THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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S.C. Supreme Court

Unpublished Opinion No. 2012-UP-420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.

REPLY BRIEF OF PETITIONER

T. Alexander Beard, Esquire
1000 Johnnie Dodds Blvd.
Suite 103-321
Mt. Pleasant, SC 29464
(843) 216-0331

Edward P. Guerard, Jr., Esquire
1106 Port Harbor Court
Mt. Pleasant, SC 29464
(843) 881-7869

Attorneys for Petitioner

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WACHOVIA'S DUTY TO PETITIONER

Charleston Paint Co. v. Exchange Banking & Trust Company, 129 S.C. 290, 123 S.E. 830 (1924) expresses the general law for banks dealing with fiduciary accounts. A bank receiving fiduciary funds is liable for defalcation of the fiduciary if the bank assists the fiduciary to accomplish the misappropriation having knowledge, actual or constructive, that fraud is being, or about to be, perpetrated by the fiduciary. The recent case of *Cody P. v. Bank of America, N.A.*, 395 S.C.611, 720 S.E.2d 473 (Ct. App. 2011) followed similar rationale.

Charleston Paint Company hired an attorney, W. L. Rodrigues, to collect an account against Long and Company. Long and Company paid the claim by check made out to Charleston Paint Company. Rodrigues altered the check by adding "W.L. Rodrigues, Atty. for", making the check payable to "W.L. Rodrigues, Atty. for Charleston Paint Company". He endorsed the check: "For deposit a/c W.L. Rodrigues, Atty. for Charleston Paint Co. W.L. Rodrigues, Atty." Over a period of time Rodrigues withdrew all of the funds from his law firm account for his own use and Charleston Paint sued the bank to recover the misappropriated funds. The Court held that it was for the jury to say whether or not the negligence of the bank amounted to constructive knowledge of the breach of trust threatened. Similarly, there is a jury question of knowledge in the case at bar and summary judgment should not have been granted.

Cody P. dealt with negligence by Bank of America concerning the misappropriation of funds on deposit by a conservator. There was no question that there was a duty of care owed by the bank that ran to the beneficiary of the conservator deposit account. The issue was not whether or not there was a duty to the beneficiary; it was the question of proximate cause for the loss by the beneficiary. The Court found Bank of America liable to the beneficiary for the defalcation by the fiduciary in connection with disbursements to herself from the fiduciary

account.

Another compelling reason to reverse the grant of summary judgment is the additional step in the process by Wachovia and the fiduciary that was not present in the *Charleston Paint* case. Wachovia, in a face-to-face meeting with Stewart, opened a new personal certificate of deposit account for the individual benefit of the fiduciary with her personal social security number and transferred $260,000 from the fiduciary account to the fiduciary's personal account.

It is this step of Wachovia's personal and direct participation in the transfer from the fiduciary account to the fiduciary's personal certificate of deposit that is at issue. Wachovia directly participated in the transfer of the $260,000 and several other transfers from the Estate account to a new personal account opened by Wachovia for Stewart a few days after the Estate account was opened and a little more than four months after the death of Danny Washington and depleted the Estate funds prior to the statutory eight month period for filing claims against the Estate. (See, S.C. Code, Sections 62-3-801 and 62-3-805). This is actual knowledge of malfeasance by the Personal Representative in transferring all of the Estate funds to her personal account. This is like *Cody P. v. Bank of America, N.A., supra,* where the Court recognized a duty by Bank of America resulting from direct actions by bank representatives aiding a conservator in opening new accounts with fiduciary funds in violation of her fiduciary duties.

After the bank in *Charleston Paint* deposited the funds into the law firm account, it did not directly participate in disbursement from the account. And in *Charleston Paint*, the bank did not benefit from the fraudulent checking transactions from the law firm account that were processed by the bank. In contrast, Wachovia would have profited as a matter of ordinary business from a $260,000 certificate of deposit account. Even if Wachovia did not

benefit, the transaction would be highly suspect.

The protection (assumption) quoted by Respondent from *Charleston Paint* that the bank could assume the attorney would properly disburse funds from his law firm account has been effectively codified for checks and other negotiable instruments under the Uniform Commercial Code. The U.C.C., however, is not applicable to the non-negotiable internal counter transfer in this transaction where the Wachovia representative opened the certificate of deposit account and transferred the funds to Stewart's personal account for her personal benefit. The common law controls and the assumption from *Charleston Paint* relied upon by Respondent is not applicable.

Wachovia attempts to show that *Cody P. v. Bank of America, N.A., supra*, has no application to this case on the basis that "the miscreant was not a personal representative of an estate, but instead a court-appointed conservator for a minor". (Resp.'s Br. P. 18). Respondent argues "Petitioner also mistakenly conflates the duties of a conservator with those of a personal representative." (Resp.'s Br. P. 19). This is erroneous. The general duties and relationship of conservators and personal representatives are the same. Section 62-5-417 states that "...a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees...." Section 62-3-703 basically provides the same requirements and standards for a personal representative.

A further error by Respondent, the lower court and the Court of Appeals is their reference to (requirement of) actual knowledge by a bank of the fraud by a fiduciary. Actual knowledge is not the test for aiding and abetting; the test is knowing participation. *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008); *Futures Group, II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996). (But see, *Gordon v. Busbee*, 397

S.C. 119, 723 S.E.2d 822 (Ct. App. 2012) that dealt with a lawyer's duty in general and not a bank dealing in a face-to-face transaction with a fiduciary).

This is not an electronic banking case. Holding a bank responsible for a face-to-face personal transaction with a fiduciary by a bank representative (or letting a jury or a trier of fact decide) is not a threat nor an undue burden on our modern banking system.

THE ACCOUNT AGREEMENT

Wachovia argues that the terms of the account agreement control in this case. Plaintiff was not, however, a party to the account agreement, and thus, is not bound by its provisions. As one court has noted:

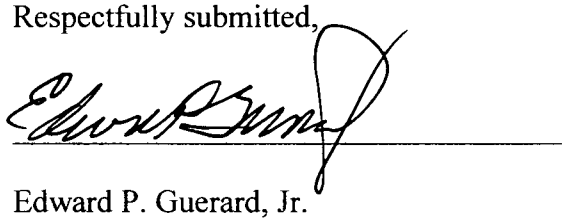
> It is a fundamental principle of contract law that parties to a contract may bind only themselves and that the parties to the contract may not bind a third person who is not a party to the contract in absence of his consent to be bound.
>
> *Nationwide Mutual Ins. Co. v. Chantos*, 293 N.C. 431, 238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

More specifically, a contract right cannot be a defense to a claim of negligence brought by a third party not a party to the contract. *See, e.g., Mullins v. United Carbon Co.* 111, 113, 137 S.W.2d 1089 (Ct. App. Ky. 1940). A bank has a duty to third party beneficiaries of fiduciary accounts under South Carolina law notwithstanding an account agreement. *See, Cody P. v. Bank of America, N.A., supra* and *Charleston Paint Co. v. Exchange Banking & Trust Co., supra.*

CONCLUSION

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

Respectfully submitted,



Edward P. Guerard, Jr.
1106 Port Harbor Court
Mt. Pleasant, SC 29464
(843)881-7869
S.C. Bar No. 02345

T. Alexander Beard
1000 Johnnie Dodds Blvd.
Suite 103-321
Mt. Pleasant, SC 29464
(843)216-0331
S.C. Bar No. 00603

Attorneys for Appellant

January 5, 2015

EDWARD P. GUERARD, JR.
Attorney at Law
1106 Port Harbor Court
Mount Pleasant, SC 29464

Telephone (843)881-7869 E-Mail tguerardjr@gmail.com

By Federal Express

January 5, 2015

RECEIVED
JAN 06 2015
S.C. SUPREME COURT

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

Re: Errol Washington v. Alice R. Stewart
Appellate Case No. 2012-213171
Lower Court Case No. 2009-CP-10-02846
Reply Brief of Petitioner

Dear Mr. Shearouse:

Enclosed please find for filing the following:

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

2. One original Proof of Service to opposing counsel.

Please return a copy of items 1 and 2 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.

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)