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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-213171  
Lower Case No. 2009-CP-10-02846

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 RESPONDENT WACHOVIA BANK, N.A.

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## COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals properly affirm the trial court's grant of summary judgment with respect to the aiding and abetting a breach of fiduciary duty cause of action, because Petitioner produced no evidence that Respondent Wachovia Bank had actual knowledge of, or knowingly participated in, the personal representative's wrongdoing?
2. Did the Court of Appeals properly affirm the trial court's grant of summary judgment with respect to the negligence cause of action, because Respondent Wachovia Bank did not owe Petitioner a duty of inquiry as urged by Petitioner?

## STATEMENT OF THE CASE

The Court of Appeals correctly affirmed the trial court's grant of summary judgment in favor of Respondent Wachovia Bank, N.A. ("Wachovia Bank") and refused to accept the arguments of Petitioner that would place the bank in an impossible position of oversight of a fiduciary under the undisputed facts of this case. There is no basis, in fact or law, to alter the lower courts' decisions.

On May 5, 2009, Petitioner filed the Complaint against Wachovia Bank in the Court of Common Pleas for Charleston County, South Carolina, alleging three causes of action against Wachovia Bank: (1) aiding and abetting a breach of fiduciary duty; (2) negligence; and (3) conversion under S.C. Code Ann. § 36-3-307. On June 24, 2009, Wachovia Bank timely filed its Answer, denying all allegations and asserting a number of affirmative defenses, including a Rule 12(b)(6) affirmative defense for failure to state a claim upon which relief could be granted.<sup>1</sup>

On May 24, 2010, Wachovia Bank filed its Motion for Summary Judgment as to all causes of action with an accompanying Memorandum with exhibits and affidavits. (R. pp. 40-88). A number of supplemental, reply and opposition pleadings were filed by both parties regarding the Motion for Summary Judgment. (R. pp. 89-116; 171-174; 176-186; 187-204; 224-234). The trial court held a hearing on the Motion for Summary Judgment on November 5, 2010. (R. pp. 254-278).

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<sup>1</sup> Other defendants named in the Complaint, Alice R. Stewart and Leroy Stewart, failed to answer and appear in this action. The Burch defendants appeared *pro se*, but were thereafter dismissed from the lawsuit by Petitioner. Defendants Sterling Lending Group, Inc. and Regent Bank were likewise dismissed by Petitioner.

On January 5, 2011, the trial court filed its Order of December 24, 2010, granting summary judgment in favor of Wachovia Bank (the “Order”) (R. pp. 4-14), with judgment entered on January 13, 2011. On January 27, 2011, Petitioner filed a Motion to Alter or Amend the judgment. (R. pp. 239-41). On February 7, 2011, Wachovia Bank filed a Memorandum in Opposition to the Motion to Alter or Amend the judgment. (R. pp. 243-48).

On February 16, 2011, Petitioner filed a Notice of Appeal of the Order with the Court of Appeals. Concurrently, Petitioner filed a reply to Wachovia Bank’s Memorandum in Opposition to Petitioner’s Motion to Alter or Amend in the trial court. (R. p. 252 & pp. 249-250). The trial court denied Petitioner’s Motion to Alter or Amend in an Order dated February 16, 2011, which was entered on February 23, 2011, and provided to the parties on April 25, 2011, when the Clerk of Court mailed out its Notice of Entry of Judgment Pursuant to Rule 77, SCRC. (R. pp. 15-16).<sup>2</sup>

The Court of Appeals heard oral arguments in the case on June 5, 2012. On July 11, 2012, in a *per curiam* unpublished opinion, with all judges concurring,<sup>3</sup> the Court of Appeals affirmed the trial court’s grant of summary judgment in favor of Wachovia Bank. Petitioner requested a rehearing, raising only two distinct arguments in his Petition: (1) “The Court [of Appeals] overlooked the fact that there was sufficient evidence in the record that Wachovia had actual knowledge of the breach of Stewart of her fiduciary duty to preclude summary judgment”; and (2) “The Court of Appeals

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<sup>2</sup> Wachovia Bank questioned the jurisdiction of the Court of Appeals because Petitioner filed a Notice of Appeal before the trial court decided his Motion to Alter or Amend. The Court of Appeals disagreed and accepted jurisdiction. (App. p. 3, n.1).

<sup>3</sup> C.J. Few, J. Huff, and J. Short comprised the Court of Appeals panel.

overlooked the fact that because Stewart owed a statutorily imposed fiduciary duty to [Petitioner], Wachovia Bank should have been aware of this duty, and thus, owed a duty of care to Appellant.” (App. pp. 4-5). Respondent filed a Return to the Petition for Rehearing on August 3, 2012. The Court denied the Petition for Rehearing in an Order filed on September 13, 2012. (App. p. 6).

On October 15, 2012, Petitioner filed a Petition for a Writ of Certiorari with the Court. On November 14, 2012, Respondent filed a Return to the Petition for Writ of Certiorari. The Petition which was granted on September 14, 2014.<sup>4</sup>

#### FACTS

Defendant Alice R. Stewart (“Stewart”) was appointed personal representative of the Estate of Danny Washington on July 18, 2007, by Charleston County Probate Court Judge Irvin G. Condon. (R. p. 52; R. p. 5). This appointment by the Probate Court was done with the consent of the heirs of the Estate of Danny Washington and with a waiver of any bond requirement for Stewart. (R. p. 258; R. p. 5).

Stewart thereafter opened, on or about August 1, 2007, a commercial deposit account with Wachovia Bank (the “Account”). (R. pp. 54-55; R. pp. 57-86; R. p. 5). The Account is a non-profit, business checking account. Id.; (R. pp. 256-257). The Account was opened under the federal tax identification number of the Estate of Danny Washington. (R. pp. 176-186; R. p. 5). Stewart, as the personal representative, was the sole signer on the Account. Id. The Account is defined by various account agreements, including the “Deposit Agreement and Disclosures for Commercial Accounts” (the

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<sup>4</sup> After *certiorari* was granted, Petitioner filed a Motion for Substitution of Co-Counsel in the Court of Appeals, which was granted. Alexander Beard and Edward P. Guerard, Jr. are current counsel for Petitioner.

“Deposit Agreement”), the “Customer Access Agreement” and the signature card (collectively, the “Account agreements”). (R. pp. 54-55; R. pp. 57-86).

It is undisputed that Stewart, herself, the authorized signer on the Account, conducted and requested the banking transactions that the Petitioner now complains about. (R. p. 5). Stewart did so during the time period that she was the duly appointed personal representative of the Estate. Id. Stewart made various counter withdrawals, cashed various checks, both at Wachovia Bank branches and at other banks, and made various wire transfers, most of which were self-initiated by using a pin code without any teller or other bank assistance. (R. pp. 257-258). Among the number of transactions in the Account, on or about August 6, 2007, Petitioner alleges that Stewart conducted a counter withdrawal at Wachovia Bank from the Account transferring money to a six (6) month certificate of deposit account in the name of Stewart alone. (R. p. 20, ¶ 22; R. p. 5).<sup>5</sup>

Petitioner is the successor personal representative of the Estate of Danny Washington. Petitioner’s proffered issues on appeal to this Court are the trial court and the Court of Appeals (1) ignored evidence that Wachovia Bank knowingly participated in Stewart’s breaches of fiduciary duties to the Estate of Danny Washington, and (2) erred in their failure to find Wachovia Bank owed a duty of inquiry to investigate the actions of the authorized signer on the Account, Stewart. The trial court correctly granted summary judgment in favor of Wachovia Bank on these causes of action; the Court of Appeals

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<sup>5</sup> The trial court correctly found that Petitioner’s affidavits, both of Petitioner Washington and an expert witness, contained no admissible evidence of the knowledge or actions of Wachovia Bank which met the requirements of Rule 56, SCRPC. (R. p. 9 at n.7). Petitioner relies on these same inadmissible allegations, while inappropriately labeling them “facts,” in his current Brief. (Pet’r’s Br. pp. 4-6).

affirmation of the trial court's findings was correct. Wachovia Bank now asks this Court to affirm the decisions of the lower courts for the reasons stated below.

#### ARGUMENTS<sup>6</sup>

1. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT WITH RESPECT TO THE AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY CAUSE OF ACTION BECAUSE PETITIONER PRODUCED NO EVIDENCE THAT WACHOVIA BANK HAD ACTUAL KNOWLEDGE OF, OR KNOWINGLY PARTICIPATED IN, STEWART'S WRONGDOING.

The Court of Appeals and the trial court correctly applied the elements for the cause of action of aiding and abetting a breach of fiduciary duty as set forth in the case of Vortex Sports Entm't, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008). The Court of Appeals in Vortex set forth the three elements of the aiding and abetting cause of action as (1) a breach of fiduciary duty owed to the plaintiff; (2) defendant's knowing participation in the breach; and (3) damages. These same elements were cited by the South Carolina Supreme Court in Future Group, II v. NationsBank, 324 S.C. 89, 478 S.E.2d 45 (1996). There, this Court pointed out that "[t]he gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Id.; see also Gordon v.

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<sup>6</sup> In Wachovia Bank's Return to the Petition for Writ of Certiorari, Wachovia Bank asserted that Petitioner failed to preserve all questions set forth in his Petition for Writ of Certiorari for review by this Court. Rule 242(d)(2), SCACR, requires that (1) the issue must have been raised in the initial arguments to the Court of Appeals and (2) the issue must have been raised in a petition for rehearing before the Court of Appeals. The issue is not preserved for consideration by the Supreme Court unless both of these requirements are met. Wachovia Bank incorporates as if fully set forth herein Section I.B. of its Return. To the extent, however, that this Court is reviewing the broader issues as urged by Petitioner in its Brief, Wachovia Bank is addressing those issues in this Brief without intending any waiver of its position on Petitioner's failure to preserve, the same being reserved and incorporated herein.

Busbee, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012) (citing Vortex elements and requirement of actual knowledge).

The record here is void of any “knowing participation” or “actual knowledge” of the personal representative’s, Stewart’s, wrongdoing by Wachovia Bank. Such is the standard for a cause of action asserting the aiding and abetting of a breach of a fiduciary duty. As properly concluded by the trial court, and affirmed by the Court of Appeals, the record “*even when viewed in the light most favorable to Plaintiff [Petitioner]*, is devoid of any evidence of Wachovia’s ‘actual knowledge’ of Stewart’s wrongdoing.” (R. p. 9) (emphasis added).

Petitioner argues that this finding was in error. Petitioner, in conclusory fashion, states there is “ample evidence that Wachovia knew of the breach by Stewart of her fiduciary duty.” Petitioner, as in previous briefs, relies on seven allegations in an attempt to create a question of material fact over the issue of actual knowledge. Petitioner’s allegations do not establish a question of material fact regarding actual knowledge. Petitioner has submitted no evidence<sup>7</sup>, nor can it, demonstrating that Wachovia Bank knowingly participated in Stewart’s breaches of fiduciary duties to the Estate of Danny Washington.

Petitioner proposes: “An inference is evidence,” without citation. This appears to be a wishful over-reading of McCready v. Atl. Coast Line R.R. Co., 212 S.C. 449, 48 S.E.2d 193 (1948). The issue in McCready was whether a shipment of green beans, which arrived spoiled, had been properly iced, or was the shipper negligent. The court

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<sup>7</sup> Petitioner’s affidavits contained no admissible or competent evidence on the knowledge of Wachovia Bank which could meet the requirements of Rule 56, SCRPC. See supra n.5.

considered the alleged amounts of ice added at different stops and the lack of ice on delivery and calculated the amount of ice that should have remained upon delivery; however there was none. The court stated that inferences drawn from physical facts may be as strong as direct evidence, and qualifies this thought further by noting that inferences may amount to circumstantial evidence. 48 S.E.2d at 196. Petitioner misapprehends the McCready court's exposition on physical evidence as adopting the position that inference and evidence are the same.

Petitioner states: "If the evidence yields more than one reasonable inference, or inference is in doubt, or if there is a difference of opinion, the case must be submitted to the jury." (Pet'r's Br. p. 7.) Here, the lower courts have correctly applied the standard for summary judgment and determined that even when the record is viewed in the light most favorable to Petitioner, it is devoid of any evidence, by inference or otherwise, of Wachovia's "actual knowledge" of Stewart's wrongdoing.

In furtherance of his argument that a non-fiduciary's knowledge of a breach can be inferred from surrounding circumstances, Petitioner also cites three cases from other federal jurisdictions in which the issue was the liability of a non-fiduciary of an ERISA plan who had knowledge of a breach of duty by a fiduciary of the plan. Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988); Donovan v. Schmoutey, 592 F. Supp. 1361, 1396 (D. Nev. 1984); and Donovan v. Daugherty, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982). These federal cases dealt with a provision of the ERISA statutory scheme and as such, are not applicable to the relationship between a bank and its depositor and do not address the South Carolina common law cause of action for aiding and abetting a breach of fiduciary duty.

Petitioner continues to fail to recognize the appropriate standard and elements of the cause of action of aiding and abetting a breach of a fiduciary duty. The gravamen of such a claim, as pronounced by this Court, is the *actual knowledge* of, or *knowing participation* in, the fiduciary's breach. As stated by the trial court, and affirmed by the Court of Appeals:

As stated in Vortex, 'knowing participation' is required under the South Carolina cause of action for aiding and abetting the breach of fiduciary duty. There is no evidence of 'knowing participation' by Wachovia. Rather, the undisputed facts show that Stewart was the sole authorized signer on the Account and, that during the term of her appointment as [personal representative] . . . of the Estate, she requested payment of Wachovia on the Account. Wachovia complied with those instructions pursuant to the terms of the deposit agreement. Plaintiff [Petitioner] has presented no evidence to this Court that Wachovia knowingly participated in any breach of duty by Stewart.

(R. p. 11). The Court of Appeals aptly noted Stewart's appointment as personal representative was without restriction and that the "mere movement of funds does not create actual knowledge of a breach of fiduciary duty." The mere fact that Wachovia Bank may have known that Stewart was a personal representative also does not equate to, nor prove, that Wachovia Bank had "actual knowledge" that Stewart was engaging in breaches of her duty as a personal representative. Stewart was appointed personal representative, acting under proper order of the Probate Court without any restrictions on her regarding Estate funds and was the sole, authorized signer on the Account. Stewart had the same power over the Estate's property as an absolute owner would have, but for the benefit of creditors and beneficiaries of the estate. S.C. Code Ann. § 62-3-711(a). None of the assertions by Petitioner on pages 8 through 10 of his Brief demonstrate any evidence, not even a scintilla, of "actual knowledge" or "knowing participation" in Stewart's breach.

Rule 56, SCRPC, requires that the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. SCRPC 56. Instead, the non-moving party must submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate a genuine and material issue of fact. Id. The non-movant's proof must meet the evidentiary standard of proof that would apply at a trial on the merits. Id. An affidavit must be made on personal knowledge and cannot be based on hearsay or conjecture. Id.

Here, the lower courts appropriately applied the summary judgment standard required by Rule 56, SCRPC. Summary judgment in favor of Wachovia Bank on this cause of action is proper and was properly affirmed by the Court of Appeals.

2. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT WITH RESPECT TO THE NEGLIGENCE CAUSE OF ACTION BECAUSE WACHOVIA BANK DID NOT HAVE A DUTY OF INQUIRY.

Petitioner alleges that Wachovia Bank was negligent in its handling of the Account and that Wachovia Bank had a duty of inquiry. As in any negligence cause of action, in order to recover, a plaintiff must show a duty of care owed by a defendant to the plaintiff, a breach of that duty by a negligent act or omission and damages proximately resulting from that breach. See Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003). An essential element in a negligence cause of action is the existence of a legal duty of care owed by the defendant to the plaintiff. Id. "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff . . . . If there is no duty, the defendant is entitled to judgment as a matter of law." Id. "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, 479

S.E.2d 47, 49 1996). “An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.”

Carson v. Adgar, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997).

**a. The duty of Wachovia Bank is defined in and arises from the Deposit Agreement of the Account and is one of creditor/debtor.**

Wachovia Bank’s duty here is defined in the Account’s Deposit Agreement, which states, at page 3 (R. p. 59), in pertinent part:

1. **LEGAL EFFECT OF AGREEMENT.** This Agreement governs all commercial deposit accounts established with Wachovia Bank, National Association . . . .

The words ‘you,’ ‘your’ and ‘yours’ as used in this Agreement mean the person, partnership, corporation, association, limited liability company or other entity that maintains one or more deposit accounts with us including, but not limited, to all owners and signers on the account . . . .

**Our deposit relationship with you is that of debtor and creditor, and you agree that we are not in anyway acting as a fiduciary for you or for your benefit.** [Emphasis added].

By the clear and unambiguous language of the Deposit Agreement and the law of South Carolina, both the relationship between Wachovia Bank and Stewart *and* the relationship between Wachovia Bank and the Estate, is that of debtor and creditor. There is no fiduciary relationship with respect to the Account.<sup>8</sup> Deposits were made in to the

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<sup>8</sup> The deposit agreement is consistent with South Carolina law that the normal bank-depositor arrangement creates a creditor-debtor relationship. Rush v. South Carolina Nat’l Bank, 288 S.C. 560, 343 S.E.2d 667 (Ct. App. 1986). “South Carolina holds that the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature.” Regions Bank v. Schmauch, 354 S.C. 648, 651, 582 S.E.2d 432 (Ct. App. 2003). Petitioner agrees that there is no fiduciary duty at issue.

Account, at which time the bank became the creditor who was obligated to return those funds upon request by the authorized signer.

As the trial court stated:

Within the creditor and debtor relationship, deposits were made into the Account, at which time Wachovia became the creditor then obligated to return those funds upon demand by Stewart. At the time of the transactions questioned by Plaintiff [Petitioner], Stewart was the sole authorized signer on the Account acting with the power of the Probate Court of South Carolina under a valid Certificate of Appointment and with no restrictions. As such, Wachovia had no duty of inquiry regarding the actions of Stewart.

(R. p. 12).

The Court of Appeals affirmed the trial court's finding of no duty beyond that established by the Deposit Agreement. The Account agreements are clear that Wachovia Bank does not undertake to advise its customer in a commercial deposit account. (R. pp. 57-86; R. pp. 54-55). Wachovia Bank also does not review or evaluate the actions of Stewart as personal representative of the estate as part of its banking relationship in a commercial deposit account. Id. Wachovia Bank's duty is to act in compliance with the Account agreements and pursuant to the instructions of the signatory on the Account. The trial court and the Court of Appeals correctly found that there was no duty, as a matter of law, under the undisputed facts of this case to require more of Wachovia Bank. As the trial court succinctly stated, "Wachovia's duty and obligation was to act as it did -- to act pursuant to its deposit agreement and to comply with the instructions of Stewart, the sole authorized signer on the Account." (R. p. 12).

**b. Petitioner cannot, as a matter of law, maintain that a duty of care was owed by Wachovia Bank beyond that stated in the Account Deposit Agreement.**

Petitioner concedes in his Brief that “the general rule is that a bank has no duty to inquire whether a fiduciary is applying the funds of a trust account properly.” (Pet’r’s Br. p. 10) (emphasis added). Petitioner then misapplies a number of cases to urge an exception of this general rule to the case at hand. Petitioner argues that Wachovia Bank assisted in Account transfers, and thereby became charged with notice as to the proprietary of the transactions of Stewart, which imposed a duty to inquire into the actions of Stewart. Wachovia Bank had no such duty of inquiry into Stewart’s actions, as a matter of law, and the trial court and Court of Appeals did not err in so finding.

Petitioner’s assertions that there is a duty of inquiry in this case ignore the Account agreements, and instead cite to the early South Carolina Supreme Court cases of Charleston Paint Co. v. Exchange Banking & Trust Co., 129 S.C. 290, 123 S.E. 830 (1924) and Spartanburg County v. Arthur, 169 S.C. 456, 169 S.E. 235 (1933). These cases are distinguishable from the case at bar and do not impose a duty upon Wachovia Bank to protect Petitioner against the acts of Stewart.

In Charleston Paint, an attorney altered the payee of a check making it payable to himself, as attorney for the original company payee, and then deposited the check in his personal account (rather than in his trust account for the benefit of the company payee). It was alleged by the original company payee that the bank knew or should have known from the form, appearance and contents of the check that it had been altered and that the proceeds belonged to the plaintiff, not the attorney. 129 S.C. at 293, 123 S.E. at 830.

The plaintiff company also argued that the bank failed to comply with the terms of the endorsement on the check and applied the check to wrong account.

As recognized by the trial court, “[t]he Charleston Paint court made it clear that its ruling was limited to the specific facts present in that case, to wit, that the bank was faced with a forged check.” (R. p. 9). The Charleston Paint court stated, “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 . . . .” 129 S.C. at 296, 123 S.E. at 832; (R. p. 9). The Charleston Paint decision has never been cited for the proposition that Petitioner urges under facts as presented in the case at bar. As the Charleston Paint court explained, under ordinary circumstances:

The bank, even with knowledge of the existence of a trust, may safely assume that, although the deposit may be entered to the credit of the fiduciary’s account as an individual, or as attorney, he will faithfully disburse it.

129 S.C. at 294, 123 S.E. at 830; (R. pp. 9-10).

Here, we are not dealing with forged instruments or actions; instead, we are dealing with transactions by the authorized signer on the Account, the personal representative Stewart. The fact that Stewart may have transferred funds into her personal account does not alter the analysis. (R. p. 10). As indicated in Charleston Paint, Wachovia Bank “may safely assume that, although the deposit may be entered to the credit of the fiduciary’s account as an individual . . . , [she] may faithfully disburse it.” 129 S.C. at 294, 123 S.E. at 830; (R. p. 10).

Plaintiff also cites to the 1933 case of Spartanburg County, 169 S.C. 456, 169 S.E. 235. This case is also distinguishable. Spartanburg County involved a claim of a preference in the face of the insolvency of a bank. The bank had accepted checks drawn

by the treasurer of Spartanburg County and each check had been made payable to the bank, itself. The bank took the funds and applied them directly to the indebtedness due the bank by a corporation headed by the treasurer, individually. In this instance, the court recognized the bank knew that the indebtedness owed to it was by the individual, and not the County. The court held that the Treasurer's payment was a preferential payment.

Here, we are not dealing with issues of preferential payments. Furthermore, we are not dealing with facts where Wachovia Bank applied any payments to its own benefit or against any individual indebtedness of Stewart due to Wachovia Bank. Petitioner makes no such allegations that Wachovia Bank received any payments from Stewart and conceded before the trial court that Wachovia Bank received no benefit from Stewart's wrongdoing. (R. p. 10; R. pp. 273-275).

Petitioner also cites to Peoples Life Ins. Co. v. Community Bank, 278 S.C. 70, 292 S.E.2d 188 (1982), in support of its negligence cause of action. Peoples Life is distinguishable from the present case and, therefore, neither persuasive nor binding on this Court. Peoples Life involved a dispute over a bank's handling of a check, which is a negotiable instrument. Furthermore, the court in Peoples Life concluded that it was "undisputed that the endorsements [on the check] were unauthorized." As stated above, the present case involves neither negotiable instruments nor forgery.<sup>9</sup>

Petitioner states in his brief that Peoples Life relied on Charleston Paint in holding the bank liable for negligence and conversion. (See Pet'r's Br. p. 12). This statement is misleading and fails to accurately describe the Peoples Life ruling. In fact, Peoples Life

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<sup>9</sup> Peoples Life is also distinguishable because the plaintiff alleged a conversion cause of action under S.C. Code Ann. § 36-3-419, which Petitioner has conceded does not apply in the present case.

merely reversed the trial court's granting of a motion to strike and motion for non-suit. Interestingly, Peoples Life relied on § 36-3-419 as the basis for its conclusion that non-suit was improper on the negligence cause of action. On this issue, the court explained that the bank failed to meet its burden of presenting evidence that it acted in good faith, as required for this affirmative defense under § 36-3-419. There is no such burden on Wachovia Bank in the present case.

The duty between Wachovia Bank and Petitioner is defined by the Deposit Agreement, and Wachovia had no duty of inquiry into the misconduct of Stewart. There are no circumstances in this case to alter this rule.

The case law urged by Petitioner consistently states that no duty of inquiry arises, except in the limited instances where the fiduciary is applying trust or estate funds to pay his or her own personal indebtedness to the bank *and* the bank benefits from such a transaction, or in instances where forged instruments are at issue. The cases cited by Petitioner are factually distinguishable, neither controlling nor applicable to the present case, and do not impose a duty upon Wachovia Bank to protect Petitioner against the acts of Stewart. Here, no facts suggest Stewart was applying any Estate funds against any personal indebtedness to Wachovia Bank. Further, it is undisputed that the present case does not involve forged instruments or actions; instead, the transactions in question were made by the authorized signer on the Account, the personal representative Stewart, who was acting without any restrictions on her appointment by the Probate Court. Petitioner's urgency that the lower courts' decisions exempt banks from a general duty of care owed to third parties is misplaced. The general rule is there is no duty of care, unless certain exceptions apply. Here, as a matter of law, there are no such exceptions.

c. **Petitioner’s reference to a “seminal” New York case of Bischoff v. Yorkville Bank is misplaced and is not applicable to the case at bar to impose a duty of inquiry on Wachovia Bank.**

Petitioner’s reference to the New York case of Bischoff v. Yorkville Bank, 218 N.Y. 106, 112 N.E. 759 (1916), is also misplaced because Bischoff is distinguishable. Like the bank in Spartanburg County, the bank in Bischoff took funds to pay off indebtedness owed to it. Additionally, Bischoff involves negotiable instruments. The estate account checks at issue in Bischoff were made payable to the defendant bank to pay off the personal indebtedness of the personal representative with the bank. The facts here, as indicated above, are distinguishable as no funds were applied to any indebtedness owed to Wachovia Bank by Stewart, and Wachovia Bank obtained no benefit from these transactions.

Even though the New York case of Bischoff is distinguishable, the case offers some useful language:

A bank does not become privy to a misappropriation by merely paying or honoring the checks of a depositor drawn upon his individual account in which there are, in the knowledge of the bank, credits created by deposits of trust funds. The law does not require the bank, under such facts, to assume the hazard of correctly reading in each check the purpose of the drawer, or, being ignorant of that purpose, to dishonor the check.

Id. at 761. The New York court goes on to state that the *presumption* of validity remains, until annulled by notice or knowledge, that the depositor will preserve or lawfully apply the trust funds. Id.

In Bischoff, because the checks were made payable to the bank, itself, to pay off the personal indebtedness of the personal representative, the New York court found that the bank no longer had the right to assume that the personal representative was using the moneys lawfully. In the case at bar, however, no facts exist to override the presumption

allowed to Wachovia Bank – that Stewart, the personal representative, was acting properly and lawfully. This, the trial court and Court of Appeals correctly held.

To impose upon Wachovia Bank a duty of inquiry with a commercial checking account as urged by Petitioner contradicts the language of the Account Deposit Agreement. Wachovia Bank has no ability to determine the veracity of Stewart’s actions – Stewart is the agent duly appointed and authorized under the laws of the State of South Carolina and its Probate Court to transact business on behalf of the Estate of Danny Washington. There are no co-signers on the Account. Wachovia Bank has no other information on the Estate of Danny Washington with respect to the commercial, checking account, nor any reasonable ability to conduct an investigation on the Estate of Danny Washington, the actions of Stewart or who the rightful beneficiaries may be of Estate assets. Wachovia Bank’s relationship here with the Estate of Danny Washington and Ms. Stewart, the personal representative, is one of creditor-debtor only. A demand by an authorized signer is made, and Wachovia Bank’s obligation is to abide by that demand under the governing Account agreements. The trial court correctly granted summary judgment in favor of Wachovia Bank as it met the duties, as a matter of law, under the Account agreements.

**d. The Court of Appeals’ decision in this case does not conflict in any respect with its decision in Cody P. v. Bank of America.**

Petitioner’s argument in Section II.B. of his Brief that the Court of Appeal’s decision conflicts with Cody P. v. Bank of America, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011), is unsubstantiated. Cody P. is distinguishable, as it contained very different facts than the case at hand. In Cody P., the miscreant was not a personal representative of an estate, but instead a court-appointed conservator for a minor. In Cody P., the Probate

Court's certificate of appointment of the conservator and fiduciary letters placed restrictions on the conservators' ability to conduct business on behalf of the conservatorship bank account by stating that there could be "[n]o withdrawals without court order." In contrast, the Court of Appeals correctly noted in this case that Stewart's appointment as personal representative placed no restrictions on her regarding the handling of Estate funds. As such, Stewart had "the same power over the title to property of the estate that an absolute owner would have, in trust . . . ." S.C. Code Ann. § 62-3-711(a).

Petitioner also mistakenly conflates the duties of a conservator with those of a personal representative. Both of these positions are statutorily defined (S.C. Code Ann. §§ 62-1-201 (6) and -(33)); statutes pertaining to conservatorships are primarily found in Article 5 of Title 62, while those pertaining to personal representatives are primarily found in Article 3 of Title 62. The distinction is clear. The South Carolina Probate Code's provisions regarding a personal representative's general duty as a fiduciary do not extend or impose a similar duty on Wachovia Bank. As the Court of Appeals correctly found, a bank's "duty does not extend to ensuring a depositor is behaving wisely with his or her money."

Petitioner notes: "The Court of Appeals . . . does not mention Cody P. in its opinion." J. Huff, who was on the panel that heard arguments in this case, was also a member of the panel which heard Cody P. During oral argument, J. Huff questioned Respondent on the relevance of Cody P. to this case. In his Petition for Rehearing, Petitioner reargued that Cody P. had a fact pattern analogous to the instant matter; in oral argument and in its Return to the Petition, Wachovia Bank set forth the reasons that Cody

P. was irrelevant. Cody P. was discussed before the Court of Appeals in Petitioner's Reply Brief, at oral argument, in the Petition for Rehearing, and in Wachovia Bank's Return. The lack of mention of Cody P. in the Court of Appeals' opinion was not the result of oversight. Cody P. does not apply.

**e. The Uniform Commercial Code discussion in Petitioner's Brief is without any significance to the case at bar.**

Petitioner asserted a conversion cause of action under the Uniform Commercial Code in the Complaint.<sup>10</sup> However, Petitioner conceded during briefing in the trial court, that Sections 3 and 4 of the Uniform Commercial Code, and the conversion provisions therein, do not apply. Petitioner maintains that Article 4A applies, but asserted no cause of action under Article 4A in the Complaint. Furthermore, Article 4A lacks a fiduciary duty dealings provision. For these reasons, the Uniform Commercial Code does not govern the present dispute.

Notwithstanding this fact, the policy behind the Uniform Commercial Code is instructive when considering a bank's role in modern business. The Uniform

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<sup>10</sup> Section 36-3-307(3) provides a conversion Uniform Commercial Code cause of action and states: "If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty." The Official Comment to Section 36-3-307(3) goes on to provide:

For example, Doe as President of Corporation writes a check on Corporation's account to the order of Doe personally. The check is then indorsed over to Bank . . . . In this case there is no notice of breach of fiduciary duty because there is nothing unusual about the transaction. Corporation may have owed Doe money for salary, reimbursement for expenses incurred for the benefit of Corporation, or for any other reason. If Doe is authorized to write checks on behalf of Corporation to pay debts of Corporation, the check is a normal way of paying a debt owed to Doe. Bank may assume that Doe may use the instrument for his personal benefit.

For analogous reasons, Wachovia Bank may assume that Stewart was acting appropriately in her actions with it.

Commercial Code created limitations on common law rules, and “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.” (Pet’r’s Br. p. 16). Petitioner ignores, and tries to circumvent, these limitations based on his concession that Articles 3 and 4 of the Uniform Commercial Code do not apply. Instead, Petitioner looks to antiquated case law that pre-dates the Uniform Commercial Code and pronounces these cases to be controlling common law on the duty standard. As indicated above, these pre-Uniform Commercial Code cases are distinguishable and do not apply in the present case; they simply do not override or negate the creditor/debtor nature of the Account and the duties required of Wachovia Bank in the Account Deposit Agreement.

**f. The existence of a duty is a question of law for the court and cannot be established by affidavit opinion.**

The trial court addressed the question of duty and found that, “Wachovia’s duty is defined in, and arises from, the clear and unambiguous Deposit Agreement related to the Account.” (See R. p. 12). Furthermore, the trial court’s Order states, among other things, that “Wachovia’s duty and obligation was to act as it did – to act pursuant to its deposit agreement and to comply with the instructions of Stewart, the sole authorized signer on the Account.” *Id.* The existence of a duty is a question of law for the courts and, without a duty, there is no actionable negligence. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007).

Petitioner’s expert affidavit attempts to refer to a standard of care for fiduciary banking accounts, but does not address Wachovia Bank’s duty under the Deposit Agreement and the duty as defined by the law of the State of South Carolina. The

Petitioner's expert's affidavit does not create a new duty, nor can it, and it does not raise a genuine question of material fact on whether Wachovia Bank breached the contractual duty appropriately recognized by the trial court. The existence of a duty is a question of law and is not the appropriate subject of expert testimony.

**g. While the issue of foreseeability was not preserved for review, foreseeability is irrelevant because Wachovia Bank had no duty of inquiry in this case.**

Petitioner now argues because it was not a party to the account agreement, it is not bound by its provisions. As a third party to the agreement, Petitioner asks this Court to determine whether Wachovia owed them a duty under the traditional foreseeability tests, "and not under principles governing the relationship of a bank and its depositors and customers." Petitioner first raised foreseeability as an issue in his Petition for Writ of Certiorari.

Despite numerous opportunities to raise this argument in the lower courts, Petitioner did not. Parties must properly preserve their arguments for appellate courts for review. See Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). Issues not raised to and ruled on by the lower courts are not properly preserved for review. Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012); see also Rule 242, SCACR & supra n.6. This Court should not consider this new theory.

However, should the Court consider Petitioner's foreseeability argument, it fails. It is an attempt to establish a duty by bootstrapping. "Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability. Foreseeability itself does not give rise to a duty." South Carolina State Ports Auth. v.

Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986) (citations omitted). “In the absence of a duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability.” Land v. Green Tree Servicing, LLC, 2014 U.S. Dist. LEXIS 154879 (D.S.C. Oct. 31, 2014). Accord Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586 (2003). Without an existing duty, foreseeability by itself cannot impose liability on Wachovia Bank. Wachovia Bank has previously addressed why there is no duty of inquiry, supra Arguments, Part 2.

Further, the Court of Appeals appropriately analyzed Petitioner’s negligence cause of action. The Court of Appeals correctly cited the elements of a claim for negligence and noted, among other principles, that “[a]n affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.” The Court of Appeals’ references, in its unpublished opinion, to a bank-depositor relationship correctly set forth the relationship between a bank and its customers. The Court of Appeals astutely noted that Wachovia Bank’s duty, however, “does not extend to ensuring that a depositor is behaving wisely with his or her money.” This is particularly so under the undisputed facts of the present case which establish that Stewart was a duly appointed personal representative acting without any restrictions on her appointment, was the sole authorized signer on the Account, and was the person conducting the transactions complained of to which Wachovia Bank received no benefit.

**h. The decision of the Court of Appeals does not allow for subversion of the South Carolina Probate Code, but rather comports with commercial banking business.**

As correctly stated by the Court of Appeals, Stewart had “the same power over the title to property of the estate that an absolute owner would have, in trust . . . .” S.C. Code Ann. § 62-3-711(a). Stewart’s appointment by the Probate Court was without restriction on her ability to handle Estate funds. The South Carolina Probate Code’s provisions regarding a personal representative’s general duties as a fiduciary do not extend or impose a similar duty on Wachovia Bank. Banks are not insurers or gatekeepers of wrongdoer’s actions in all circumstances, as Petitioner would have this Court find.

CONCLUSION

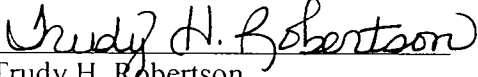
Without knowing participation in a misappropriation, as outlined above, or actual knowledge of a malfeasance by Stewart, Wachovia Bank carried out its duties owed under the Account and its governing documents. It is undisputed that Stewart was the sole, authorized signer acting with the power of the Probate Court under a valid Certificate of Appointment with no restrictions at the time of the questioned transactions by Petitioner. Wachovia Bank was allowed by law, in a debtor and creditor relationship, to presume that she would act pursuant to her lawful powers. In fact, the Account agreements obligated Wachovia Bank to comply with the instructions of Stewart, the sole authorized signer on the Account. Wachovia Bank does not undertake to review or evaluate the actions of personal representatives in commercial, checking accounts. As

found by the trial court, and affirmed by the Court of Appeals, Wachovia Bank had no duty of inquiry regarding the actions of Stewart.

The New York case cited by Petitioner, while not controlling, nevertheless provides a general rule that a bank has no duty to inquire whether a fiduciary is applying the funds of a trust or estate account properly, even where the fiduciary places them in his or her own personal account. The bank has the right to presume that the fiduciary will apply the funds for their proper purpose. Actual knowledge or knowing participation is required to overcome that presumption. There being no such evidence in this case, the presumption stands, and Wachovia Bank is entitled to judgment in its favor on all causes of action as a matter of law. This matter does not require the services of a fact finder as to the claims against Wachovia Bank. (See George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder)).

For the reasons stated above, the trial court's Order and the Court of Appeals' opinion should be affirmed in its entirety.

Respectfully submitted,

  
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December 29, 2014

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

RECEIVED

DEC 29 2014

Roger M. Young, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2012-213171  
Lower Case No. 2009-CP-10-02846

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

v.

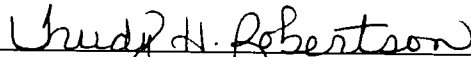
Alice R. Stewart, Leroy Stewart, Alvin E. Burch, Sr., a/k/a Alvin E. Birch,  
Rudell S. Burch, Sterling Lending Group, Inc., a South Carolina  
Corporation, Regent Bank, and Wachovia Bank, N.A., ..... Defendants,

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.

PROOF OF SERVICE

I certify that I have served the *Brief of Respondent Wachovia Bank, N.A.* by  
depositing a copy of it in the United States Mail, postage prepaid, on December 29, 2014,  
addressed to attorneys for the Petitioner, Edward P. Guerard, Jr., 1106 Port Harbor Court,  
Mt. Pleasant, SC 29464 and T. Alexander Beard, Beard Law Offices, 1000 Johnnie  
Dodds Blvd., Suite 103-321, Mt. Pleasant, SC 29464.

Respectfully submitted,

  
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