. Plaintiffs seek damages in excess of six million dollars.

Following discovery, all Defendants moved for summary judgment. (R. p. 0108-0110). Claims against the attorney, Heyward Carter, Jr., were resolved. (R. p. 1855, lines 10-11). Following hearing on the motions, Plaintiffs moved to withdraw a response

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

to a Request for Admission. (R. pp. 0453-60). An order was entered on July 3, 2013, granting Ms. Kerrison's and Dixon Hughes' motion for summary judgment. (R. pp. 0001-0022). A later motion to alter or amend the order was denied, as was the motion to withdraw the Request for Admission. (R. pp. 0027-0030). This appeal followed.

B. FACTUAL BACKGROUND

1. The Trusts and Parties

This case arises out of a family dispute, in which the children of Thomas C. Stevenson, Jr., and Jacquelin K. Stevenson have, "to the last syllable of recorded time," "followed the way to dusty death," through a series of lawsuits against each other and third parties.

Mr. Thomas Stevenson, Jr., Plaintiffs' father, died in June of 1988. Mr. Stevenson's will (Amended Complaint, R. pp. 0090-0091, ¶¶ 11-16; Answer to Amended Complaint, R. p. 0099, ¶¶ 11-16; Turner Deposition, Exhibit 5, Will, R. pp. 0843-0867) 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. (R. pp. 0852-0853). The residual beneficiaries of the QTIP trust were Mr. Stevenson's children: Thomas C. Stevenson, III, Daniel R. Stevenson, II, Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder. (Amended Complaint, R. p. 0091, ¶ 14; Answer to Amended Complaint, R. p. 0099, ¶ 14). The residual beneficiaries of the marital trust were the same people, but subject to a power of appointment held by Jacquelin K. Stevenson. 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 of both trusts were Plaintiffs' brothers, Thomas and Daniel

Stevenson (the "trustees"). (Amended Complaint, R. p. 0091, ¶ 15; Answer to Amended Complaint, R. p. 0099, ¶ 15.)

On January 4, 2001, Jacquelin Stevenson executed a non-durable power of attorney in favor of Kathleen Turner and Daniel Stevenson. (Turner Deposition, Exh. 3, Power of Attorney dated 1/4/01, R. pp. 0835-0842). She signed a second, durable power of attorney on February 18, 2003, in favor of Kathleen Turner and Daniel Stevenson. (Turner Deposition Exh. 6, Power of Attorney dated 2/18/03, R. pp. 0868-0875). On September 17, 2007, Jacquelin Stevenson died. (Turner Deposition, Exh. 22, R. p. 0876). Within four months of Ms. Stevenson's death, the Plaintiffs, Jacquelin S. Bennett, Genevieve S. Felder and Kathleen S. Turner, brought suit against their brothers, Thomas C. Stevenson, III, and Daniel R. Stevenson, II, (February 13, 2013, Dep. of Thomas C. Stevenson, R. p. 1687, lines 19-24) beginning the legal tale that continues "in this pretty pace" to the present day.[2]

Defendant Lynne Kerrison worked with Pratt-Thomas Gumb & Co., PA, ("Pratt-Thomas Gumb") a public accounting firm, in 1997. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0978, lines 4-10). In 1997, she began preparing tax returns for Mrs. Jacquelin Stevenson and for the trustees of the two trusts. (July 13, 2011, Dep. of Lynne Kerrison, R. p. 0956, lines 22-25 – p. 0957, lines 1-5). Preparing tax returns was her only engagement for the trustees. An employee of the Stevenson family, Pat Neapolitan, kept the trusts' records and wrote and signed all of the checks for the trusts. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0997, lines 19-24). Ms. Neapolitan provided Ms. Kerrison with the information needed to complete the tax returns. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0912, lines 7-10). As long ago as 2001, Ms. Kerrison was concerned

[2] The lawsuit against the trustees resulted in a settlement with Thomas C. Stevenson, III, and a judgment against Daniel R. Stevenson, II. Plaintiffs recovered substantial money and property, and caused the trustees to forfeit any interest in either trust or their mother's estate. (Responses 45-52 to Requests for Admission to Turner, (R. pp. 0180-0181, 0180A-0180B) to Felder (R. pp. 0266-0267) and to Bennett (R. pp. 0225-0226), and Exhibits A-E thereto). Defendants contend, and Plaintiffs dispute that Plaintiffs were more than fully compensated for any losses through the recoveries from their brothers.

about how checks written to Daniel Stevenson from the trusts should be characterized, and she contacted Ms. Neapolitan to discuss the checks. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0912, lines 3-23 – p. 0998, lines 1-3 – p. 1003, lines 6-25 – p. 1004, lines 1-15). Ms. Neapolitan expressed no concerns about the checks and even characterized them as "gifts." (July 13, 2011 Dep. of Lynne Kerrison, R. p. 1000, lines 4-8 – p. 1004, lines 7-15).

2. Ms. Kerrison Advises the Beneficiaries of the Trustees' Actions in 2001

Notwithstanding Ms. Neapolitan's assurances, Ms. Kerrison contacted Ms. Stevenson's attorney, Heyward Carter, to tell him about the transactions. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0922, lines 5-17 – R. p. 0926, lines 22-25 – R. p. 0927, lines 1-2, 21-23 – R. p. 0949, lines 21-24; July 14, 2011 Dep. of Heyward Carter, R. p. 1523, lines 6-17). Soon thereafter, on October 23, 2001, Lynne Kerrison met with Thomas C. Stevenson, III, and Daniel R. Stevenson, II, the trustees, and with Jacquelin Stevenson's attorney, Heyward Carter, to discuss the questioned transactions. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 1027, lines 24-25 – R. p. 1028, lines 1-3; Dep. of Heyward Carter, R. p. 1531, lines 23-25). This was the first, but not the last, time that Ms. Kerrison made representatives of the trustees and beneficiaries (Mr. Carter and Ms. Neapolitan) aware of the trustees' withdrawals from the trusts. In 2001, the Plaintiffs in this action were only residuary beneficiaries of the QTIP trust and contingent residuary beneficiaries of the marital trust. (Amended Complaint, R. p. 0090-0091, ¶¶ 11-16; Answer to Amended Complaint, R. p. 0099, ¶¶ 11-16; Turner Deposition Exhibit 5, Will, R. pp. 0843-0867). Ms. Kerrison never had any dealings at all with Kathleen Turner (or any other Plaintiff) about Jacquelin Stevenson's financial matters. (Kathleen Turner's Responses to Lynne Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158, R. pp. 0181-0183, 0185-0186, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208).

3. The Trustees Advise Plaintiff Turner of Their Actions in 2003

A year and a half later, on May 21, 2003, the trustees themselves met with Kathleen Turner at their mother's Meeting Street home. (November 9, 2011 Dep. of Kathleen Turner, R. p. 0550, lines 2-7). Kathleen Turner admitted that during this meeting she "thought something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, R. pp. 0550-0560, p. 0570, lines 17-25, p. 0571, lines 1-4). Thomas C. Stevenson, III's uncontested testimony was that he provided Ms. Turner with a written accounting of all trust assets, including the loans that had been made to him, to Daniel R. Stevenson, II, to their businesses, and that all was clearly described. (February 13, 2013 Dep. of Thomas C. Stevenson, III, R. pp. 1648-1658). Ms. Turner admits that the meeting occurred and that Thomas C. Stevenson, III, "mumbled" and "looked at a piece of paper," but denied that she received a written accounting. (November 9, 2011 Dep. of Kathleen Turner, R. pp. 0550-0560, 0570).

4. The Trustees' Actions Continue and in 2006 They Twice Meet with Turner, Who Does Nothing Until After Jacquelin Stevenson Dies

The trustees' withdrawals continued from the trusts. Neither their mother, Jacquelin Stevenson, nor Kathleen Turner intervened. In early 2006, Ms. Kerrison again spoke with Jacquelin Stevenson's attorney, Heyward Carter, about the ongoing withdrawals. (July 13, 2011 Dep. of Lynn Kerrison, R. p. 0966, lines 13-25 – p. 0967, lines 1-5). On April 19, 2006, Kathleen Turner again met with Thomas C. Stevenson, III. (Plaintiff Kathleen S. Turner's Reponses to Lynne Kerrison's First Request for Admissions, 170, R. p. 0211). Again, Thomas C. Stevenson, III, told Kathleen Turner that he and Daniel R. Stevenson, II, had taken money from the trusts. (Plaintiff Kathleen S. Turner's Reponses to Lynne Kerrison's First Request for Admissions, 171, R. p. 0211). On April 27, 2006, there was yet another meeting, where Kathleen Turner received additional information about her brothers' actions while trustees. (November 9, 2011 Dep. of Kathleen Turner, R. p. 0600, lines 20-25 – p. 0601, lines 1-9; July 14, 2011

Dep. of Heyward Carter, R. p. 1562, lines 23-25 – p. 1563, lines 1-9). Despite the beneficiaries' knowledge of the trustees' actions in 2001, 2003, and on April 19 and 27, 2006, Plaintiffs did nothing. Even after the April 2006 meetings, the trustees continued to loan money to themselves. Jacquelin Stevenson died in September 2007. Plaintiffs brought suit against the brothers on January 22, 2008.[3]

In their Complaint and Amended Complaint, Plaintiffs contend that Lynne Kerrison and Pratt-Thomas Gumb, while providing accounting services to Mrs. Stevenson and the two subject trusts, breached a duty by failing to sooner inform the Plaintiffs (in addition to their mother) of the "improper self dealing withdrawals" made by trustees Thomas C. Stevenson, III, and Daniel R. Stevenson, II (Amended Complaint, R. p. 0092, ¶24).

ARGUMENTS

A. STANDARD OF REVIEW

Plaintiffs' appeal is from the circuit court's grant of summary judgment. In reviewing the circuit court's decision, this Court will apply the same standard as that applied by the circuit court under Rule 56(c), SCRCP. *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009); *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009). Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issue of fact exists, the evidence and all reasonable inferences must

[3] Contrary to the suggestion in the Plaintiffs' Initial Brief (p.3, n.2), Mrs. Stevenson did not die in 2006, but on September 17, 2007. (Turner Dep. Exhibit 22, R. p. 0876). Nor did plaintiffs' knowledge of Heyward Carter's and Lynne Kerrison's involvement with the trusts have to await discovery in their lawsuit against the brothers – Ms. Turner was present at meetings with Mr. Carter and Ms. Kerrison in 2006.

be viewed in the light most favorable to the nonmoving party. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

Plaintiffs also appeal from the circuit court's denial of their motion to withdraw or amend a response to a request for admission, relied upon by the circuit court as an alternative ground for its ruling on the statute of limitations. Because a motion to alter, amend or withdraw a response to a request for admission is committed to the circuit court's discretion, *See* Rule 36(b), SCRCP; *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590, 315 S.C. 17 (1993), review is limited to whether the circuit court abused its discretion.

B. THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE CLAIM WAS BROUGHT MORE THAN THREE YEARS AFTER THE PLAINTIFFS "KNEW OR BY EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN" THAT THEY HAD A CAUSE OF ACTION

The applicable statute of limitations for all of Plaintiffs' causes of action is three years. *See* S.C. Code Ann. 15-5-530(5). The "discovery rule" applies to actions brought under section 15-5-530(5). *See* S.C. Code Ann. 15-3-535. The statute provides:

> Except as to actions initiated under section 15-3-545, all actions initiated under section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.

The South Carolina Supreme Court has interpreted the phrase "'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Graham v. Welch, Roberts and Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013) (emphasis in original), quoting *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The Court of Appeals has made it clear that not

only is the standard an objective one, but that specific knowledge of a specific claim against a particular defendant is not the standard.

> Whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). That knowledge of a specific claim against a specific person is not required was emphasized by this Court in *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 633, 682 S.E.2d 1, 4-5 (Ct. App. 2009): "[T]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" *quoting Mahar v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). A plaintiff will be found to be on inquiry or constructive notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed. *Kelly*, 383 S.C. at 634, 682 S.E.2d at 5, quoting *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799-800 (Ct. App. 1997). Applying these rules, this Court held in *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011) that a party's knowledge of an attorney's error in giving notice of a third-party settlement related to a workers compensation claim triggered the statute of limitations with respect to the claim against the attorney, notwithstanding the client and attorney's continued litigation before the workers compensation commission, and despite the absence of an adverse decision on the claim from the commission until several years later. Likewise, in *Graham v. Welch, Roberts and Amburn. LLP*, this Court rejected a tax preparer's client's effort to create a triable issue of fact concerning discovery of his cause of action, finding that while the taxpayer may have initially had a reasonable belief that his tax preparer had applied funds toward his tax liabilities, the receipt of an invoice from the tax preparer showing the application

of the funds towards fees put the taxpayer on inquiry notice, at the least, that the funds had not been applied as he believed.

In this case, the court reviewed the evidence and found that there were not one, but at least three, occasions on which the statute of limitations began to run:

1. When Ms. Kerrison told the trust beneficiary's attorney, Heyward Carter, of the trustees' withdrawals from the trusts on October 23, 2001;
2. When the trustees, Thomas C. Stevenson, III, and Daniel R. Stevenson, II, met on May 21, 2003, with Plaintiff Kathleen Turner, who at that time was attorney-in-fact for the trust beneficiary, Jacquelin Stevenson, and who by her own admission knew "something must be very wrong."
3. On April 19, 2006, when trustee Thomas C. Stevenson, III, informed Kathleen Turner that he and his brother, Daniel R. Stevenson, II, had taken money from the trusts.

(Order Granting Defendants Dixon Hughes PLLC and Lynne Kerrison's Motion for Summary Judgment, R. pp. 0005-0010).

1. The Statute of Limitations Began to Run on October 23, 2001, When Lynne Kerrison Told Heyward Carter That the Trustees Had Taken Money From the Trusts.

In the fall of 2001, Heyward Carter was the attorney for Jacquelin Stevenson, (July 14, 2011, Deposition of T. Heyward Carter, Jr., R. p. 1493, lines 2-4) who was, at that time, the only current beneficiary of the two trusts (she also held power of appointment over the disposition of the QTIP trust). (Carter Dep., R. p. 1510, lines 19-21; Amended Complaint, R. p. 0090, ¶ 12; Answer to Amended Complaint, R. p. 0099, ¶ 12). "In general, notice to an attorney is notice to his client." *Wardlaw v. Troy Oil Mill,* 74 S.C. 368, 54 S.E. 658 (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 (1978), citing *Simon v. Flowers,* 231 S.C. 545, 99 S.E.2d 391 (1957). "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." *See also*, *Dorman v. Campbell*, 331 S.C.179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (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); *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 308, 257 S.E.2d 496, 497 (1979).

The undisputed facts show that in the fall of 2001, Ms. Kerrison made Heyward Carter, attorney for Jacquelin Stevenson, aware of the loans or disbursements that Thomas Stevenson and Daniel Stevenson were making to themselves. At the latest, Mr. Carter was aware of the loans to Thomas and Daniel Stevenson by October 23, 2001, when he met with the trustees. (July 14, 2011, Dep. of Heyward Carter, R. p. 1509, pp. 1519-1523, p. 1531, lines 23-25). Heyward Carter, as the attorney for Jacquelin Stevenson, had actual knowledge of Thomas and Daniel Stevenson's actions, and that knowledge is imputed to Jacquelin Stevenson, the sole lifetime beneficiary of the two subject trusts from their creation until her death in 2007 (and the person from whom Plaintiffs' rights, if any, derive). Based on principles of agency and the well-established principle that notice to an attorney constitutes notice to his client, the statute of limitations then ran no later than October 23, 2004, three years after the date Lynne Kerrison made Heyward Carter aware of Thomas and Daniel Stevenson's actions.

The Plaintiffs do not deny that notice was given to Heyward Carter, Ms. Stevenson's attorney, and that the notice, if imputed from the attorney to the client, would be sufficient to bar the statute of limitations. Rather, Plaintiffs argue that the information transmitted was insufficient to place the Plaintiffs personally on notice of a problem with the trusts, and further argue that the adverse interest exception should

apply, so as not to impute the knowledge of the attorney, Heyward Carter, to Jacquelin Stevenson. Neither argument avails the Plaintiffs.

Citing *Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (as do Defendants), the Plaintiffs argue that something more than the notice to the Plaintiffs' attorney was required to find that the Plaintiffs were on "inquiry notice" of a problem with the trusts. The notice to the attorney in *Dorman* was that the house was "below flood level." This, along with other evidence, was cited by this Court as sufficient to place the plaintiffs on notice of an issue with the elevation of the property. However, Ms. Kerrison's notice to Heyward Carter was far more than a cursory communication that there was "a problem" with the trusts. The uncontested evidence shows that Ms. Kerrison told Mr. Carter of the trustees' specific withdrawals by October 23, 2001. Plaintiffs conceded as much to the trial court. (Plaintiffs' Brief in Opposition to Motion for Summary Judgment, R. p. 0334; April 28, 2013; Dep. of Carter, R. p. 1508, lines 22-25 – p. 1509, lines 1-4 – p. 1523, lines 6-17 – p. 1531, lines 23-25). Mr. Carter knew and recognized that the trustees' actions constituted (at the least) improper self-dealing. (Deposition of Carter, R. p. 1511, lines 19-25 – p. 1512, lines 1-2 – pp. 1519-1521). This knowledge, and Ms. Kerrison's role as the source of this information, is imputed to Jacquelin Stevenson .

Ms. Kerrison's actions on October 23, 2001, were sufficient to trigger the running of the statute of limitations. Because "the date on which discovery should have been made is an objective, not subjective question," *Kreutner v.David*, 320 S.C. 283, 285-86, 465 S.E.2d 88, 90 (1995), this Court should affirm the trial court's determination that Ms. Kerrison's notice to Heyward Carter on October 23, 2001, of the trustees' actions was sufficient to trigger the running of the statute of limitations.

Plaintiffs also argue that under the "adverse interest exception" Mr. Carter's knowledge should not be imputed to Jacquelin Stevenson pursuant to the rule that a principal is charged with knowledge received by their agent, as described in *Crystal Ice*

Co. of Columbia Inc. v. First Colonial Corp., 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979). Plaintiffs argue that Mr. Carter's actions show that he was acting against the interests of his principal, Jacquelin Stevenson, either fraudulently or to protect his personal interest. No evidence supports Plaintiffs' argument. Plaintiffs offered no evidence that Mr. Carter was at any time acting fraudulently or that he sought to further his personal interests, as opposed to those of his client. Indeed, Plaintiffs' Amended Complaint alleges only that Carter was negligent, that he breached fiduciary duties by failing to inform the Plaintiffs of improper self-dealing withdrawals, and that he "aided and abetted" the breach of fiduciary duty committed by the trustees. (Amended Complaint, R. pp. 0092-0094). Plaintiffs' argument fails for lack of any record evidence to create a genuine issue of material fact.

In any case, even if the Plaintiffs raised an issue of Carter's adverse interest, it would not avail them with respect to their claims against Ms. Kerrison. In the *Crystal Ice* case, the South Carolina Supreme Court rejected application of the "adverse interest exception" because even if the attorney had an adverse interest, such an agent's fraud "cannot alter the effect of his knowledge to his principal with respect to third persons who had no connection with the fraud." *Crystal Ice,* 273 S.C. at 309-10, 257 S.E.2d at 498. Ms. Kerrison is such a third person. Plaintiffs' argument fails for lack of both factual support and legal sufficiency. Because Plaintiffs filed their complaint on April 24, 2009, their action is time-barred.

2. Plaintiffs Were On Notice of Their Claims No Later than May 21, 2003.

Even if the October 23, 2001, meeting were insufficient to start the running of the statute of limitations, the undisputed facts show that Kathleen Turner, who was at that time attorney-in-fact for Jacquelin K. Stevenson, knew of sufficient facts to place an objectively reasonable person on notice of the claims in this action no later than May 21, 2003, and thus, the statute of limitations ran on May 21, 2006.

As Jacquelin Stevenson's attorney-in-fact, Kathleen Turner was her agent and fiduciary. Her knowledge is charged to Jacquelin Stevenson, as well as to herself. *In re Thames,* 344 S.C. 564, 570, 544 S.E.2d 854, 856 (Ct. App. 2001); *Crystal Ice,* 273 S.C. at 309, 257 S.E.2d at 497 ("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"). Kathleen Turner admitted that she met with her brother Thomas Stevenson on May 21, 2003. (November 9, 2011, Dep. of Kathleen Turner, R. p. 0550, lines 2-17). While Ms. Turner claims that Thomas C. Stevenson, III, "mumbled" and "looked at a piece of paper" while Daniel R. Stevenson, II, "hovered," (November 9, 2011, Dep. of Kathleen Turner, R. pp. 0550-0560), she also admitted that she knew "something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, R. p. 0570, line 22). At this meeting she received a paper that disclosed the loans that had been made. (February 13, 2013, Dep. of Thomas Stevenson, R. pp. 1653-1658). Despite her effort to indicate some degree of confusion or ignorance concerning her brother's words at this meeting or of what he gave her, Ms. Turner clearly admitted in her deposition "I thought something must be very wrong." (Turner Dep., R. p. 0570, line 22). In spite of this knowledge, she chose not to ask her brother any further questions, to clarify in any way what he was telling her, nor did she make any additional inquiry. (Turner Dep., R. pp. 0550-0570).

Plaintiffs argue that Ms. Turner must have been "worried about her brother's personal well being." (Plaintiffs' Initial Brief, p. 21). The argument lacks any factual basis. No evidence in the record supports the argument that Ms. Turner was concerned for her brother's personal well-being, or any other part of his personal life. Plaintiffs also argue that the disclosure "did not include the professional negligence of accountants so as to trigger the statute of limitations against them," but it is not notice of the specific claim against the specific individual that is required, rather, "[T]he statute of limitations begins to run when the facts and circumstances of an injury would put a person of common

knowledge and experience on *notice that some claim against another party might exist.*" *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (emphasis in original), citing *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987). In *Burgess*, this Court held that a plaintiff's legal malpractice and fraud claims were barred because she knew of an alleged affair between her attorney and an officer of her employer, and had she made inquiry, she would have discovered that communications had occurred between her attorney and her employer. *See also Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (various communications during the pendency of a medical malpractice action put plaintiff on notice that she was not represented in underlying medical malpractice lawsuit). Ms. Turner's claimed subjective ignorance of facts and circumstances is unavailing; the law provides that if the facts and circumstances could have been known to her through the exercise of ordinary care and reasonable diligence, she is charged with the knowledge she would have had. Thus, even if the statute of limitations did not run on October 23, 2001, it ran no later than May 21, 2006, three years after her meeting with her brothers.[4]

3. Even if it Did Not Begin Running in 2001 or 2003, the Statute of Limitations Began Running on April 19, 2006.

Kathleen Turner met again with Thomas C. Stevenson, III, on April 19, 2006. During that meeting, he told her that he and Daniel R. Stevenson, II, had taken money from the trusts. (Plaintiff Kathleen Turner's Responses to Defendant Lynne Kerrison's First Request for Admissions, 170-171, R. p. 0211). Ms. Turner remained her mother's

[4] Had Ms. Turner exercised reasonable diligence once she knew "something must be very wrong," she could have requested, and would have been entitled to receive, information concerning the trust transactions under S.C. Code Ann. 62-7-813, as it then existed. The statute, effective 2005 through all relevant times, provided that on demand, a trustee was obligated to respond to a beneficiary's reasonable requests for information (S.C. Code Ann. 62-7-813(a)) and to furnish reports to beneficiaries of annual receipts and disbursements and other information (S.C. Code Ann. 62-7-813(c)). Before 2005, S.C. Code 62-7-303(b)(c) (as it then existed) had similar provisions requiring information generally and at least annual statements of accounts.

attorney-in-fact at that time, and her mother was still alive. Her knowledge is therefore charged to her mother, the trust beneficiary, and through her, the Plaintiffs. If this was her first notice, then on this date she would have realized that she had not been told previously of these withdrawals by Lynne Kerrison (indeed Ms. Turner has argued throughout this litigation that the statute of limitations should not be found to run against her because she was not specifically told that she had a cause of action against the accountants). Plaintiffs are bound by their admissions. *See* Rule 36, SCRCP; *Commerce Ctr. 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 (Ct. App. 2003). This lawsuit was not filed until April 24, 2009, more than three years after this meeting.

4. The Trial Court Properly Denied Plaintiffs' Motion to Alter, Amend or Withdraw their Response to a Request for Admission.

Plaintiffs assert that the trial court erred in denying their request to withdraw a response to a request for admission. (Plaintiffs' Initial Brief, pp. 14-20). As a preliminary matter, the trial court's ruling is not essential to the judgment, because the request for admission supported only the alternative accrual of the statute of limitations on April 19, 2006. The trial court found that the statute of limitations began to run October 23, 2001, and also, in May 2003 (Order on Summary Judgment, R. pp. 0005-0009), and the Plaintiffs' claims would be barred in any event, even had they not made the questioned admission. In any event, the request was untimely and the court properly exercised its discretion in denying the request, both on procedural and substantive grounds.

During the lawsuit, these Defendants served Requests for Admissions on Plaintiffs. Plaintiff Turner responded on June 9, 2011. (Turner Responses to Defendants First Requests for Admission, R. pp. 0171-0213). The requests included two (Nos. 168-169) directed to the May 2003 meeting between Plaintiff Kathleen Turner and Thomas C.

Stevenson, III,, asking that Kathleen Turner admit that she met with Thomas C. Stevenson, III, in May 2003, and that she was then told that he and Daniel R. Stevenson, II, had taken money from the trusts. (R. p. 0211). Kathleen Turner denied both. (Id.). The two requests were followed by two more (Nos. 170-171) concerning the April 19, 2006 meeting. (Id.). The requests and responses were:

> 170. You met with Thomas Stevenson on April 19, 2006.
>
> RESPONSE: Admitted
>
> 171. Thomas Stevenson informed you that he and Daniel Stevenson removed money from the trust on April 19, 2006.
>
> RESPONSE: Admitted

(Id.)

These Defendants filed their motion for summary judgment on July 13, 2012. (R. p. 0108). The court heard argument on April 29, 2013, and notified the parties that it intended to grant the motion on June 10, 2013. (Amended Order on Plaintiffs' Motion to Alter or Amend Pursuant to Rule 59(e), SCRP, R. p. 0027). On June 13, 2013, at the court's direction, Defendants submitted a proposed order and judgment. (Id.). Plaintiffs filed a motion to alter or amend the response to Request for Admission 171 on June 19, 2013. (R. pp. 0453-0460). The court denied that request by its order of August 20, 2013. (Amended Order on Plaintiffs' Motion to Alter or Amend Pursuant to Rule 59(e), SCRP, R. pp. 0029-30).

Citing *Ropfogel v. United States,* 138 F.R.D. 579 (D. Kan. 1991), Plaintiffs argue that because the request was ambiguous, was contrary to other evidence (a deposition later given by Kathleen Turner) (Kathleen S. Turner Dep. of November, 2011, R. pp. 0585-0586), and because, said Plaintiffs, the admission frustrated a presentation of the case on the merits, the court erred in refusing to allow Plaintiffs to withdraw the admission. While the *Ropfogel* decision is not controlling on this Court, an examination

of the opinion shows several reasons why this Court should hold that the trial court did not abuse its discretion in denying Plaintiffs' motion.

First, the *Ropfogel* court correctly notes that the decision is committed to the court's discretion, reviewable only for an abuse of discretion. Second, the court noted that it was the party seeking to withdraw the admission that bore the burden of showing that the merits of the action would be served by so allowing. Finally, the court noted that a court should be "cautious in exercising its discretion to permit withdrawal of a request for admission." *Ropfogel,* 138 F.R.D. at 583.

In this case, Plaintiffs' argument for the ambiguity of the request or for inadvertence in the response is belied by the fact that Turner denied the immediately preceding two admissions, which were quite similar, but which addressed the May 2003 conversations. Plaintiffs have not shown how the presentation of statute of limitations issues "on the merits" will be served, particularly when, as in this matter, there are many other reasons to dismiss Plaintiffs' action on summary judgment (including reasons related to the statute of limitations).

The standard to be applied by the trial court was that announced by this court in *Barber v. Hobbs,* 313 S.C. 319, 321, 437 S.E.2d 409, 410 (Ct. App. 1993), and reaffirmed in *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.,* 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001): (1) Whether a presentation on the merits would be furthered by allowing amendment or withdrawal, and (2) whether the party who obtained the admission could show prejudice. In this case, Plaintiffs showed neither; the presentation of the merits as to the particular defense would not be served, and defendants would be prejudiced by allowing withdrawal after a motion had been submitted, argued, and the court had announced a decision. *See Ropfogel v. United States,* 138 F.R.D. 579, 583 (D. Kan. 1991) (burden to justify withdrawal particularly high after pretrial order entered); *see also Foggie v. CSX Transp. Inc.,* 313 S.C. 98, 431 S.E.2d 587, 590, 315 S.C. 17 (1993) (affirming the trial court's refusal to permit

withdrawal of an admission two days before trial and rejecting argument that the opposing party would not have been prejudiced, given the lateness of the request).

Plaintiffs' arguments concerning the presentation of the merits and the absence of prejudice were presented to the circuit court for the first time after it announced judgment, and the decision made was within the circuit court's discretion. The decision was consistent with the precedents of the South Carolina Supreme Court and the Court of Appeals, and Plaintiffs have shown no abuse of discretion. In any event, a decision on this issue in Plaintiffs' favor would not change the outcome of this case, given the court's other rulings. This court should affirm the trial court's decision concerning the motion to withdraw the admission.

C. THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE DEFENDANTS OWED NO DUTY OF CARE TO THE PLAINTIFFS AND BECAUSE ANY DUTY WAS SATISFIED

The Circuit Court found that neither Lynne Kerrison nor Pratt-Thomas Gumb (nor its alleged successor, Dixon Hughes) owed any duty to the Plaintiffs to disclose any actual or suspected malfeasance of the trustees. The Plaintiffs challenge that determination, arguing that the status of one Plaintiff, Kathleen Turner, as Mrs. Stevenson's attorney-in-fact, required Ms. Kerrison and Pratt-Thomas Gumb to provide her with information concerning the trustees' actions. Plaintiffs have no other argument for the existence of a duty. Plaintiffs' argument either stands on its head the law concerning the relationship between principal and agent or establishes that Ms. Kerrison and Pratt-Thomas Gumb (or its alleged successor, Dixon Hughes) satisfied any duty to disclose to the principal, Jacquelin Stevenson, the trustees' actions through the October 23, 2001, notice to Heyward Carter. The evidence is uncontested that Mr. Carter was acting as an attorney for Jacquelin Stevenson, the principal for whom Kathleen Turner was attorney-in-fact. If any duty were owed to Jacquelin Stevenson as the trust beneficiary, it was satisfied on October 23, 2001.

1. The Plaintiffs Were Not Clients of Lynne Kerrison or Pratt-Thomas Gumb.

Plaintiffs do not argue that they were clients. Instead, they argue that one Plaintiff, Kathleen Turner, was owed a duty by virtue of her status as attorney-in-fact for her mother, Jacquelin Stevenson. Even if accepted, their argument would avail only Ms. Turner. Not only were Plaintiffs not clients, they had no relationship of any type or kind with Ms. Kerrison or Pratt-Thomas Gumb. Plaintiffs admit that they did not meet with Ms. Kerrison, that they did not discuss the trust finances with Ms. Kerrison, and that they requested no 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, R. pp. 0181-0183, 0185-0186, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208; 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, R. pp. 0267-0269, 0271-0272, 0274-0276, 0278-0280, 0282-0284, 0286-0288, 0290-0292; Plaintiff Jacquelin S. Bennett'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, R. pp. 0226-0228, 0230-0231, 0233-0235, 0237-0239, 0241-0243, 0245-0247, 0249-0251). There was simply no relationship at all between Plaintiffs and Ms. Kerrison. They were, in both the legal and the ordinary sense of the word, strangers.

2. Only Ms. Stevenson and the Trustees Were Clients of Ms. Kerrison.

Plaintiffs contend (and Defendants admit) that Ms. Kerrison had only three engagements related to this claim – (1) an engagement to provide services to the trustees of the marital trust; (2) an engagement to provide services to the trustees of the QTIP trust; and (3) an engagement to provide services to Mrs. Jacquelin K. Stevenson. The circuit court's opinion correctly noted that the only clients to whom Lynne Kerrison and Pratt-Thomas Gumb provided accounting services **related to the trusts** were Thomas

and Daniel Stevenson, the co-trustees of the trusts. Jacquelin K. Stevenson, although a beneficiary, was not the person for whom Ms. Kerrison and Pratt-Thomas Gumb prepared the subject tax returns for the trusts. She was a client, but not with respect to the work for the trustees.

3. Accountants Do Not Owe Duties of Care to Non-Clients.

"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 Cnty. Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007), citing, *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). "Without a duty there is no actionable negligence." *Id.* South Carolina does recognize 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 (Ct. App. 1986) (emphasis added). No South Carolina court has held that accountants for trusts owe professional duties to non-client prospective, contingent trust beneficiaries. *Cf. Rydde v. Morris,* 381 S.C. 643, 675 S.E.2d 431 (2009) (attorney had no duty to non-client prospective beneficiaries of a will that was not properly executed). "Ordinarily, the common law imposes no duty on a person to act." *Johnson v. Robert E. Lee Acad., Inc.,* 401 S.C. 500, 504, 737 S.E.2d 512, 514 (Ct. App. 2012), citing *Hendricks v. Clemson Univ.,* 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003). "In other words, a person has no duty to protect another from harm inflicted by a third person." *Rayfield v. S.C. Dep't of Corr.,* 297 S.C. 95, 100-01, 374 S.E.2d 910, 913 (Ct. App. 1988).

Because no accountant-client (or any other) relationship existed between Ms. Kerrison, on the one part, and Plaintiffs as beneficiaries of the trusts, on the other part, Plaintiffs' claims must fail. South Carolina law places no duty on accountants to disclose information about their clients to non-clients. *ML-Lee Acquisition Fund, L.P. v. Deloitte*

& Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Even though the *ML-Lee* court adopted section 552 of the *Restatement of Torts*, which imposes a limited duty of care by accountants to non-clients to whom the accountants make affirmative negligent misrepresentations, *Id.*, the court held that section 552 of the *Restatement of Torts* "imposes no duty to *disclose* information." *ML-Lee,* 327 S.C. at 241, 489 S.E.2d at 471, n.3 (emphasis in original).

In *Johnson v. Robert E. Lee Acad. Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012), this Court declined to extend the liability of accountants to third parties in cases not involving negligent misrepresentation. In *Johnson*, the Court noted 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." *Johnson,* 401 S.C. at 513-14, 737 S.E.2d at 504. To similar effect are the decisions of courts in other states. *See Blair v. Ing,* 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 & Flom,* 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,* 796 P.2d 1060 (Kan. Ct. App. 1990), *rev. on other grounds*, *Gillespie v. Seymour*, 823 P.2d 782 (Kan. 1991) (beneficiaries failed to state a negligence claim 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); *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 cause execution of 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 prospective beneficiary's complaint failed to state facts sufficient to constitute a cause of action. *Id.* The Supreme 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.

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

[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.*

of legal title to the property contained in the trust.[6] 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 in conflict with each other, imposing a duty to act in favor of both the trustee(s) and each beneficiary individually would place the accountant in an untenable ethical position. It is this sort of conflict that the *Rydde* court sought to avoid and that this court should decline to create.

Implicit in Plaintiffs' theory of recovery is that this Court impose a duty on accountants to: (1) review all confidential information received in the preparation of tax returns for indications that the client is harming some third-party; (2) identify any and all third parties whom the confidential information may indicate are being harmed; and (3) disclose the confidential information received from the client to the third parties or else face potential civil liability. No statute or common law in South Carolina supports this proposition. Such a duty would be unwise and would place accountants in an untenable position. *See also ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

Plaintiffs' efforts to create a novel duty through the affidavit of their expert, George DuRant, are unavailing. "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,

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[6] The AICPA Code of Conduct makes it clear that an accountant may not serve multiple masters with divergent interests, and that some conflicts of interest are ethically impermissible. See ET Section 102.01 - Integrity and Objectivity:

> 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), *available at http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_102.aspx*
>
> *See also* CODE OF CONDUCT ET 102.3 (provision of services to multiple family members with divergent interests may impair objectivity). S.C. Code 40-2-110(7) and Regulation 1-10 of the South Carolina Board of Accountancy adopt the AICPA Code of Conduct and the Ethical Standards of the AICPA.

479 S.E.2d 47, 49 (1996); *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011) and not by the testimony of an expert.

4. Attorney-in-Fact Kathleen Turner Has No Greater Right to Information than her Principal, Jacquelin Stevenson, and any Duty that Existed Was Satisfied on October 23, 2001.

In arguing for the existence of a duty extending to at least one Plaintiff, Kathleen Turner, Plaintiffs argue "Mrs. Stevenson was a client and the accountants did owe her a duty." (Plaintiffs' Initial Brief, p. 28). They reason that because Kathleen Turner was an attorney-in-fact for her mother, a duty was owed to her. Plaintiffs ignore the fact that as an agent for her mother, Kathleen Turner had no greater rights for information or duties owed to her by the accountants than did her mother herself. And as the uncontested evidence shows, Ms. Kerrison disclosed the trustees' actions to Heyward Carter, her mother's attorney, on October 23, 2001. Thus, even if Plaintiffs' argument that the accountant had a duty to disclose the possible defalcations of the trustee to a beneficiary is accepted, the court was correct in finding that the duty was satisfied on October 23, 2001.

5. There Was No Fiduciary Relationship Between Ms. Kerrison and Any Plaintiff.

Plaintiffs' fifth cause of action was a claim against Ms. Kerrison for breach of fiduciary duty. The court correctly found that no fiduciary duty existed, and the Plaintiffs do not appear to contest that finding.

Whether a fiduciary relationship exists between two people is an equitable issue for the court 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 (Ct. App. 2004). South Carolina does not recognize any per se fiduciary relationship between accountant and client. Instead, to determine whether such a relationship exists, the court looks to the facts and circumstances of the relationship between the parties. *Pitts*

v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 330, 574 S.E.2d 502, 507 (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 (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. S.C. Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (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 Univ.*, 353 S.C. 449, 578 S.E.2d 711 (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 Pratt-Thomas Gumb. 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, R. pp. 0181-0183, 0185-0186, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208; 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, R. pp. 0267-0269, 0271-0272, 0274-0276, 0278-0280, 0282-0284, 0286-0288, 0290-0292; Plaintiff Jacquelin S. Bennett'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, R. pp. 0226-0228, 0230-0231, 0233-0235, 0237-0239, 0241-0243, 0245-0247, 0249-0251). 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, R. p. 0912, lines 3-19 – p. 0922, lines 5-19 – p. 0928, lines 1-2 – p. 0992, lines 2-25). Ms. Kerrison did not sign checks for Mrs. Stevenson or the trusts. (July 13, 2011, Dep. of Lynne Kerrison, R. p. 0957, lines 13-16). 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, Pratt-Thomas Gumb, Dixon Hughes, PLLC and the Plaintiffs. From these facts, it is impossible to infer a fiduciary relationship.

6. The Duty that Plaintiffs Wish this Court to Create Would Conflict with Federal Law.

In 1971, Congress enacted 26 U.S.C. § 7216, which 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 to other than specified persons or organizations 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 prohibit 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.[7]

Any common-law duty to disclose taxpayer information to third parties would 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 Co.*, 373 S.C. 248, 264, 644 S.E.2d 755, 763 (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." *Prof'l Samplers, Inc. v. S.C. Emp't Sec. Comm'n*, 334 S.C. 392, 397, 513 S.E.2d 374, 377 (Ct. App. 1999). The disclosures that Plaintiffs seek to mandate are exactly the disclosures that 26 U.S.C. § 7216 prohibits.

Plaintiffs argue that the regulations adopted by the Internal Revenue Service implementing 26 U.S.C. § 7216, in particular those at found at 26 C.F.R §301.7216-2(e), allow disclosure to "related taxpayers," including beneficiaries of a trust. Plaintiffs are simply incorrect about the regulation. 26 C.F.R. 301.7216(e)(2) permits a tax preparer to use information of a related party to prepare the tax return of another related party. It does not permit disclosure of information, nor its use, for any other purpose. The regulation says:

> (e) Disclosure or use of information in the case of related taxpayers.
>
> (1) In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax

[7] 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).

return preparer obtained from a first taxpayer if—

(i) The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;

(ii) The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and

(iii) The first taxpayer has not expressly prohibited the disclosure or use.

(2) For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to another taxpayer if they have any one of the following relationships: Husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

To adopt the position advocated by Plaintiffs, that accountants have a duty to tell non-clients of the possible misdeeds of their clients, would place tax preparers in the untenable position of having to choose between facing either civil liability for nondisclosure or criminal liability for disclosure. That conflict is evident in this case. Plaintiffs allege that Lynne Kerrison and Pratt-Thomas Gumb breached a duty of care owed to the beneficiaries by "failing to inform the Plaintiffs, including Kathleen Turner as power of attorney for Jacquelin Stevenson, of the improper self-dealing withdrawals known to these Defendants." (Complaint, R. p. 0037-0038, ¶ 44.) The disclosure of information to other beneficiaries, as non-clients, would have subjected Lynne Kerrison and Pratt-Thomas Gumb to criminal liability under federal law.

Plaintiffs have failed to offer any argument justifying this Court in creating a duty from an accountant to non-client trust beneficiaries, and the circuit court was correct to dismiss Plaintiffs' claims. In any event, any such duty was satisfied.

D. THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY BECAUSE THERE WAS NO EVIDENCE THAT THE DEFENDANTS "KNOWINGLY PARTICIPATED" IN ANY BREACH OF FIDUCIARY DUTY BY THE TRUSTEES

Plaintiffs' sixth cause of action alleged that Lynne Kerrison and Pratt-Thomas Gumb knowingly participated in the trustees' breaches of fiduciary duty by "failing to disclose to Plaintiff Kathleen Turner who held power of attorney for her mother, or the other Plaintiffs as beneficiaries, of the improper self-dealing withdrawals." This allegation is clearly duplicative of the malpractice allegation and for the reasons previously discussed is insufficient to support an independent cause of action. Plaintiffs also allege that "Defendants Kerrison and Pratt-Thomas Gumb also participated in these breaches of fiduciary duty by issuing checks from the subject trusts for the improper self-dealing withdrawals." (Amended Complaint, R. p. 0095, ¶ 52). The circuit court correctly dismissed the claim because Plaintiffs offered no competent evidence of "knowing participation" in any breach of fiduciary duty perpetrated by Thomas and Daniel Stevenson. (Order Granting Defendants' Dixon Hughes PLLC and Lynne Kerrison's Motion for Summary Judgment, R. pp. 0020-0021).

Plaintiffs make much of the fact that for a period of time the accounting firm had custody of the physical checkbook for one or both trusts, while neglecting to point out that the accounting firm had no ability to sign the checks. (Kerrison Dep., R. p. 0957). Plaintiffs argue that because after Pat Neapolitan's death, Pratt-Thomas Gumb, through an employee, Angela Heisenbuttle, would give checks to any of the siblings who asked for them, which checks then had to be signed by Thomas C. Stevenson, III, and Daniel R. Stevenson, II (Kerrison Dep., R. p. 0957), they "knowingly participated" in the breach. Plaintiffs' argument ignores the practical problem that as the authorized signers, Thomas C. Stevenson, III, and Daniel R. Stevenson, II, had at all times the ability to go to the bank and request more checks, or simply to withdraw or transfer funds. Thus, there is

simply no causal link between Pratt-Thomas Gumb's custody of a checkbook and Thomas C. Stevenson, III, and Daniel R. Stevenson, II's self-dealing transactions. Plaintiffs also neglect the fact that this occurred only when, and after, the situation had been reported to and examined by the attorneys Heyward Carter and Howard Morrison. (Kerrison Dep., R. p. 0958, lines 13-25 – p. 0959, lines 1-6). Ms. Kerrison's previous report of the trustees' actions to the life income beneficiary's attorney conclusively negates any inference that Ms. Kerrison "knowingly participated" in any breach of 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 (Ct. App. 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 cannot show that Defendants Lynne Kerrison and Pratt-Thomas Gumb, or its alleged successor, Dixon Hughes, knowingly participated in the alleged breach by the trustees.

At most, Defendants will be able to show Lynne Kerrison learned of the first alleged breaches of duty in 2001, *after the fact*, when Ms. Kerrison was preparing the tax returns for Ms. Stevenson. Ms. Kerrison never assisted or participated in the alleged breaches; she first learned of them after they had been completed. She reported the breaches to Ms. Stevenson's attorney. Again, Plaintiffs' only real complaint is that Ms. Kerrison gave notice to Ms. Stevenson's attorney, Heyward Carter, rather than to Ms. Turner, the attorney-in-fact, but they cannot avoid the fact that notice was given. Absent prior knowledge of the withdrawals, or 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 (Ct. App. 2012) (granting a directed verdict on a claim of aiding and abetting a

breach of fiduciary duty based on improper transfers made by a personal representative where the attorney lacked actual knowledge of the transfers either at the time the transfers were made or beforehand.)

E. THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE PLAINTIFFS' CLAIMS DID NOT SURVIVE THE DEATH OF JACQUELIN K. STEVENSON

Although not cited by the trial court as a basis of its decision, the record in the case shows that the trial court's decision may be affirmed for other grounds appearing in the record. (Rule 220(c), SCACR). In the present case, Plaintiffs' claims did not survive the death of Jacquelin K. Stevenson.

While S.C. Code Ann. 15-5-90 provides that actions based on injuries to an individual shall survive the death of that person, the common law recognizes an exception to the survivability of a claim in cases involving fraud or deceit. Furthermore, the "fraud exception to survivability is not limited only to a cause of action titled 'fraud'" but to all actions based on theories of fraud or deceit. *Brailsford v. Brailsford,* 380 S.C. 443, 449-50, 669 S.E.2d 342, 345-46 (Ct. App. 2008). The label given to the claim by a plaintiff is irrelevant where the claim arises from fraudulent and/or deceptive conduct. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 97 (2002). Because the actions in this case are based on the alleged fraudulent conduct of Thomas and Daniel Stevenson towards Jacquelin Stevenson, they do not survive the death of Jacquelin Stevenson.

Plaintiffs' claims against Defendants Lynne Kerrison and Dixon Hughes must derive from the allegation that:

> During Thomas C. Stevenson, III and Daniel R. Stevenson, II's terms as co-trustees both improperly took money from the Marital Trust, QTIP Trust and the Estate of Jacquelin K. Stevenson.

(Amended Complaint, R. p. 0091, ¶ 19). The only wrongdoing by Ms. Kerrison alleged by Plaintiffs is her failure, upon learning of the withdrawals, to tell the Plaintiffs of Thomas and Daniel Stevenson's actions.

Plaintiffs' claims, while labeled professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, are actually based on the alleged duty of Lynne Kerrison to disclose information directly to the Plaintiffs. (Amended Complaint, R. pp. 0091, 0092, 0094, 0095, ¶¶ 19, 24, 43, 47, 48, 52). A "nondisclosure is fraudulent when there is a duty to speak." *Ardis v. Cox,* 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). The essence of the Plaintiffs' claims against Defendants Lynne Kerrison and Pratt-Thomas Gumb is that they failed to disclose the fraudulent actions of Thomas and Daniel Stevenson, and by their very nature the claims are, in effect, claims of fraud for failure to disclose the fraud of another. Because this is an action arising out of a fraud, in the guise of an action for professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, it did not survive the death of Jacquelin Stevenson.

In *Brailsford v. Brailsford,* this Court determined that an action by the widow of a trust beneficiary, both individually and in her capacity as personal representative of the estate, against trustees for various instances of fraudulent conduct did not survive the death of her husband. *Brailsford,* 380 S.C. at 449-50, 669 S.E.2d at 345-46. This Court reasoned that the widow's causes of action were "essentially a cause of action for fraud simply disguised under a different title." *Id.* The Court relied on the case of *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564-565, 564 S.E.2d 94, 97 (2002), where the South Carolina Supreme Court found that where the essence of the alleged misconduct amounted to misleading the deceased by either intentional deception or gross negligence, such actions fit within the ambit of fraud or deceptive conduct and, regardless of the label given, did not survive the deceased.

The reasoning behind disallowing suits based on theories of fraud to survive an individual is that evidence of the state of mind of the victim is crucial to determining whether a fraud was perpetrated. In *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991), finding that civil conspiracy claims did not survive the death of the victim, the Fourth Circuit upheld the constitutionality of S.C. Code Ann. 15-5-90 and the recognized exception for fraud. The Court acknowledged that a rational basis for the fraud exception to the survivability statute is "that fraud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital." *Id; see also Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002); *Pamplico Bank and Trust Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972); *Cline v. S. Ry. Co.*, 113 S.C. 440, 102 S.E. 641 (1920). Because the issue of Jacquelin Stevenson's state of mind, potential consent and ratification and knowledge are crucial to the issue of whether a duty was breached and a fraud committed, either by trustees Thomas and Daniel Stevenson or Defendant Lynne Kerrison, Plaintiffs' claims did not survive Jacquelin K. Stevenson's death.

F. THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE, INDIVIDUALLY AND AS BENEFICIARIES OF THE TRUSTS, PLAINTIFFS SUFFERED NO RECOGNIZED DAMAGES AS THEY HAD NO ENFORCEABLE RIGHT TO INHERIT

Although not cited by the trial court as a basis for its decision, this Court may affirm the trial court for any reason appearing in the record. Rule 220(c), SCACR. Because Plaintiffs, as contingent, residuary beneficiaries, suffered no recognized damages, their claims should be dismissed.

Under South Carolina law, trusts or trustees are the devisees of testamentary gifts; "*beneficiaries are not devisees.*" S.C. Code Ann. 62-1-201(8) (emphasis added). Moreover, the "point in time that a claim for the object of a bequest arises necessarily

depends on when the legatee has a legal right to it." *Church v. McGee,* 391 S.C. 334, 348, 705 S.E.2d 481, 489 (Ct. App. 2011). During Mrs. Stevenson's lifetime, Plaintiffs, as individuals and trust beneficiaries, held *no legal right* to Mrs. Stevenson's personal assets or the assets of the trusts. Because all of the alleged improprieties occurred during Mrs. Stevenson's lifetime, Plaintiffs suffered no damages.

Before Mrs. Stevenson's death, Plaintiffs had 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. During her lifetime, Mrs. Stevenson was the sole beneficiary of both trusts, and the entire corpus of both trusts could have been used for her benefit. Neither trust instrument provided a means by which trust assets could have been distributed to the residual beneficiaries during Mrs. Stevenson's lifetime. (Turner Deposition, Exhibit 5, Will). Plaintiffs held no interest in their mother's personal assets, and Mrs. Stevenson held the legal right to dispose of those assets. Consequently, while Mrs. Stevenson lived, Plaintiffs, as individuals and beneficiaries, held no legal right to the assets of the trusts or Mrs. Stevenson's personal assets. Plaintiffs' rights accrued only after Mrs. Stevenson's death, after the actions alleged in the complaint.

Plaintiffs cannot show that their individual rights were invaded. Plaintiffs do not allege that anything was improperly taken from their personal assets, only that Thomas and Daniel Stevenson "both improperly took money from the Marital Trust, QTIP Trust, and Estate of Jacquelin K. Stevenson." (Complaint, R. p. 0034, ¶ 20). Because Plaintiffs held no right to the assets of either trust while their mother lived, nor any protected expectation in the remainder, and no money was taken from them personally, Plaintiffs, as individuals and trust beneficiaries, suffered no damages, and therefore Defendants are entitled to summary judgment as a matter of law.

CONCLUSION

The trial court should be affirmed because it correctly held that Plaintiffs' claims were barred by the statutes of limitation, because it correctly held that the Defendants owed no duty to the Plaintiffs, and because there was no evidence that Ms. Kerrison "knowingly participated" in any of the trustees' breaches of fiduciary duty. Furthermore, the trial court can be affirmed for additional reasons appearing in the record (Rule 220(c), SCACR) because Plaintiffs' claims did not survive the death of Jacquelin Stevenson, and because Plaintiffs suffered no damages.

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Dated: April 24, 2014
Charleston, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Roger M. Young
Case No. 2011-CP-400

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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.; 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated: 4/24/14

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents Dixon Hughes and Lynne L. Kerrison and Certificate of Counsel on Appellants by depositing a copy of same in the United States Mail, postage prepaid, on April ____, 2014, addressed to their attorneys of record, A. Camden Lewis, Keith M. Babcock, James M. Griffin and Ariail E. King at Lewis Babcock & Griffin, LLP, 1513 Hampton Street, P O Box 11208, Columbia, SC 29211.

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