THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2012-UP-420
Case No. 2009-CP-10-2846

Errol Washington as Personal Representative of the Estate of Danny Washington, ... Petitioner,

v.

Alice R. Stewart, Leroy Stewart, Alvin E. Burch, Sr., a/k/a Alvin E. Birch, Rudell S. Burch, Sterling Lending Group, Inc., a South Carolina Corporation, Regent Bank, and Wachovia Bank, N.A., ... Defendants,

Of Whom Alice R. Stewart, Leroy Stewart, Alvin E. Burch, a/k/a Alvin E. Birch, Rudell S. Burch and Wachovia Bank, N.A., are the ..... Respondents.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting summary judgment with respect to the aiding and abetting a breach of fiduciary duty cause of action on the grounds that there was no evidence that Wachovia knowingly participated in the breach by Stewart of her fiduciary duties?

2. Did the trial court err in granting summary judgment with respect to the negligence cause of action on the grounds that there was no duty owed by Wachovia to the beneficiaries of the Estate of Danny Washington?

STATEMENT OF THE CASE

This is an appeal from an order granting Respondent Wachovia Bank, N.A. summary judgment on the claims asserted against it by Appellant Errol Washington.

Errol Washington is the successor personal representative of the Estate of Danny Washington. Acting in that capacity, he commenced the action below on May 5, 2009, seeking to recover funds improperly taken from the estate bank account by the original personal representative, Alice Stewart. The Complaint asserts causes of action against Stewart for breach of fiduciary duty, conversion, constructive trust and equitable lien. Ms. Stewart has not filed an answer or other pleading in this action, and is on information and belief, not participating in this appeal.

Alice Stewart's husband, Leroy Stewart, was named a defendant below on the grounds that he may have received some of the funds misappropriated by Alice Stewart. He has not filed an answer or otherwise appeared in this action.

Alvin E. Burch, Sr., Rudell S. Burch, Sterling Lending Group, Inc., and Regent Bank were named as Defendants below because they may have had an interest in a house alleged to have been constructed in part with funds taken by Alice Stewart from the estate account, and on which Appellant sought an equitable lien. During the course of litigation, this residence was foreclosed upon by the first mortgage holder, rendering these claims moot. As a result, Sterling Lending Group and Regent Bank were dismissed from the action below, and no further relief is being sought by Washington against them or Alvin E. Burch, Sr. or Rudell S. Burch. The Burches have filed an answer.

The estate account from which Stewart improperly withdrew the funds was maintained at Wachovia. The Complaint asserts claims against Wachovia Bank, N.A. for aiding and abetting Stewart in her breach of fiduciary duty, for conversion, and for negligence. (R. pp. 22-25, ¶¶ 36-41 & ¶¶ 48-63).

Wachovia in its answer denied any liability and asserted numerous defenses. Wachovia also asserted a cross-claim against Alice Stewart for contractual and equitable indemnity. (R. pp. 29-37).

Wachovia then moved for summary judgment as to all the claims against it. Appellant opposed this motion, and submitted in opposition an affidavit of Appellant, and an affidavit of Appellant's expert, Joanna Runey. By order dated December 24, 2010, filed January 5, 2011, the trial court granted Wachovia summary judgment on all of the claims. It is this order granting summary judgment to Wachovia that is now under appeal.

Appellant received written notice of the order granting summary judgment on January 17, 2011. Appellant filed a motion to alter or amend the order granting summary judgment on January 27, 2011. (R. p. 239). This motion was denied by the trial court by order dated February 16, 2011. (R. p. 15). Appellant served hiss notice of appeal on February 16, 2011. (R. p. 252).

Appeal was heard on June 5, 2012, and the lower court was affirmed by order of the Court of Appeals on July 11, 2012. A Motion to Reconsider was filed on July 26, 2012 and denied by order dated September 17, 2012. A Petition for Writ of Certiorari was filed by Appellant on October 15, 2012 and Petition for Certiorari was granted by this Court by Order dated September 24, 2014.

FACTS

A. The Estate Account.

Danny Washington died intestate on March 31, 2007. At the time of his death, and for many years prior, he had disabilities that resulted in his being under a conservatorship. His estate consisted of funds in the amount of $304,775.18. (R. p. 19, ¶¶ 11 & 13). Alice Stewart, one of Mr. Washington's sisters, was appointed as Personal Representative of his estate by the Charleston County Probate Court on July 18, 2007. (R. p. 19, ¶ 14; p. 96).

Stewart opened an estate account at Wachovia Bank on July 25, 2007. The title of this account was "The Estate of Danny Washington Alice R. Stewart PR." Shortly after opening the account, on August 1, 2007, Stewart arranged for the conservator to wire transfer all of the $304,775.18 in estate funds to the new estate account at Wachovia. (R. p. 19, ¶ 17).

B. The Transfers from the Estate Account to Stewart's Personal Accounts.

Within two days after depositing the estate funds in the estate account, and about a week after opening the estate account, Stewart made two withdrawals from the estate account totaling $277,000—91% of the Estate's funds—and deposited those funds in her personal accounts. (R. pp. 91-92, ¶¶ 18 & 25). These withdrawals were made in face-to-face transactions with the assistance of Wachovia personnel at the same branch where, again with the assistance of Wachovia personnel, she had opened the estate account.

The first of these withdrawals was on August 2, 2007—one day after depositing the $304,775.18 in estate funds to the new estate account. Stewart went to the North Rivers

Branch of Wachovia and arranged for a wire transfer of $17,000 from the estate account to her personal account at Bank of America. (R. p. 92, ¶ 25).

The second withdrawal was made the next day—August 3, 2007. Stewart again went to the North Rivers Branch of Wachovia, and with the assistance of Wachovia personnel opened a new account in her name personally, and then had Wachovia transfer $260,000 in estate funds from the estate account to her new personal account at Wachovia. This transfer was done by way of a "non-negotiable internal counter withdrawal." (R. p. 20, ¶¶ 22 & 25: p. 97). The Wachvoia employee who directly participated in this transaction was the bank's customer service representative.

The new personal account into which the $260,000 was deposited was a Certificate of Deposit in Stewart's name personally, and had Stewart's Social Security number assigned to it, rather than the tax identification number of the Estate used in connection with the estate account. (R. p. 91, ¶ 18).

The withdrawal by Stewart of the $260,000 from the estate account, the opening of the new personal account by Stewart, and the deposit of the $260,000 in the new account were all accomplished by Stewart during a single visit to the North Rivers branch of Wachovia in North Charleston.

In addition to these transfers, Stewart over the next several months had Wachovia wire transfer an additional $31,000 in funds from the estate account to her personal account at Bank of America, at regular, two-week intervals. (R. p. 92, ¶ 25). The additional wire transfers were as follows:

- August 17, 2007 $3,000
- August 23, 2007 $3,000

- September 5, 2007 $10,000

- September 14, 2007 $15,000

All of the withdrawals set forth above were done in face-to-face transactions at the same Wachovia branch—the "North Rivers" branch. All of the transactions were done with the assistance of the same Wachovia personnel who had helped Stewart open the estate account shortly before. (R. pp. 91-92, ¶¶ 18-22). The principal Wachovia employee who assisted Stewart was a Mr. Horne, along with Willie Hill, and Linda M. Kresge (R. p. 92, ¶22; pp. 188-190).

On December 22, 2008, the Charleston County Probate Court issued its Order removing Stewart as Personal Representative for cause, holding she made inappropriate and unauthorized distributions from the estate, and appointing Errol Washington, one of Mr. Washington's nephews, as Successor Personal Representative. (R. p. 17, ¶ 1; p. 89, ¶ 2).

ARGUMENTS

I. There Was Sufficient Evidence of Wachovia's Knowing Participation in the Breach by Stewart of Her Fiduciary Duty to Preclude Summary Judgment.

The trial court ruled that the elements for aiding and abetting a breach of fiduciary duty are (1) a breach of a fiduciary duty owed to the plaintiff; (2) defendant's knowing participation in the breach and (3) damages, relying on Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). (R. p. 8).

Applying these elements, the trial court found that Stewart did in fact owe a fiduciary duty to the estate. (R. p. 8). This ruling by the trial court is consistent with, among other things, S.C. Code Ann. § 62-3-703(a), which provides that "A personal

representative is a fiduciary who shall observe the standard of care applicable to trustees ...." The trial court also found that Stewart breached this duty. Id.

The trial court held, and Wachovia vigorously argued, that there was no fiduciary duty owed by Wachovia to the Estate of Stewart with respect to the estate account, the relationship being one of debtor-creditor. (R. 6-7). Appellant does not challenge this finding, and in fact, Appellant never alleged there was such a fiduciary duty. The issue is whether Wachovia knowingly assisted Stewart in the breach of *her* duty to the estate.

The trial court further found, however that "the record is "devoid of any evidence of Wachovia's 'actual knowledge' of Stewart's wrongdoing." (R. p. 9). It is this finding which is error.

In determining whether triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be construed in the light most favorable to the non-moving party. E.g., Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). If the evidence yields more than one reasonable inference, if its inference is in doubt, or if there is a difference of opinion, the case must be submitted to the jury. Gamable v. International Paper Realty Corp. of South Carolina, 323 S.C. 367, 474 S.E.2d 438 (1996); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967). If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury. Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1964).

An inference is evidence. A well connected set of circumstances is as cogent of the existence of a fact as any array of direct evidence; it is sufficient if there is evidence from which the fact can be inferred. McCready v. Atlantic Coast Line R.R., 212 S.C. 449, 48

S.E.2d 193(1948); and see Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). See, e.g., Brock v.Hendershott, 840 F.2d 339, 342 (6th Cir. 1988) ("a non-fiduciary's knowledge of the breach can be inferred from surrounding circumstances raising a reasonable inference of knowledge") (citing Donovan v. Schmotrey, 592 F.Supp. 1361, 1396 (D. NEV. 1984) and Donovan v. Daughtery, 550 F.Supp. 390, 410-11 (S.D. ALA. 1982). [1]

Appellant, as the non-moving party, is only required to submit a "mere scintilla of evidence" in order to withstand summary judgment. Hancock v. Mid-South Mgmt. Co. Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009).

There is ample evidence that Wachovia knew of the breach by Stewart of her fiduciary duty. First, as the trial court found, Stewart as a personal representative owed a fiduciary duty to the beneficiaries of the estate. Indeed, such a fiduciary duty exists as a matter of law by statute. See S.C. Code Ann. § 62-3-703(a).

Second, the name of the estate account opened at the North Rivers Branch—"Estate of Danny Washington, Alice Stewart PR"—would have put Wachovia on notice of this fiduciary duty.

Third, the name on the Certificate of Deposit opened by Stewart, as well as the use of Stewart's social security number on the account, rather than the estate account, would have put Wachovia on notice that this was a personal account of Stewart. Likewise, the wire transfers were made from the estate account to the account of Stewart at Bank of America—on its face not an estate account.

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[1] The ERISA cause of action in Hendershott was overruled, but the underlying rationale is applicable to the instant case.

Fourth, the opening of Stewart's personal Certificate of Deposit and the transfer of $260,000 in estate funds to that account was accomplished during the same, single visit to the North Rivers branch.

Fifth, the withdrawal of 91% of an estate account by a personal representative within 2 days of the deposit of the estate funds, and within approximately one week of the opening of the account, should have alerted Wachovia that something was amiss.

Sixth, all of these transactions required the direct, personal assistance of Wachovia personnel. None of the transfers were by check, by computer, or by telephone; each was a face-to-face transaction at the same branch.

Seventh, the same, limited number of Wachovia personnel at the same branch conducted these transactions. Thus, these personnel had knowledge of both the fiduciary account and the personal accounts, and the transfers in question. This is not a case of disparate employees having fragments of information.

The foregoing facts are not disputed by Wachovia. Construed in the light most favorable to Appellant, these facts, and the inferences from those facts, create not just a scintilla of evidence but rather overwhelmingly establish that Wachovia knowingly participated in the ongoing breaches of fiduciary duty by Stewart.

Moreover, these undisputed facts establish that Wachovia actively participated in those breaches. None of the transactions complained of were electronically originated or done by checks handled by automatic processing. Each required a face-to-face request to Wachovia personnel at the North Rivers branch, and the affirmative, personal, conscious assistance of such Wachovia branch personnel. These same personnel who opened and had knowledge of the fiduciary account (if as a result of the account's title, if nothing

else), knew they were approving and effecting transfers to a personal account (as shown by the title of that account *and* the social security number assigned to the account).

What more could Wachovia have done to actively participate other than open the fiduciary account with knowledge of its fiduciary nature (as a result of the account name), open the personal account with knowledge of its personal nature (as a result of its name and use of the social security number of Stewart), and on the same day transfer the majority of the funds out of the estate account to the personal account as a result of a single visit by Stewart? Construing the facts and the inferences from the facts in a light most favorable to Appellant, the facts create far more than a scintilla of evidence as to Wachovia's knowing participation in Stewart's breach, and in fact overwhelmingly establish that participation.

II. Wachovia Bank, N.A., Owed Appellant a Duty of Care.

The trial court erred in granting summary judgment to Wachovia on Appellant's negligence claim, ruling that Wachovia owed no duty to Appellant.

A. The common law rule.

At common law, the general rule is that a bank has no duty to inquire whether a fiduciary is applying the funds of a trust account properly. If, however, the circumstances are such that the bank is on notice that the transferor is a fiduciary, and may be making a conveyance of fiduciary funds for his own personal advantage, then the bank does have a duty of inquiry.

This seminal case is Bischoff v. Yorkville Bank, 112 N.E. 759 (N.Y. 1916), a New York case which has been followed by the Supreme Court of South Carolina. In

Bischoff, a personal representative diverted funds from an estate account to pay his personal indebtedness to the depository Bank. The Bank was held liable for the diversion as a result of the payment by the representative of his personal debt to the Bank with estate funds.

The South Carolina Supreme Court followed Bischoff in two early cases, Charleston Paint Co. v. Exchange Banking & Trust Co. 129 S.C. 290, 123 S.E. 830 (1924), and Spartanburg Cnty v. Arthur, 169 S.C. 456, 169 S.E. 235 (1933).

In Charleston Paint, the Court held that a bank is liable when, with knowledge of the existence of a trust, it "has knowledge *actual or constructive* that a fraud is being or is about to be perpetrated by the fiduciary and assists the fiduciary in making the misappropriation":

> A bank receiving trust funds under such circumstances is liable to the true owner for the defalcation of the trustee, if *any* of the following conditions existed: (1) That the bank violated the terms of the deposit contract. (2) That the bank appropriated the fund, either with or without the fiduciary's consent to the payment of the latter's debt to the bank. (3) That the bank assisted the fiduciary to accomplish the misappropriation, having knowledge, *actual or constructive*, that the fraud was being, or about to be, perpetrated by the fiduciary."

Charleston Paint at 294-5, 123 S.E. at 831 (emphasis added).

The appellant court held that a jury charge stating that "mere negligence" was sufficient to hold a bank liable for a misappropriation of funds by a fiduciary.

In Arthur, relying on Charleston Paint, the Court found a bank liable for a misappropriation of funds received with full knowledge of their trust character and applied toward indebtedness of the depositor at another banking institution. Id. 169 S.C. at 461, 169 S.E. at 236.

More recently, the Supreme Court of South Carolina, relying on Charleston Paint, held that where an agent held insurance premiums in a fiduciary capacity and the bank accepted more than twenty such checks for deposit to his personal account, the bank was liable for negligence and conversion. Peoples Life Ins. Co. of S.C. v. Cmty. Bank, 278 S.C. 70, 292 S.E.2d 188 (1982). The Court remarked that while the decision was in part based on a case pre-dating the Uniform Commercial Code, the South Carolina version of the U.C.C. merely codified the common law rule as expressed in Charleston Paint. Id. at 73, 190, 292 S.E.2d at 190.

As set forth above, there is no doubt that Wachovia was aware that Stewart was a fiduciary by virtue of the title of the account, by virtue of S.C. Code Ann. § 62-3-703(a), and as a result of the fact that Wachovia received a copy of Stewart's Certificate of Appointment, titled the account "Estate of Danny Washington by Alice Stewart, its Personal Representative" and because Wachovia opened the account with the estate's tax identification number. (R. p. 90-91, ¶¶ 14 & 15).

Likewise, as set forth in the discussion above, there is no question that Wachovia knew of sufficient facts to put it on notice as to the impropriety of the transactions. As discussed at length above, Wachovia personnel actively participated in the transfer of funds from the estate account to the personal accounts of Stewart, and in fact transferred to Stewart personally a majority of the deposited estate funds within several days of their deposit in the estate account.

B. Wachovia's Duty to Appellant

Subsequent to the filing of Appellant's initial brief, the Court of Appeals decided Cody P. v. Bank of America, N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011). This case establishes that a depository bank owes a duty to protect fiduciary funds deposited with it, and that this duty runs to the protected person—the person to whom the fiduciary's duty runs—even if that protected person is not the "customer" signing the account card. This is the same as the common law.

The facts in the Cody P. case are remarkably similar to the instant case. Both cases involve the transfer of funds—which the depository bank knew or should have known were fiduciary funds—to personal accounts of the fiduciary, with the assistance of bank personnel.

In Cody P., a relative was appointed conservator for $253,991.50 in life insurance proceeds paid as a result of the death of the insured. The beneficiary of the life insurance was the insured's minor son. Id. at 94-95.

The relative appointed as conservator went to a Bank of America branch, and opened a CD in her name as "guardian" for the minor son. Bank of America allowed her to deposit $252,449.51 in checks payable to her as "conservator" into this account. Bank of American allowed the deposit without questioning the fact that the checks deposited were payable to the relative "as conservator." Id.

Several days later, the relative in Cody P. opened a Uniform Gift to Minors ("UGMA") account in her name as guardian for the minor son. She deposited a small check payable to her as conservator into this account. Once again Bank of America did not question the propriety of the deposit of conservator funds into a UGMA account. Id.

The relative then withdrew the entire $253,991.50 from the CD and deposited it in the UGMA account. Over the next several months, the relative made online transfers of $258,500 from the UGMA account to her personal account. Id. at 96-97.

Bank of America appealed the denial of its motion for JNOV on plaintiff's negligence claim. The Court of Appeals rejected the argument that the action of the maleficent relative was an unforeseeable, intervening act, and noted that banks anticipate theft and misappropriation of customer funds. Id. At 98. Thus accordingly, the Court of Appeals found that the misappropriation was foreseeable, and a jury could conclude that all of the elements of negligence were present.

Significantly, the Plaintiff in Cody P. was not the relative who opened the accounts and signed the signature card. Rather, the Plaintiff was the third party, protected person, just as in the case now on appeal. There was no issue in Cody P. of the terms of the signature card or account agreement between the fiduciary and the bank somehow binding a protected person who was not a party to the account agreement, or somehow prohibiting a suit by that third party against the bank under the independent duty owed by the bank to the third party.

This independent duty owed by a bank to certain third parties was implicitly recognized by the Court in Cody P. The Court noted that the testimony established that "when an individual is managing funds for another, additional safeguards are used by banks to protect the funds of the minor or incapacitated person." Id. at 98. According to the Court, "[d]espite Cody's [the minor son] financial vulnerability and BOA's awareness thereof, it failed to set up Cody's account of the proper safeguards to protect his funds."

Id. at 106. Finally, the Court of Appeals noted that "BOA's failure to protect Cody's funds with the proper safeguards was highly reprehensible." Id. at 109.

The Court of Appeals stated that the use of the term "conservator" on the checks payable to the relative put Bank of American on notice that there may be restrictions on the account which merited further review. Specifically, the Court of Appeals held that this term indicated to Bank of America that there were probate court documents relating to the conservatorship that Bank of America should review. Id. at 99. This is the precise argument made by Appellant in this case: the use of the term "personal representative" should have put Wachovia on notice to make further investigation of the transfers by the personal representative to her personal account. The Court of Appeals, however, did not mention Cody P. in its opinion.

C. Effect of Statutory Enactments on the Common Law Rule.

The common law rule set forth above was later somewhat limited in many states by the Uniform Fiduciaries Act ("UFA"). One of the purposes of the UFA was to relax the common law rules that require a bank to exercise the highest degree of vigilance to detect a fiduciary wrongdoing. See eg. Estate of William R. Barney v. PNC National Association, 714 F.3d 920 (6th Cir. 2013). South Carolina, however, never adopted the Uniform Fiduciaries Act, and thus the limitations in that Act do not apply, and cases applying the Uniform Fiduciaries Act do not apply.

Nor does the U.C.C. change the law on Wachovia's common law duty. The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment. See Clearwater Trust v. Bunting, 367 S.C. 340,

626 S.E.2d 334 (2006); Nuckolls v. Great Atl. & Pac. Tea Co., 192 S.C. 156, 5 S.E.2d 862 (1939).

The common law rule was also somewhat limited by the adoption of Articles 3 and 4 of the Uniform Commercial Code. These Articles of the U.C.C. provide some protection to banks acting in good faith with respect to the handling of checks payable to and drawn by fiduciaries. These limitations recognize the reality that, given the complexity and volume of modern commerce, it is not reasonable to expect banks to physically examine all checks and deposits made by fiduciaries.

Those protective limitations in Articles 3 and 4 of the Uniform Commercial Code, however, are limited to checks and similar items; they do not apply to other money transfers, such as wire transfers, cash withdrawals, and cash deposits. The non-negotiable internal counter withdrawal for $260,000 that funded the certificate of deposit which was handwritten by the bank officer is not an instrument or a check, and therefore Articles 3 and 4 of the Uniform Commercial Code do not apply. See Brooks v. First Federal Savings & Loan Ass'n of Sylacauga, 37 U.C.C. Rep. Serv. 2d 495, 726 So.2d 640, 643-44 (Ala. 1998) (holding Section 4-401 of the U.C.C. did not apply because there were no "items" [checks, negotiable instruments, etc.] involved, only "intra-bank transfers."). As a result, the law applicable to this case is effectively the original common law discussed above.

The transfers of funds in this case, and also any intra-bank fund transfers, are governed by Article 4A of the Uniform Commercial Code, and not Articles 3 and 4. Under Article 4A, common law claims are not preempted unless they are inconsistent with the provisions of Article 4A. See Brooks v. First Federal Savings & Loan

Association of Sylacauga, at 644; see also Sheerbonnet, Ltd. v. Am. Express Bank, Ltd., 951 F. Supp. 403, 407-09 (S.D.N.Y. 1995); Hedged Inv. Partners, L.P. v. Norwest Bank Minn., N.A., 578 N.W.2d 765 (Minn. Ct. App. 1998).

No provision addressing notice of breach of fiduciary duty is contained in Article 4A, and, as a result, claims relating to transfers of funds are governed by the common law. Youxin Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 89 (2d Cir. 2010); Schlegel v. Bank of Am., N.A., 271 Va. 542, 628 S.E.2d 362 (2006); Regions Bank v. Wieder & Mastroianni, P.C., 423 F. Supp. 2d 265 (S.D.N.Y. 2006); Regions Bank v. Provident Bank, Inc., 345 F.3d 1267 (11th Cir. 2003).

Cash withdrawals made over the counter fall into this same category, and are likewise outside the scope of Articles 3 and 4 of the Uniform Commercial Code. Brooks at 643-44, citing § 7-4-401, Ala. Code 1975; Miller v. Union Planters Bank, N.A., 2006 U.S. Dist. LEXIS 86366 at 8 n. 2. ("The three cash withdrawals at issue in this case are not 'fund transfers' and therefore Art 4A of the U.C.C. does not apply.").

In summary, Articles 3 and 4 of the U.C.C. do not apply to the transactions in this case. Rather, Article 4A applies. Because Article 4A does not displace the common law rules imposed on banks, those common law rules apply. And under those common law rules, the bank had a duty which was breached.

D. The Affidavit of Plaintiff's Expert.

The duty of Wachovia is further established by the affidavit submitted by Appellant of its expert witness, Ms. Joanna Runey, as to the standard of care in handling fiduciary deposits. (R. pp. 171-173). She attested in her affidavit that Wachovia had a duty to

make further inquiry before making such large transfers of funds from an estate account into personal accounts of the personal representative, occurring almost immediately after qualification of the fiduciary. (R. p. 172) Wachovia failed to provide any counter-factual evidence to dispute Ms. Runey's expert opinion that Wachovia knew or should have known the transactions constituted a breach of fiduciary duty. Thus, the existence of a duty on the part of Wachovia is supported not only by the facts, but by expert testimony.

E. The Rules Governing the Bank-Depositor Relationship Do Not Apply, Because Petitioner Was Not the Depositor.

The trial court held that there can be no duty between Wachovia and the estate because such a duty is precluded by the account agreement relating to the estate account. (R. P.12). Plaintiff was not, however, a party to the account agreement, and thus, is not bound by its provisions. As one court has noted:

> It is a fundamental principle of contract law that parties to a contract may bind only themselves and that the parties to the contract may not bind a third person who is not a party to the contract in absence of his consent to be bound.
>
> Nationwide Mutual Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977), cited with approval by Drafts v. Shull Sausage Company, 276 S.C. 52, 275 S.E.2d 577 (1981).

A contract right cannot be a defense to a claim of negligence brought by a third party not a party to that contract. See, e.g., Mullins v. United Carbon Co., 282 Ky. 111, 113, 137 S.W.2d 1089 (Ct. App. Ky. 1940).

The Court of Appeals held that Wachovia could owe no duty to the beneficiaries of the estate because a bank-depositor relationship is that of creditor and debtor, rather than a fiduciary relationship. But Petitioner and the beneficiaries of the estate whom he

represents, were not Wachovia's customers nor were they depositors, and thus, the rules governing bank-depositor and bank-customer relations do not apply.

Because they were true third parties, the question of whether Wachovia owed them a duty should be analyzed under the traditional foreseeability tests, and not under principles governing the relationship of a bank and its depositors and customers.

F. The Decision of the Court of Appeals Will Allow for Subversion of the Provisions of the South Carolina Probate Code.

Financial institutions play an important role in making the Probate Code and similar fiduciary statuts work. If financial institutions are able to close their eyes to transactions by fiduciaries under circumstances that would cause a reasonable person to make inquiry, then the integrity of the Probate Code and similar statutes will be damaged. Cf. Henry Lowenstein and Andy E. Hendrick, The Price of One Hour—Defending Conservatorship Integrity: Cody P. v. Bank of America, 25 Quinn. Prob. Law Jour. 287 (2012).

CONCLUSION

For the reasons stated, this Court should reverse the order of the Circuit Court granting judgment, and remand this case to the Circuit Court.

Respectfully submitted,

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November 5, 2014

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PROOF OF SERVICE

I certify that I have served the Brief of Petitioner and the Appendix on opposing counsel by depositing a copy of it in the United States Mail, postage prepaid, on November 5, 2014, addressed to opposing counsel at their office as set forth below:

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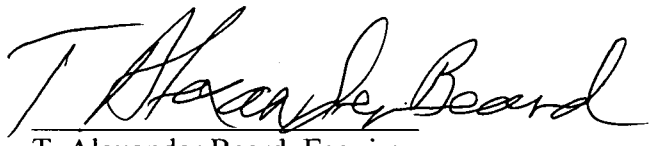

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By Federal Express

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: Errol Washington as Personal Representative of the Estate of Danny Washington v. Alice R. Stewart, *et al.*
Appellate Case No. 2012-213171
Lower Court Case No. 2009-CP-10-02846
Brief of Petitioner
Appendix

Dear Mr. Shearouse:

Enclosed please find for filing the following:

1. One original and fifteen copies of the Brief of Petitioner;

2. One original and thirteen copies of the Appendix;

3. One original Proof of Service to opposing counsel.

Please return a copy of items 1, 2, and 3 stamped to indicate filing. A stamped, self-addressed envelope is enclosed for your convenience.

By copy of this letter, I am serving all counsel of record and all parties *pro se* with copies of the foregoing.

Thank you for your assistance. If I need to do anything further in this regard, please don't hesitate to contact me.

Sincerely yours,

Edward P. Guerard, Jr.
Nov 6, 2014

EPG;bg
Enclosures
Cc: Trudy H. Robertson, Esq. (w/enclosures)
Robert E. Sumner, IV, Esq. (w/enclosures)
Alice E. Birch (w/enclosures)
Rudell S. Birch (w/enclosures)
Alice R. Stewart (w/enclosures)
Leroy Stewart (w/enclosures)