2012-206628

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Opinion No. 4880 (S.C. Ct. App. filed January 4, 2012)

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch,

Petitioners-Respondents,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch,

Respondents-Petitioners.

REVISED APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, Appellants,

v.

Jacqueline F. Busbee, individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch, Respondents.

In the Matter of: The Estate of Clara Gordon Burch

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880
Heard March 8, 2011 – Filed August 31, 2011

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Adele J. Pope, of Columbia, and Thomas H. Pope, of Newberry, for Appellants.

B. Michael Brackett, of Columbia, for Respondent Jacqueline F. Busbee, as

Personal Representative of the Estate of George E. Burch; Warren C. Powell and Willima D. Britt, Jr., of Columbia, for Respondent Jacqueline F. Busbee, individually; and Carlos W. Gibbons, Jr., of Columbia, for Respondents, Dennis E. Burch and Laurie E. Burch.

KONDUROS, J.: Charles and Barbara Gordon appeal the circuit court's denial of their motions for directed verdict and the grant of directed verdict to the defendants on various causes of action. They further appeal various matters related to jury instructions as well as the circuit court's refusal to grant equitable relief. We affirm in part and reverse in part.

FACTS

Clara Gordon Burch and her fourth husband, George E. Burch, were married in 1984. Clara was 75 at the time of their marriage and George was almost 70. Clara had no children, while George had two, Dennis E. Burch and Laurie E. Burch. Clara's will, executed in 1985, left a life estate in her home to George, but ceded her remaining assets to her Gordon family members, including her nephew Charles, and other nieces and nephews. In October 1994, Clara entered a nursing home and was experiencing "cognitive defects." She had amassed a sizable estate composed primarily of bonds, certificates of deposit, and other funds received incident to her previous marriages. In February of 1995, Clara executed a power of attorney (POA) in George's favor. The POA did not contain a gifting provision. George's attorney, Jacqueline Busbee, prepared the POA, although she did not meet or confer with Clara before doing so. Thereafter, George removed funds in CDs or accounts owned by Clara or from their joint account totaling approximately $400,000. Clara passed away in April of 2000, and, per the provisions in her will, George was named personal representative (PR) of her estate. Busbee began advising George in his capacity as PR. George died on January 18, 2003, and, per the provisions of his will, Busbee was named PR of his estate. Charles was appointed successor PR of Clara's estate on February 27, 2003. Charles filed this lawsuit in April 2005.[1]

At trial before the circuit court, Charles's wife, Barbara, and George's daughter, Laurie, testified George mentioned an arrangement between Clara and him to handle their estate finances. Laurie also testified George gave her a loan in the amount of $170,000 that was to be considered an advance against her inheritance if it was not repaid at the time of his death.

The Gordons presented expert accounting evidence through Agnes Asman, a certified public accountant. She testified she had examined all the records available to her and created a chart that represented transfers made from Clara's funds into accounts or CDs held solely in George's name or in their joint account that had been used to pay for Clara's nursing home care. In her estimation, George had misappropriated approximately $450,000 exclusive of interest. On cross-examination, Asman conceded the examination she had conducted was not a forensic accounting that would demonstrate the source of the funds into the accounts and specifically trace the funds to their final destination. She further admitted she had not examined the signature cards for the various accounts but had relied on the Internal Revenue Service form 1099s to determine who had ownership of various accounts and assets. In at least one instance when Asman's chart showed ownership of an account by Clara, George was also a signator on the account. Additionally, Asman testified she had not considered George's contribution to the parties' joint bank account when determining that he had withdrawn money that belonged to Clara.

With respect to Busbee, the Gordons alleged she had operated as George's attorney in his capacity as PR and as attorney for Clara's estate. They claimed Busbee failed to check the status of Clara's estate at the time of her death by failing to inventory Clara's safety deposit box and by neglecting to obtain Clara's last bank statements prior to the death. They also argued Busbee's filing of the inventory of assets in Clara's and George's estates was inaccurate and/or fraudulent. They contended Dennis and Laurie knew of George's transfer of funds from Clara's accounts and estate and received the benefit of those transfers either directly or as his devisees.

At the close of the Gordons' case, the circuit court granted Dennis Burch's directed verdict motion as to all claims against him. With respect to Laurie, the court granted a directed verdict in her favor as to all claims with the caveat that she may be called upon to repay the loans from George to his estate. The circuit court granted a directed verdict in favor of Busbee on all claims against her individually with the exception of the causes of action for legal malpractice and breach of fiduciary duty. It also allowed the conversion claim against her as PR of the estate to remain but only insofar as she was the representative of George's estate in the action, not based on her actions in converting any assets.

At the close of all evidence, the Gordons moved for directed verdict against George's estate, arguing the money transferred by George should be returned to Clara's estate because he had transferred the funds without Clara's permission. That motion was denied, apparently based on the argument that George and Clara had made an oral contractual arrangement

for the execution of these transfers.

After closing arguments, court was dismissed for the day. The following morning, the Gordons submitted additional jury charge requests relating to the proportional ownership of joint bank accounts with right of survivorship and other matters. The circuit court refused the charges, determining the request was untimely pursuant to Rule 51, SCRCP. After the jury was charged, the Gordons took exception to the charge on conversion. They argued the circuit court had placed the burden of persuasion on the plaintiff when the burden should have been shifted to the defendant to prove the transfers were valid in the absence of authorization to make them. The circuit court stood by its original charge.

The jury found in favor of Busbee and George's estate on the remaining causes of action. The Gordons then sought equitable relief from the circuit court seeking (1) the removal of Busbee as PR of George's estate; (2) a declaration that the bank accounts and loan to Laurie were receivable assets of Clara's estate; (3) the appointment of a special administrator to account to Clara's estate; and (4) the imposition of a constructive trust on all liquid assets of George's estate to the extent of the transfers with interest. The circuit court denied this motion and all post-trial motions. This appeal followed.

LAW/ANALYSIS

I. Denial of Directed Verdict (George's Estate)

The Gordons contend the circuit court erred in failing to direct a verdict in their favor concerning the transfers George made after Clara's undisputed incompetence in the summer of 1995. We agree in part.

In reviewing the denial of a directed verdict motion, this court employs the same standard as the trial court: we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418 (Ct. App. 2000).

At the close of evidence, the Gordons moved for a directed verdict "as to all transfers of the assets of Clara Burch by George Burch from and after June 30 of [1995]." On appeal, George's estate argues this motion was not sufficiently specific as required by Rule 50(a), SCRCP, which states "[a] motion for a directed verdict shall state the specific grounds therefor." We disagree.

The Gordons relied upon Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430

(1985), in making their motion. In Fender, the attorney in fact for the decedent transferred to himself 37.4 acres of land, a car, and the proceeds of two bank accounts prior to the decedent's death. Id. at 262, 329 S.E.2d at 431. The POA did not contain a gift-giving provision and the South Carolina Supreme Court adopted a bright-line rule in this area. Id. "[I]n order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing." Id. (emphasis added). Fender's mandate is designed to protect the vulnerable from improper conduct by those in whom they place the greatest trust. Accordingly, the Gordons' directed verdict motion to disallow the transfers under Fender was sufficiently specific to operate as a directed verdict motion for breach of fiduciary duty.

In this case, no one disputes Clara's POA did not contain a gift-giving provision and the record contains no written evidence of her authorization for George to make the transfers he did. The circuit court based its decision on the existence of evidence, however slight, showing an arrangement between Clara and George to allow him to make transfers to avoid estate taxes. However, under Fender, the existence of such an oral agreement is insufficient to authorize the transfers. Any transactions involving George's taking funds that were undisputedly Clara's and transferring them into a fund solely owned by him would fit within the construct of Fender. Therefore, the circuit court erred in failing to grant the Gordons' directed verdict motion as to those transactions.

The transactions made during April 2000 and listed in the record as Plaintiff's Exhibit 6, with the exception of the $70,000 withdrawal made from George and Clara's joint account, fall within this category. With respect to these transactions all evidence indicates George took funds belonging solely to Clara and opened CDs for those amounts exclusively in his name. Even if these transfers were made in furtherance of some oral agreement between George and Clara, they are exactly the types of transactions prohibited by Fender as a matter of law.[2] Our supreme court has drawn a very bright line in such situations so as to avoid the defrauding of vulnerable adults by fiduciaries.

Because the evidence relating to each transaction in this case is not identical, the transactions should be considered individually. Some of the transactions involve facts that arguably bring them outside the clear scope of Fender. For example, one transaction at issue involved George closing a CD and depositing the funds into the joint account that was used to pay for Clara's care while in the nursing home. Another transaction involved the removal of $70,000 from the joint account and conversion into a $50,000 CD for George and a $20,000 deposit into his own bank account.[3] Yet another transaction

involved the removal of funds from a joint account, although it is disputed when the account was made joint, after Clara's death. In each of these instances, George at least arguably had an initial claim to the funds as proceeds in a joint account or he put Clara's funds into a joint account that paid for her care, an act that would arguably be for her benefit. With respect to some of the transactions, how the funds were expended is unclear. In those cases, determining whether George had breached a fiduciary duty was within the jury's province.

In sum, Fender mandated a grant of directed verdict on transactions in which the evidenced demonstrated Clara's solely-owned assets were transferred by George for his sole benefit. Therefore, the following funds taken from Clara's estate pursuant to the transactions listed on Plaintiff's Exhibit 6 should be returned to Plaintiffs: (1) $79,495.11 and $4,778.46 withdrawn from two of Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 received upon the closing of one of Clara's accounts at Security Federal on April 17, 2000; (3) $39,552.98, $6,235.99, and $9,904.21 withdrawn from three of Clara's accounts at Community Bank[4] on April 17, 2000. We remand this matter to the circuit court for a determination of the interest that will be due to the Plaintiffs on these sums. The issue of the propriety of the remaining transactions was properly submitted to the jury because they involved questions of disputed fact.

II. Grant of Directed Verdict

A. Aiding and Abetting a Breach of Fiduciary Duty

(Busbee – Individually and as PR)

The Gordons contend Busbee knew or should have known of George's activities and she was therefore guilty of aiding and abetting his conduct. We disagree.

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Anderson v. The August Chronicle, 355 S.C. 461, 470, 585 S.E.2d 506, 511 (Ct. App. 2003). If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper. Id.

"The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." Vortex

Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Future Group, II v. NationsBank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

The Gordons presented no evidence Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them. Furthermore, to establish this cause of action, a "knowing participation in the breach" is required. See Vortex, 378 S.C. at 205, 662 S.E.2d at 449 (discussing evidence of the defendant's actual knowledge as sufficient to overcome directed verdict); Future Group, II, 324 S.C. at 100-101, 478 S.E.2d at 50 (affirming the grant of directed verdict when there was no evidence of defendant's actual knowledge). Consequently, Busbee's constructive knowledge was not sufficient to survive a directed verdict motion.

The one instance of actual knowledge alleged by the Gordons in their brief relates to a Wachovia CD transferred from Clara's name to George's between the time of their deaths. With respect to this CD, it is a factual issue as to whether the CD was connected to an individual retirement account (IRA). If it was connected, the surviving spouse would be the beneficiary of the CD upon the decedent's death. Therefore, Busbee did not have actual knowledge of an improper transfer by George, and the circuit court did not err in directing a verdict in Busbee's favor individually and as PR on this cause of action.

B. Fraud/Fraud Benefit under Section 62-1-106

(Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons contend the circuit court erred in granting a directed verdict in Busbee's favor, individually and as PR, and in favor of Dennis and Laurie Burch as to this cause of action. We disagree.

Section 62-1-106 of the South Carolina Code (2009) provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought

> against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Here, the circuit court determined no evidence was presented that Dennis had committed any sort of fraud in connection with this matter and he had yet to receive any of the funds transferred from Clara's estate to George's estate. Therefore, he had not committed fraud or benefited from any other party's fraud. We agree with the circuit court. Evidence showed the only participation Dennis had was evaluating the contents of George's safety deposit box after his death, and a bank employee testified the examination was conducted properly.

With respect to Laurie, the record contains no evidence that she herself committed fraud. Although she received a benefit from George's conduct in the form of the loan from her father, the circuit court indicated those funds might be owed to Clara's estate pending the resolution by the jury of the remaining claims against George's estate. Therefore, we find the circuit court did not err in granting directed verdict on this claim.

As to Busbee, individually and as PR, she did not benefit from the alleged fraud. Therefore, the only question is whether she perpetrated fraud by filing the inventory of assets of George's estate that listed the transfers as part of his estate. The record contains no evidence Busbee knew any representations she made in those filings were false at the time they were made. Consequently, the circuit court did not err in granting a directed verdict in Busbee's favor.

C. Conversion (Busbee – Individually and as PR)

The Gordons argue Busbee continued George's conversion of Clara's assets by including them in George's estate's inventory of assets. We disagree.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Bank of New York v. Sumter Cnty., 387 S.C. 147, 158, 691 S.E.2d 473, 479 (2010). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003).

Nothing in the record demonstrates Busbee assumed the control of any funds

without authorization. At the time she became PR, the assets were in accounts held by George and she properly exercised control over them as the PR of his estate. The individual claim of conversion fails because she exercised no control over the assets in her individual capacity. Therefore, we affirm the circuit court's grant of directed verdict.

D. Civil Conspiracy

(Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons maintain the circuit court erred in granting a directed verdict in favor of Busbee, individually and as PR, and Dennis and Laurie Burch with respect to their civil conspiracy claim. We disagree.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). "The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design." Cricket Cove Ventures, LLC v. Gilliand, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010).

The record contains no evidence, only speculation, that any of the parties conspired with each other for the purpose of harming Clara or her estate. Furthermore, civil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. See Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Accordingly, we conclude the circuit did not err in granting a directed verdict.

III. Jury Charges

A. Joint Bank Accounts

The Gordons argue the circuit court erred in failing to give the following jury

charge: "Funds placed in a joint account with right of survivorship remain property of the contributing party until that party's death, unless there is clear and convincing evidence of a different intent." We disagree.

The principal embodied in this charge emanates from the case of Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001). In Vaughn, the decedent opened several joint bank accounts with her nephew, and the decedent was the sole contributor to those accounts. Id. at 197, 547 S.E.2d at 869. The nephew withdrew the funds a week prior to the decedent's death and deposited the monies in an account titled solely in his name. Id. The court determined the statute governing such accounts was unambiguous and required a holding that funds withdrawn from such an account prior to a decedent's death were no longer presumed to belong to the survivor but became assets of the decedent's estate. Id. at 199, 547 S.E.2d at 870. A survivor would have to establish entitlement to the funds by "other evidence of intent" without the presumption of right of survivorship. Id. at 200, 547 S.E.2d at 871.

The circuit court disallowed the jury charge on the procedural grounds in Rule 51, SCRCP, which states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This charge was requested after closing arguments, but before the circuit court charged the jury. While Rule 51 makes clear that it is preferable to have all requested charges submitted prior to closing arguments, it is not an absolute rule. In Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996), this court discussed the discretion vested in the trial court with respect to the allowance of "late" instructions. "[T]he trial court's discretion to refuse a charge because it is not timely requested should be sparingly and cautiously exercised." Id. at 541, 466 S.E.2d at 372. "While Rule 51 contains permissive language with respect to the timing of the filing of a request to charge, [it] does not specifically bar a request to charge that is made after the jury is charged . . . ." Id.

Of the transactions remaining at issue, some could be impacted by the failure to give the requested instruction. For example, a check for $70,000 was drawn on Clara and George's joint account in the week prior to her death. George subsequently opened a $50,000 CD in his own name and deposited $20,000 in his own account. These facts fit squarely within the situation presented in Vaughn. Furthermore, the defense was not prejudiced by the fact that the instruction was requested after closing arguments. The defense strategy as to George's estate was that he and Clara had an arrangement and he would have been entitled to these joint account funds upon Clara's death. That argument was made to the jury.

However, to warrant a new trial, the failure to give the requested instruction must have been prejudicial. See Dalon, 320 S.C. at 540, 466 S.E.2d at 372 ("In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial."). In this case, the proportion of contribution to the joint accounts was a disputed factual point. Furthermore, the jury's verdict makes clear that it adopted the version of events presented by George's estate. Evidence of the financial "arrangement" between George and Clara is at least some other evidence of her intent that he have the monies in the joint account. The jury clearly believed the defense in the case, because it did not find against the estate as to any transfer or cause of action. Therefore, we conclude the failure to give the requested instruction was not prejudicial to the Gordons and did not constitute reversible error. See Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 484, 18 S.E.2d 331, 335 (1942) (holding the giving of erroneous charge was harmless error when it could not have affected the action of the jury).

B. Conversion

The Gordons contend the trial court's instruction regarding the burden of persuasion in a conversion claim was confusing and prejudicial warranting a mistrial. We disagree.

At the beginning of his jury charge, the circuit court instructed the jury as follows:

> There is one exception to [the general rule that plaintiff bears the burden of proof], and that is because of the confidential relationship between Mr. Burch and his wife. The estate of Mr. Burch has the burden to prove that all transfers to himself under the power of attorney and all transfers, assets form the name of Clara Burch or her estate are valid. He has to prove that by the preponderance or greater weight of the evidence. He also has the

> burden or preponderance of greater weight of the evidence to show that all transfers by Mr. Burch to himself or to any third party from Clara's funds are valid by the greater weight or preponderance of the evidence. So, it shifts to him on that issue, but everything else the plaintiff is – has their burden except for the transfers, and that is on Mr. Burch and his estate.

Later, when addressing the specific causes of action, the circuit court instructed:

> In order to prove conversion, the plaintiff must (1) prove by the preponderance or greater weight of the evidence first that the plaintiff owned or had a right to possess a certain piece of personal property.
>
> In other words, they must prove either title to or a right to possess the personal property. That would include, money, bank accounts at the time of conversion. Ordinarily, an immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the plaintiff to maintain his action.
>
> Next, the plaintiff must (2) show by the preponderance or greater weight of the evidence that the defendant gained control and possession of the property or prevented the plaintiff from using the property. The wrongful detention of another person's property may give rise to an action for conversion, and, finally, the plaintiff must show (3) by the preponderance or greater weight of the evidence that the defendant did this without the plaintiff's permission. If the plaintiff expressly or impliedly agreed to or approved the defendant's taking, use, retention, or disposition of the property, the plaintiff cannot recover for conversion of the property. . . .
>
> If you find that a conversion did take place, you should return a verdict for the plaintiff for the value of the property taken with interest. Of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence.

The Gordons objected to the charge arguing it was inconsistent and could be construed by the jury as not requiring George's estate to prove the validity of the transfers in question. The circuit court declined to make any changes or additions to its original charge

While the jury charge on conversion may have been somewhat confusing, it does not constitute prejudicial error. No South Carolina case discusses the burden-shifting scheme in a conversion claim against a power of attorney or PR. However, in Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005), this court discussed the burden shifting scheme as between will or deed contestants and fiduciaries.

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Id. at 288, 613 S.E.2d at 68 (quoting Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003)).

The court went on to interpret the Restatement as it pertains to cases in South Carolina.

> We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will.

Id. at 288, 613 S.E.2d at 68-69.

While Howard is not directly on point, it illustrates the unusual nature of the burden-shifting scheme in cases involving decedents and their fiduciaries. While the fiduciary may have the burden to offer some evidence to establish a lack of undue influence, or in this case the validity of the transfers, the ultimate burden of proof remains with the complaining party unless the fiduciary offers no evidence to rebut the relevant presumption. In this case, the circuit court's instruction indicated the ultimate burden of proof was on the Gordons and also indicated that George's estate, as his representative, was

required to offer a valid explanation for the transfers he made. These statements appear to accurately represent the burden-shifting scheme that should be employed. Therefore, the instruction was not erroneous and did not constitute reversible error.

IV. Equitable Relief

Finally, the Gordons argue the trial court erred in failing to grant the equitable relief requested. We disagree.

"A constructive trust results 'when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.'" Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (citation omitted).

> In general, a constructive trust may be imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty."

Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009) (citation omitted).

In this case, evidence was presented that George was an attentive and loving husband to Clara and at least some evidence showed that the two of them had arranged a plan for him to transfer funds for his benefit. Furthermore, a large portion of the transfers did not occur until the end of Clara's life was near and she would no longer need them for her own benefit. Furthermore, under the statutory law of the state, George was entitled at least to his elective share of Clara's estate. Based on the record as a whole, the circuit court did not err in declining to create a constructive trust in favor of Clara's estate.

The Gordons also sought an accounting, requested the removal of Busbee as PR of George's estate, and raised the Statute of Elizabeth. However, they fail to advance any argument as to why the circuit court's ruling as to these specific equitable matters was error. Therefore, we deem these issues abandoned. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding that an issue is

abandoned if the appellant's brief treats it in a conclusory manner).

CONCLUSION

We find the circuit court erred in denying the Gordons' directed verdict motion as to the transfers listed on Plaintiff's Exhibit 6 excluding the first-listed transaction in which George withdrew monies from his and Clara's joint account. We remand this matter to the circuit court for a determination of the interest due Plaintiffs on these sums. However, we find the circuit court did not err in granting a directed verdict in Busbee's and Dennis and Laurie Burch's favor as to the claims for aiding and abetting a breach of fiduciary duty, fraud, conversion, and civil conspiracy. As to the jury charges, we conclude the failure to give the requested instruction on joint bank accounts did not constitute prejudicial error and the failure to modify the instruction on the conversion claim was not erroneous. Finally, we affirm the circuit court's decision not to impose a constructive trust on the disputed funds in favor of Clara's estate, and we conclude the remainder of the Gordons' equitable claims have been abandoned on appeal. Consequently, the ruling of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and THOMAS, J., concur.

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[1] The matter was dismissed on a procedural ground but remanded for trial on appeal. Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

[2] When asked a hypothetical at trial, Steve Johnson, a defense expert, opined if the transfers were made pursuant to a contract between Clara and George, George could have made the transfers under the POA's authority to execute and carry out contracts on Clara's behalf. However, the purpose of the contractual power is to benefit Clara. Here, even if the arrangement was her desire, the transfers benefited George, not her, and such an interpretation would effectively eliminate the prohibition expressly stated in Fender.

[3] We recognize Asman testified the funds contributed to the joint account were primarily Clara's and that would render the joint account funds her property until the time of her death as discussed in Section IIIA. However, the cross-examination of Asman revealed enough uncertainty in her testimony to make the question of ownership of the joint account funds a jury issue.

[4] According to the record Community Bank is now Capital Bank.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch............................Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch...........Respondents.

PETITION FOR REHEARING

In accordance with the provisions of Rule 221(a), SCACR, the appellants in this appeal petition this Honorable Court for rehearing of published Opinion No. 4880 ("The Opinion"), filed on August 31, 2011. The appellants received notice of the filing of The Opinion on August 31, 2011.

Attached to this Petition is a Memorandum in Support of Petition for Rehearing which identifies and analyzes the points which the appellants contend The Opinion has overlooked or misapprehended. This Petition incorporates herein the appellants' analysis and arguments in the attached Memorandum.

WHEREFORE, the appellants respectfully request that this Honorable Court rehear the matters contained in The Opinion and reverse the judgment of the circuit court in the following particulars:

(a) reversing the lower court's denial of appellants' motion for directed verdict as to Wachovia CD #117232 in the amount of $33,309.87, plus interest from September 21, 2000, for breach of fiduciary duty, and remanding this matter to the lower court for assessment of prejudgment interest;

(b) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and as PR, on the cause of action for aiding and abetting breach of fiduciary duty and remanding this cause of action for new trial;

(c) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and PR, Respondent Laurie Burch and Respondent Dennis Burch, on the cause of action for fraud/fraud benefit under S.C. Code §62-1-106 and remanding this cause of action for a new trial; and,

(d) reversing the refusal of the lower court to give the proper jury instructions as to the burden of proof and burden of persuasion on the cause of action for conversion where transfers are made by use of a POA where the principal is incompetent and/or by a personal representative for his own benefit.

Respectfully submitted,

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September 13, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, ...Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch........Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

In support of their Petition for Rehearing of Opinion No. 4880 (the "Opinion"), the appellants respectfully submit this Memorandum.

INTRODUCTION

The appellants submit that the Opinion overlooked or misapprehended the importance of the Wachovia Certificate of Deposit #117232 owned by the Estate of Clara Burch which was improperly transferred by George Burch to himself five months after her death and that the records of the ownership and transfer were in the Clara Burch estate file of Respondent Busbee. According to the undisputed testimony of Mitchel Keadle, secretary to attorney Jackie Busbee, the notation on the 4/13/2001 fax from

Wachovia Bank enclosing the date of death balance on certificate of deposit #117232 stating "Clara Burch Estate" was in Jackie Busbee's handwriting. (R., p. 260). Paralegal Keadle stated that she remembered the fax being in the estate file, and she said that she would "assume" that this Wachovia certificate was placed on the Clara Burch inventory. (R., p. 262). She further testified that this Wachovia certificate was not on the Clara Burch inventory. (R., pp. 262-263; Exhibit 37, R., pp.1458-1464).

The misapprehension in the Opinion impacts both the lower court's erroneous failure to grant a directed verdict in favor of the appellants as to this certificate and also impacts the lower court's error in granting the motions for directed verdict in favor of Defendant Busbee on the cause of action for aiding and abetting breach of fiduciary duty and in granting the motion as to Defendants Busbee, Dennis Burch and Laurie Burch on the cause of action for fraud/fraud benefit under SC Code §62-1-106. The bases for these assertions are discussed herein.

ARGUMENTS

I.

In ruling only that the accounts owned by Clara which were transferred by George to himself during April 2000 were improper, the Opinion overlooked or misapprehended that the Wachovia certificate of deposit was improperly transferred by George to himself from Clara's estate in September 2000, months after Clara's death.

The Opinion correctly noted that "any transactions involving George's taking funds that were undisputedly Clara's and transferring them into funds solely owned by him" were invalid transfers under Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985). However, the Opinion concluded that only the transactions made during April

2000[1] were invalid. The Opinion correctly concluded that the lower court erred in failing to grant appellants' motion for a directed verdict under Fender, but failed to include the Wachovia certificate of deposit #117232 that was owned by Clara at her death in April 2000, becoming an asset of her estate, but which was transferred by George, as personal representative, into a certificate of deposit in his own name on September 21, 2000.

The Opinion overlooked or misapprehended that the Wachovia certificate was owned solely by Clara at her death on April 19, 2000. The Opinion states that "it is a factual issue as to whether the CD was connected to an individual retirement account." (Opinion, p. 10). This is not the case. The undisputed evidence was that this certificate was owned by Clara individually, not as an IRA or connected to one. (Testimony of banker Jeremy Hall, R., pp. 1144-1145). Further, the estate files of Respondent Busbee show that she inquired of Wachovia Bank as to the date of death balance of this CD, and Wachovia sent Busbee a fax on 4/13/2001 giving the date of death balance on Clara's CD as $32,427. On that fax, there is, in Busbee's handwriting, a notation "Clara Burch Estate." (R., pp. 1752-1754; p. 260).[2] The exhibits at trial further showed that Wachovia, per the "personal representative's request" on 9/21/2000, paid out Clara's CD #117232 in the amount of $33,309.87 (including interest since the death of Clara) and the same Wachovia official opened a new CD #9041771 the same day in the name of "George Edward Burch" in the identical amount ($33,309.87). (R., p. 1755). Contrary to the Opinion, there was no evidence that the Wachovia CD was an IRA; it was solely

[1] With the exception of the $70,000 withdrawal made by George from a joint account to himself on April 10, 2000

[2] The Wachovia 1099 for Clara for the year 2000 on this certificate is a "1099-INT" (R., p. 1754), not a "1099-R" which is the form used for interest on IRA certificates of deposit.

owned by Clara and was an asset in her estate.

In the final brief of Respondent Busbee, Busbee admitted that, while she did not convert the Wachovia certificate, the undisputed evidence was that George did:

> "...According to Mr. Hall, the certificate was closed by George Edward Burch, who then opened a new CD in the same amount of money using the proceeds from the Wachovia certificate. (R., p. 737, line 16 to p. 738, line 15). No evidence presented at trial contradicts Mr. Hall's testimony regarding the person who closed the Wachovia certificate...." (Brief of Respondent Busbee, p. 39).

The appellants' directed verdict motion also included this Wachovia certificate (Plaintiffs' Exhibit 11A, R., p. 1359; pp. 1149-1150). Like the other accounts referenced in the Opinion, George's transfer of the certificate, while acting as personal representative for Clara's estate, was a breach of fiduciary duty. The ruling of this Court should be amended to include Clara's Wachovia CD #117232 in the amount of $33,309.87, its value when taken from Clara's estate, plus prejudgment interest from September 21, 2000.

II.

By holding that the lower court properly granted a directed verdict in favor of Defendant Busbee for aiding and abetting a breach of fiduciary duty, the Opinion misapprehends or overlooks the uncontradicted facts that Busbee had actual knowledge that the Wachovia certificate of deposit was the property of the Estate of Clara Burch and that George had transferred it to himself and then failed to include it on the Inventory for the Estate of Clara Burch.

In affirming the trial court's granting Busbee's motion for a directed verdict on the cause of action of aiding and abetting a breach of fiduciary duty, the Opinion stated that the plaintiffs produced no evidence that Busbee had actual knowledge of George's transfer and that, to establish this cause of action, it was required that there be a "knowing

participation in the breach." The Opinion overlooks or misapprehends the significance of the Wachovia certificate of deposit that was transferred from Clara's estate to George after her death. (Plaintiffs' Exhibit 89, R., pp. 1752-1754). The record shows that on April 13, 2001, Defendant Busbee received a fax, in response to her inquiry, from Wachovia bank reflecting that CD #117232[3] in the name of "Clara G. Carter Burch" had been closed on September 21, 2000, over six months after Clara's death, at the "personal representative's request." Busbee was attorney for the personal representative, George Burch, at the time of the transfer. These funds were placed in certificates of deposit in George's name. (Plaintiffs' Exhibit 89A, R., p. 1755).

The Opinion misapprehends or overlooks the fact that the undisputed testimony was that Busbee wrote "Clara Burch Estate" on the fax from Wachovia giving her the date of death balance on the certificate. (R., p. 260). Although the respondents tried to argue that the CD was connected to an individual retirement account, the last witness to testify in the case, Jeremy Hall, a Wachovia banker, clarified that it was Clara's individually owned CD (R., pp. 1144-1145). Further, Busbee's own file showed that Wachovia had reported to Busbee's office on April 13, 2001, that the CD was owned by Clara. It was not owned by or affiliated with an IRA. The undisputed evidence was that this certificate was owned by Clara Burch. The Wachovia fax of 4/13/01 to Respondent Busbee in regard to Busbee's inquiries about this certificate of deposit has a notation in Busbee's handwriting (R., p. 260) that plainly states: "Clara Burch Estate." These documents (Plaintiffs' Exhibit 89, R., pp. 1752-1754 and Plaintiffs' Exhibit 89A), R., p.

[3] This is the identical certificate referenced in Argument I, about which appellants contend they were entitled to directed verdict as a matter of law.

1755) were both in the files of Defendant Busbee. She clearly had knowledge that this was an asset of Clara's estate. (R., p. 1752).

There was no factual issue as to whether the certificate was connected to an individual retirement account. At trial, the respondents tried to argue that this Wachovia certificate was connected to an IRA,[4] but Wachovia bank official Jeremy Hall put that issue to rest when he testified that this certificate was "not an IRA account" and that there was no question but that Clara "had sole ownership rights" to the certificate of deposit. (R., p. 1144-45)[5]. Based on the information she received from Wachovia bank, she knew, as evidenced by her own handwriting, that this certificate in the amount of $32,427.66 (date of death balance) was the property of Clara Burch at death and should have been listed as an asset on the inventory of Clara's estate. The jury could have concluded that as to this certificate, Busbee aided and abetted George Burch, personal representative of Clara's estate, in converting the funds for his own use, which is a clear breach of fiduciary duty.

The information about this Wachovia certificate, located in Busbee's files, is evidence of her knowledge of the fact that George, while acting as Clara's personal representative, was transferring Clara's assets to himself. The Opinion misapprehends or overlooks that fact. Busbee did not include this certificate on Clara's estate inventory (Exhibit 37, R., pp. 1458-1464) despite her handwritten note that it belonged to the

[4] Respondents called Wachovia banker Hall as a witness on this point. Hall knew nothing about the account but speculated it might be an IRA. He later obtained the account records and was recalled by appellants later in the trial. He completely recanted his prior testimony. The trial court asked Hall:

The Court: "So it's not an I.R.A. account?
Witness: It was not an I.R.A. account."

[5] Hall recanted his testimony early in the trial and admitted that he was mistaken. (R., p. 1145).

"Clara Burch Estate." (R., p. 1752).

The Opinion overlooked the testimony of expert witness, John Freeman, that Busbee's including Clara's asset on George's estate inventory, with knowledge of the Wachovia certificate of deposit being in Clara's name, constituted "active assistance in the face of knowledge of impropriety." (R., pp. 834-835). The Opinion also misapprehended or overlooked that the holding in Vortex Sports and Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) required that this cause of action be submitted to the jury. In Vortex, the trial court was presented with the testimony of expert Freeman, and it denied the defendant's motion for directed verdict. The Court of Appeals affirmed the denial of defendant's directed verdict motion.

A trial court, in ruling on a motion for directed verdict, must view the evidence and all reasonable inferences "in the light most favorable to the non-moving party." Anderson v. The Augusta Chronicle, 355 S.C. 461, 470, 585 S.E.2d 506, 511 (Ct. App. 2003).

The lower court misapprehended or overlooked the importance of the Wachovia certificate. At a minimum, the certificate created an issue of fact as to Busbee's involvement with George Burch's breach of fiduciary duty. The lower court order granting a directed verdict in favor of Respondent Busbee, individually and as personal representative, on this cause of action for aiding and abetting breach of fiduciary duty should be reversed and remanded for new trial on this cause of action.

III.

By holding that the lower court properly granted a directed verdict in favor of Defendant Busbee, individually and as personal representative, and in favor of Defendants Dennis Burch and Laurie Burch on the cause of action for fraud/fraud benefit under §62-1-106, the Court misapprehended or overlooked the uncontradicted facts that show Busbee had actual knowledge that the Wachovia certificate of deposit was the property of Clara's estate and that Busbee knowingly allowed that asset to be transferred to George Burch, rather than including it in Clara's estate inventory and further that Defendants Dennis and Laurie Burch, whether innocent or not under the statute, benefited from the fraud.

The Opinion misapprehended or overlooked the fact that the Wachovia certificate of deposit referenced above was evidence from which a jury could conclude constituted fraud/fraud benefit under S.C. Code §62-1-106. This statute allows recovery "against either the perpetrator of the fraud or restitution from any person...benefitting from the fraud, whether innocent or not...." Id.

The Opinion erroneously noted that "the record contains no evidence Busbee knew any representations she made in those filings were false at the time they were made." If that were true, the defendants' motion for directed verdict on this cause of action might have properly been granted. However, from the evidence presented that the Wachovia certificate information was in Busbee's possession and the fact that she was a fiduciary as personal representative of George's estate and as attorney, the jury could well have concluded Busbee knew at least by April 13, 2001, when she received the Wachovia fax (R., p. 1752) that the Wachovia asset was an asset of Clara's estate. She was fiduciary of both Clara's estate and George's estate. She had a duty to file an accurate inventory in Clara's estate. An inventory is "a statement filed under this

[Probate] Code" under §62-1-106. Busbee had responsibility to include this asset on Clara's estate, but she did not. Filing false documents in court, as Busbee and George did, is "fraud upon the court." This is evidence that Busbee "perpetrated" a fraud on the Probate Court, and it would support a jury verdict on this cause of action. Defendants Laurie Burch and Dennis Burch, as beneficiaries of George's estate, are liable under §62-1-106 to the extent of the benefit received (i.e., the date of death balance on the certificate, plus interest).

The lower court erred in granting directed verdict on this cause of action. There was evidence from which the jury could have found liability against all three defendants. The ruling of the lower court should be reversed, and a new trial granted as to fraud/fraud benefits under S.C. Code §62-1-106 as to Defendant Busbee, individually and as personal representative, Defendant Laurie Burch, and Defendant Dennis Burch.

IV.

By holding that the lower court did not commit error regarding the burden of persuasion in a conversion claim, the Court overlooked or misapprehended that failure to give this charge was a fundamental error on the burden of proof which was prejudicial to plaintiffs.

The Opinion recites that, while the jury charge on conversion "may have been somewhat confusing, it does not constitute prejudicial error." There has been no reported case in South Carolina discussing the burden-shifting scheme in a conversion claim against a POA or personal representative. However, the closest applicable cases are not addressed in the Opinion. Thus, the Opinion overlooked or misapprehended that the lower court's failure to charge the proper burden of proof was a fundamental error requiring reversal.

While a plaintiff always has the burden of proof, where a defendant is a fiduciary in a case involving POAs and transfers by personal representatives, there is a presumption of invalidity where there are transfers of the property of an incompetent or transfers made by a POA which does not authorize gifts. In this case, the judge was asked to charge the jury by plaintiffs' counsel:

> "the burden under conversion rests with the defendant....The jury was given the impression that conversion...the burden of proof for conversion rests with the plaintiff....Because there was no written authorization...the burden is on the Estate of George Burch to prove that they were valid." (R., p. 1247).

Plaintiffs' counsel went on to say that

> "once we show that there was a taking of the property, the burden shifts to them to show it was not invalid. If it was either from her property when incompetent, from her estate, or under the power of attorney which didn't authorize gifts." (R., p. 1248).

The judge denied the request and stated "I am going to stand by my charge." (R., p. 1250).

To charge the jury that the plaintiffs had the burden of proof as to conversion under the facts of this case is a misstatement of the law. See Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985); S.C. Code §62-6-103(a); Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001).

In order to find error in giving confusing and conflicting jury instructions to be harmless, the appellate court must determine beyond a reasonable doubt that the error did not contribute to the outcome. Keaton v. Greenville Hospital System, 334 S.C. 488, 514

S.E.2d 570, 575 (1999). Unlike a mere confusing instruction, the giving of conflicting instructions as to a material issue is reversible error because it is impossible for the jury to decide which should be accepted, and after the verdict of the jury, it is equally impossible for the Court to determine which the jury followed and which they ignored. *e.g*, Thigpen v. Thigpen, 217 S.C. 322, 60 S.E.2d 621, 626 (1950)(giving of conflicting instructions ordinarily constitutes reversible error); Wright v. Harris, 228 S.C. 144, 89 S.E.2d 97 (1955); Citizens Bank of Darlington v. McDonald, 202 S.C. 244, 24 S.E.2d 369 (1943).

In the case of Beckham v. Sun News, 289 S.C. 28, 344 S.E.2d 603, 604 (1986), the trial court properly charged the plaintiff's burden of proof as to the falsity of a libelous statement, but then went on to later charge the jury that it was the defendant's burden to prove the truth of the statement. In Beckham, then Chief Justice Ness held that such a conflict was necessarily confusing to the jury and, therefore, required that the judgment be reversed and the case remanded for a new trial. See also Cole v. SCE&G, 355 S.C. 183, 584 S.E.2d 405, 412 (Ct. App. 2002), where the Court of Appeals reversed the trial court's failure to place the burden of proving an affirmative defense on the defendant.

The Opinion misapprehended the fact that the lower court's instructions on this cause of action for conversion were not merely "confusing," but contradictory. While simple conversion may be easily understood by a jury, conversion by a fiduciary whose

actions (i.e., transferring funds via POA for his own benefit) involve a presumption of invalidity which shifts the burden of proof/persuasion to the fiduciary is complicated for a jury to understand. It is important that this be carefully and accurately charged by the trial court. As in Beckham, an incorrect charge on the burden of proof is reversible error.

The lower court's denial of the requested charge on conversion by a fiduciary was reversible error. This Court should reverse the lower court ruling refusing to give the correct charge to the jury and remand this case for a new trial on the cause of action for conversion as to Defendants Laurie Burch and Dennis Burch and the Estate of George Burch.

CONCLUSION

For the reasons set forth in this Memorandum, the appellants request that this Honorable Court grant this Petition for Rehearing and issue its Opinion:

(a) amending the Opinion to include Wachovia CD #117232, (with a balance of $33,309.87 on September 21, 2000, plus interest) as an asset of Clara's estate which George transferred to himself improperly under his authority as personal representative, as part of the appellants' directed verdict motion which this Court reversed and remanded;

(b) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and as PR, on the cause of action for aiding and abetting breach of fiduciary duty and remanding this cause of action for new trial;

(c) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and PR, Respondent Laurie Burch and Respondent Dennis Burch, on the cause of action for fraud/fraud benefit under S.C. Code §62-1-106 and remanding this cause of action for a new trial; and,

(d) reversing the refusal of the lower court to give the proper jury instructions as to the burden of proof and burden of persuasion on the cause of action for conversion where transfers are made by use of a POA where the principal is incompetent and/or by a personal representative for his own benefit.

Respectfully submitted,

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September 13, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, ...Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch.......Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that he has served the appellants' Petition for Rehearing, together with the Memorandum in Support of Petition for Rehearing, dated September 13, 2011 on Respondents by depositing a copy same in the United States Mail, postage prepaid, properly addressed to each of the following counsel on September 13, 2011:

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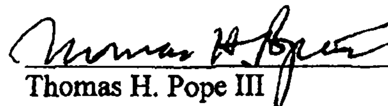
Thomas H. Pope III

September 13, 2011

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS
The Honorable Doyet A. Early, III,
Circuit Court Judge

Case Number 2003-CP-02-0604

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch .... Appellants,

vs.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch and Laurie E. Burch .... Respondents.

RETURN OF RESPONDENTS
JACQUELINE F. BUSBEE, AS PERSONAL REPRESENTATIVE,
DENNIS E. BURCH AND LAURIE E. BURCH
TO APPELLANTS' PETITION FOR REHEARING

The purpose of a petition for rehearing is to bring to the court's attention particular points that the court overlooked or misapprehended. Rule 221(a), SCACR. The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 293 (2d ed. 2002), citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933). In this

respect, a petition for rehearing in appellate court is far more restricted than a Rule 59(e), SCRCP, motion for reconsideration in circuit court.

> . . . it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as a "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. . . . [the] purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004).

Appellants focus their petition for rehearing on the Court's failure to include Wachovia CD # 117232 as an account that should be returned to the Plaintiffs, with interest. The trial court denied Appellants' motion for directed verdict with respect to this account, and the jury found in favor of the Respondents on all causes of action related to this account. Because each of the Appellants' points raised in the Petition for Rehearing was actually addressed in the opinion, and therefore not overlooked, Appellants are left with arguing that the Court misapprehended the issues and decided them incorrectly.

Respondent Busbee, individually, will be submitting her own Return to the Petition for Rehearing.

Appellants' Argument I. Appellants assert that with respect to Wachovia CD #117232 the evidence was undisputed that it was Clara's asset and that George had no claim to it as the spousal beneficiary of an IRA. If there was evidence introduced at trial that the Wachovia CD #117232 was an asset of an IRA, then the trial court's denial of Appellants' directed verdict motion was correct, and this court's statement in its Opinion that " . . .it is a factual issue as to whether the CD was

connected to an individual retirement account (IRA)" is absolutely correct.[1]

Jeremy Hall, a Wachovia employee, testified about the content of Plaintiffs' Exhibit 89. His testimony was:

Q. Can you tell from the document the ownership of the C.D. [Wachovia CD #117232], whether it was held individually or otherwise.

A. Yes, Sir. It looks like it was a C.D. held within an I.R.A.

Q. And who owned it?

A. Clara Carter Burch.

Q. And indicates date of death?

A. Yes, Sir, 4/20/2000.

Q. Okay. And on that day the C.D. owned by an I.R.A. under Wachovia's contract or management of the I.R.A. who would have survivorship rights to the C.D.?

A. If there is a beneficiary named, they have survivorship rights. If there is no beneficiary named, then the surviving spouse has survivorship rights. (R. p. 735, l. 9 to p. 736, l. 22.).

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[1] When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. Law v. S.C. Dept. of Corr., 368 S.C. 424, 629 S.E.2d 642 (2006). The appellate court will reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision was controlled by an error of law. Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005). The rule in South Carolina is that on motions for nonsuit, directed verdict, JNOV, and new trial, the evidence and all reasonable inferences which have to be drawn from it must be viewed in a light most favorable to the nonmoving party and if there is any testimony tending to prove the allegations of the non-moving party, a motion for directed verdict must be refused. This rule is especially strong in South Carolina where the "scintilla of evidence rule" is applied. Proctor v. Dept. of Health, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). "Scintilla" is defined as a spark or trace. Black's Law Dictionary 1347 (7th ed. 1999).

Appellants assert that Mr. Hall was recalled later in the trial and offered additional testimony, then saying that the CD was not associated with an IRA, because unnamed Wachovia personnel in Charlotte said so, and that his earlier testimony was in error. (R. p. 1144, l. 10 to p. 1148, l. 9). Appellants appear to argue that the changed testimony makes the issue "undisputed" such that a directed verdict should have been granted by the trial judge.

This witness offered inconsistent testimony. None of his testimony was stricken from the record, and had a motion been made to strike any portion of his testimony because of its inconsistency, the motion would have rightfully been denied. This situation was addressed in Weaver v. Lentz, 348 S.C. 672, 561 S.E.2d 360 (Ct. App. 2002):

> [I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses.

citing Small v. Pioneer Machinery, Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct.App. 1997) (citations omitted).

Appellants' Argument II - Appellants argue that aiding and abetting should not have been removed from the case by directed verdict and should have gone to the jury for its decision. This argument is directed to Respondent Busbee in her individual capacity and not as Personal Representative of the George Burch Estate. The events at issue, relating to the Wachovia CD # 117232, occurred while George was serving as Personal Representative of Clara's Estate and while Busbee was representing George in his capacity as Personal Representative. Accordingly, the attorney for Busbee, individually, will address this ground for the Petition for Rehearing and the arguments made by Busbee's attorney on this subject are incorporated herein by reference. Rule 208(b)(6), SCACR.

Appellants' Argument III. Appellants argue that the cause of action alleging fraud and fraud benefit as against Busbee, individually and as Personal Representative, and against Respondents Dennis Burch and Laurie Burch should not have been removed from the case by directed verdict and should have gone to the jury for its decision. Appellants theory is that Busbee had actual knowledge of the Wachovia CD #117232 having been closed by George and fraudulently did nothing to disclose it or recover it when acting as Personal representative of George's Estae, and that Dennis Burch and Laurie Burch were the recipients of a fraud benefit. Appellants assert that "The Opinion erroneously noted that 'the record contains no evidence Busbee knew any representations she made in those filings [inventory of assets in George's estate when she was the Personal Representative] were false at the time they were made.'"

Appellants' rely solely on a fax that Wachovia sent to Busbee on April 13, 2001, when she was the attorney for George in his capacity as Personal Representative of Clara's estate. (Plaintiffs' Exhibit no. 89, R. p. 1752-1754). This fax contained information about the date of death value for Wachovia CD #117232. The Appellants' theory is that this fax was crystal clear in establishing that the particular Wachovia CD was Clara's and that George had no right or claim to it. Consequently, Busbee, when appointed as Personal Representative of George's estate almost two years later, was supposed to know that George had wrongfully closed the Wachovia CD #117232 sometime between the date of the fax and the date of George's death. Plaintiffs' Exhibit no. 89 is the same exhibit that the Wachovia employee testified about at trial, first saying that it indicated that the CD in question was held in or by an IRA, and, if true, George could have a claim to it as the surviving spouse.

Appellants' cite no testimony or other exhibits in the record to support their argument that they have proven by clear, cogent and convincing evidence each and every element of fraud with respect to Busbee's, as Personal Representative of George's Estate, inventory and appraisement in

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George's Estate.

If Busbee, as Personal Representative, was not proven to have committed actionable fraud, there is no fraud that can serve as the foundation for Dennis and Laurie Burch having benefitted from the fraud. In any event, there was no evidence that money from the particular Wachovia CD found its way into the possession of Dennis or Laurie Burch, and the evidence at trial was that no distributions have been made from the George Burch estate, so there is no evidence that Laurie and/or Dennis Burch received a "fraud benefit" from the closing of Wachovia CD # 117232.

These Respondents incorporate herein by reference the arguments set forth in their joint Final Brief at pages 34-39. Rule 208(b)(6), SCACR.

Appellants' Argument IV - Appellants persist in arguing that the burden of proof with respect to the conversion claim was on the Defendants, and, consequently, that the Court misapprehended the Appellants' jury charge exception with respect to the burden of proof in a conversion case involving actions of a fiduciary. When the Appellants say "To charge the jury that the plaintiffs had the burden of proof as to conversion under the facts of this case is a misstatement of the law," the Appellants are the ones who actually misapprehend the law. (Appellants' Petition for Rehearing, p. 10, lines 18-19.) The Court correctly distinguished between the ultimate burden of proof and the operation of the presumption of invalidity and its concomitant shifting of the burden of going forward with the evidence. The Court's analysis of Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005), including its application to this case, was spot on. There was nothing overlooked or misapprehended.

Additionally, these Respondents' Final Brief explained how the "somewhat confusing" but non-prejudicial jury charge on the burden of proof in a conversion action involving a fiduciary was actually caused by the Appellants. What the Appellants contend was the incorrect charge, but which

was actually a correct charge, on the burden of proof for conversion was specifically requested by the Appellants in their requests to charge nos. 23 and 25. (Plaintiff's Requests to Charge nos. 23 and 25 in Supp. ROA). What Plaintiffs contend was the correct charge was requested by Plaintiffs' Request to Charge no. 52. (R. p. 2692). Each of the "inconsistent" charges Appellants complain about now were requested to be given by the Appellants. A party cannot take exception to an instruction given at his own request. 89 C.J.S. Trial §727 (2001). These Respondents incorporate herein by reference their arguments in Section 10 of their Final Brief, pages 44-45.

The Appellants' particular exception to the jury charge on conversion was "The jury was given the impression that conversion - the burden of proof for conversion rests with the Plaintiff [sic] . . . the burden is on the estate of George Burch to prove that they were valid." (R. p. 1247, l. 10 to p. 1248, l.1). The burden of proof for conversion did indeed rest with the Plaintiffs/Appellants, so what Appellants objected to was a correct charge. The Defendants/Respondents bore the burden of going forward with the evidence to rebut the presumption of invalidity that arises when a transaction involves a fiduciary. Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005).

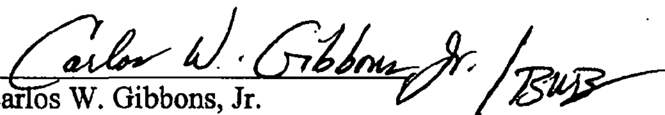
Furthermore, this Court found the charge, although somewhat confusing, not to be prejudicial because the charge communicated to the jury that "the ultimate burden of proof was on the Gordons and also indicated that George's estate, as his representative, was required to offer a valid explanation for the transfers he made." On the question of prejudice, the Appellants received the benefit of a correct charge that they actually requested, and received the benefit of an erroneous charge, without objection, that they also requested, that was prejudicial to the Respondent estate (or Busbee as PR), to which no one objected. Stated otherwise, the Appellants chose not to object to an incorrect charge that was favorable to them. Absent harm or prejudice to the Appellants, there is no relief for an error in the jury charge. For a jury charge to warrant reversal on appeal, it must be

both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

These Respondents incorporate herein by reference their arguments in Section 11 of their Final Brief, pages 46-47. Rule 208(b)(6), SCACR.

Conclusion

Appellants have not demonstrated that this Court overlooked or misapprehended anything relating to the particular issues raised in the Petition for Rehearing. The specific subjects were addressed in the Opinion, and were decided according to the law and the facts of record. The Petition for Rehearing should be denied.



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9-23-2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2003-CP-02-0604

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch . . . . Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch, Dennis E. Burch and Laurie E. Burch . . . . Respondents.

PROOF OF SERVICE

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondent Jacqueline F. Busbee, as Personal Representative, in the above-captioned matter, do hereby certify that I have served counsel for the Appellants and Respondent Busbee, Individually with copies of **Respondent Busbee, as Personal Representative, Laurie Burch and Dennis Burch's Return to Appellants' Petition for Rehearing**, by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 23rd day of September, 2011, at the following addresses:

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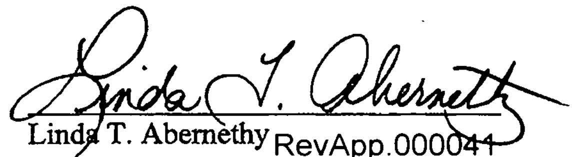

Linda T. Abernethy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch, Dennis E. Burch and Laurie E. Burch .... Respondents.

RETURN OF RESPONDENT JACQUELINE F. BUSBEE, INDIVIDUALLY, TO APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. South Carolina Retirement System, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Id. (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999) (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933))).

Appellants' Petition is based entirely upon the premise that the Court of Appeals overlooked or misapprehended the importance of the Wachovia Certificate of Deposit #117232 (the "Wachovia CD"). Specifically, Respondent Jacqueline F. Busbee ("Jacqueline Busbee") received a fax from Wachovia regarding the Wachovia CD during the time she served as attorney for George Burch in his capacity as personal representative of the Estate of Clara Burch. Appellants argue that the fax amounts to clear, cogent and convincing evidence that Jacqueline Busbee committed fraud, and aided and abetted George, when the inventories and appraisements filed in the Estate of Clara Burch and filled out and attested to by George Burch did not include the Wachovia CD.

The fax from Wachovia included the notation "CDA IRA." (R. pp. 1752-1753). Wachovia's Financial Specialist, Jeremy Hall, initially determined that "CDA IRA" meant the Wachovia CD was owned by an individual retirement account and upon Clara Burch's death the money would have gone to George Burch. (R. pp. 1752-1753; p. 735,

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l. 24-p. 737, l. 4). Mr. Hall, after speaking with unnamed personnel in Wachovia's Charlotte office, later testified that the Wachovia CD was not owned by an I.R.A., despite the fact that all the information contained in his Aiken branch suggested it was. (R. p. 1144, l. 10-p. 1148, l. 9). This Court of Appeals concluded that there was a factual issue as to whether the Wachovia CD was connected to an individual retirement account and, therefore, Jacqueline Busbee did not have actual knowledge of an improper transfer by George. Gordon v. Busbee, Opinion No. 4880, 2011 WL 3890643, *5 (Ct. App. Aug. 31, 2011).

Pursuant to Rule 240, SCACR, Respondent Jacqueline F. Busbee, Individually, files this Return to Appellants' Petition for Rehearing of published Opinion No. 4880 filed on August 31, 2011(the "Opinion"). For the reasons set forth below, Appellants' Petition should be denied.

ARGUMENT

Appellants' Argument I: Appellants argue that the Court of Appeals, in failing to rule that the funds removed from the Wachovia CD should be returned to them, overlooked or misapprehended the "undisputed" evidence that the Wachovia CD was not connected to an I.R.A., but was owned by Clara, individually, and was, therefore, converted by George. (Petition, pp. 2-4.) Argument I is not directed to Jacqueline Busbee, individually. Respondents Dennis and Laurie Burch, and Respondent Busbee, as personal representative, have responded to Argument I in their joint Return, filed September 23, 2011. The arguments made by these Respondents' attorneys on this subject are incorporated herein by reference pursuant to Rule 208(b)(6), SCACR.

In addition, Jacqueline Busbee, individually, takes exception to one of the factual

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assertions upon which Appellants base their Argument. Appellants claim that Jacqueline Busbee, individually, admitted in her Final Brief that George Burch converted the Wachovia CD. (Petition, p. 4.). Had Appellants quoted the entire paragraph in their Petition, rather than picking a few lines out of context, it would have been apparent that Jacqueline Busbee, individually, also denied that George Burch converted the Wachovia CD. The full paragraph reads:

> The simple truth of the matter is that *if* a conversion of the funds in the Wachovia certificate occurred, *which Respondents deny*, such conversion was made by George Burch, not Jacqueline Busbee. Mr. Jeremy Hall, a financial specialist from Wachovia Bank, testified at trial regarding the Wachovia certificate. (R. p. 735, ll. 9–16). According to Mr. Hall, the certificate was closed by George Edward Burch, who then opened a new C.D. in the same amount of money using the proceeds from the Wachovia certificate. (R. p. 737, l. 16–p. 738, l. 15). No evidence presented at trial contradicts Mr. Hall's testimony regarding the person who closed the Wachovia certificate. Therefore, Appellants' conversion cause of action against Jacqueline Busbee, individually, must fail.

(Final Brief of Busbee, individually, p. 39) (emphasis added).

Appellants' Argument II: Appellants argue that because Wachovia faxed information to Jacqueline Busbee regarding the Wachovia CD during the time she was attorney for George Burch that this amounts to evidence that Jacqueline Busbee had "actual knowledge" that the Wachovia CD was the property of the Estate of Clara Burch. (Petition, pp. 4-7). Therefore, Appellants argue, when the inventories and appraisements filed in the probate court and filled out and attested to by George Burch did not contain the Wachovia CD, Jacqueline Busbee must have knowingly participated in George Burch's breach of fiduciary duty to Clara's Estate.

"The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." Vortex Sports & Entertainment,

Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008), rehearing denied (2008) (citing Future Group, II v. NationsBank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996)). "The gravamen of the claim is the defendant's *knowing participation* in the fiduciary's breach." Future Group II, 324 S.C. at 99, 478 S.E.2d at 50 (citations omitted) (emphasis added).

For Appellants' argument to succeed, this Court of Appeals must take an enormous leap of logic from the Wachovia fax to a conclusion that Jacqueline Busbee "knowingly participated" in George Burch's breach of fiduciary duty. To make that giant leap, Appellants ask the Court to completely ignore the documents in the Record as well as their own testimony and the testimony of both their experts.

Appellants rely heavily on the fax from Wachovia, which included the notation "CDA IRA." (R. p. 1753). Jeremy Hall, a Wachovia Bank Financial Specialist in the local Aiken branch, testified that the certificate was owned by an I.R.A., that the I.R.A. had no beneficiary named, and that upon Clara Burch's death, the money would have gone to George Burch. (R. p. 735, l. 24–p. 737, l. 4). Thus, had Jacqueline Busbee inquired about the Wachovia certificate, Mr. Hall would have confirmed that the money in the Wachovia certificate belonged to George Burch and was properly excluded from the inventories filed in the Estate of Clara Burch.

Jeremy Hall's original testimony was based upon the information available to him at the local Aiken branch of Wachovia. At the request of the Appellants, Mr. Hall obtained from unknown personnel at the main branch in Charlotte information that contradicted the local branch's information. He was called a second time to testify:

Q: [To Jeremy Hall] Mr. Hall, I think you've already stated that your testimony last week was an honest mistake, and we understand that.

A: Yes, sir.

Q: And until today, you didn't have the information that you have just testified to that [the Wachovia certificate] was, in fact, not an I.R.A.; correct?

A: Yes, sir.

Q: And you had to in fact get information from the home office in Charlotte to discover that.

A: Yes, sir.

Q: So, anything that was in your bank in Aiken did not answer that question for us so that you could come and tell us what the actual facts are; correct?

A: Right. There is nothing in our – nothing on my system that I could find that would answer that question. (R. p. 1146, ll. 5–20).

Appellants' can offer no evidence that had Jacqueline Busbee inquired of the local Aiken branch of Wachovia, she would not have received the same misinformation as Mr. Hall upon his first review.

Contradicting the arguments of their own counsel, Appellants, themselves, admit that Jacqueline Busbee had no "actual knowledge" of any transfers by George Burch. When asked under oath whether he had any evidence that Jacqueline Busbee knew anything about the transfers made by George, Appellant Charles Gordon answered, "No." (R. p. 949, ll. 7–19). As a follow up question, Charles Gordon was asked to provide proof that Jacqueline Busbee knew of any transfers of Clara's assets. Mr. Gordon replied, "I have no proof." (R. p. 960, ll. 9–19). Appellant Barbara Gordon had the same reply when asked if she had any evidence that when George was making the transfers Ms. Busbee knew anything about them. Her answer: "During the time, no." (R. p. 404, ll. 12–15).

Appellants state in their Petition that the Court of Appeals overlooked the

testimony of John Freeman. (Petition, p. 7). Incredibly, Appellants then argue that because Mr. Freeman gave expert testimony in the case of Vortex Sports & Entertainment, Inc. v. Ware, 278 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), and because the trial court in Vortex denied a motion for directed verdict on an aiding and abetting cause of action, that it was error for the trial court to have granted the directed verdict motion here. (Petition, p. 7). The Court of Appeals in Vortex affirmed the denial of the motion for directed verdict because it concluded that the defendant not only knew that a fiduciary duty existed but knowingly encouraged its breach. Vortex, 378 S.C. at 205, 662 S.E.2d at 449 ("Vortex presented evidence that CSMG *knew* Ware was one of several partners and the attorney for Vortex, not simply an employee . . . [and that] CSMG *knew* Ware had certain financial obligations to Vortex, even if he was no longer an employee. Therefore, there is evidence CSMG *had actual knowledge* Ware owed a fiduciary duty to Vortex [and that] CSMG *knowingly encouraged* Ware to breach that duty . . . .") Unlike Vortex, in the present case John Freeman and Appellants' other expert, Jim Hardin, testified that Jacqueline Busbee had no actual knowledge of any transfers made by George Burch. (R. p. 637, ll. 21-p. 638; p. 844, ll. 20-24).

Jacqueline Busbee could not have known more about the Wachovia CD than Wachovia's own Financial Specialist, who testified that the money belonged to George Burch upon his wife's death. Appellants and their experts admit as much. To argue otherwise is mere speculation, and the standard for directed verdict does not authorize submission of speculative, theoretical, or hypothetical views to the jury. Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct.App.2006). Appellants' Petition should, therefore, be denied.

Appellants' Argument III: Appellants argue that the trial court erred in granting Jacqueline Busbee's motion for directed verdict on the cause of action for fraud/fraud benefit under S.C. Code § 62-1-106, and that the Court of Appeals, in affirming the trial court, "erroneously noted that 'the record contains no evidence Busbee knew any representations she made in those [probate court] filings were false at the time they were made.'" (Petition, p. 8). In support of their argument, Appellants cite to the Wachovia CD, arguing that because Busbee had in her file a fax from Wachovia containing the date of death value for the Wachovia CD, a jury could have concluded that Busbee knew the Wachovia CD was an asset of Clara's estate. (Petition, p. 8). Further, the failure to include the Wachovia CD in the documents filed in the Estate of Clara Burch constituted "fraud on the court." (Petition, p. 9).

"Fraud" within the meaning of section 62-1-106 is common-law fraud. 31 Am. Jur. 2d Executors & Administrators § 136 (2011); Eoff v. Forrest, 789 P.2d 1262, 1266 (N.M. 1990). To prove common-law fraud, the plaintiff must present clear, cogent and convincing evidence of each element.[1] Robertson v. First Union Nat. Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002). The failure to prove any element of fraud is fatal to the action. Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (S.C. 2007) (citation omitted).

Appellants would have this Court of Appeals believe that Wachovia's fax to Busbee regarding the Wachovia CD nearly two years prior to George's death constitutes

[1] To establish a cause of action for common law fraud, Appellants must prove the following nine elements: "(1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (S.C. 2007) (citing Kahn Const. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980)).

clear, cogent and convincing evidence that Busbee "perpetrated a fraud" on the probate court. (Petition, p. 9.) What Appellants fail to address is that their own actions and admissions doomed their fraud cause of action from the start:

- Appellants admitted that their entire case against Busbee for fraud involved only filings with the probate court and no verbal representations (R. p. 965, ll. 1–20; p. 966, ll. 2–9; p. 966, l. 20–p.967, l. 4; p. 969, ll. 4–25; p. 970, ll. 17–24; p. 971, ll. 7–11);
- However, Appellant Charles Gordon admitted that he had no document filed with the probate court in which Busbee represented anything to the Appellants (R. p. 961, l. 12–p. 962, l. 3);
- Appellants and both their experts concluded that Busbee had no actual knowledge of any transfers being made by George Burch (R. p. 949, ll. 7-19; p. 960, ll. 9-19; p. 637, l. 21-p. 638, l. 1; p. 844, ll. 20-24), therefore, Busbee could not have made any material representations that she knew to be false.

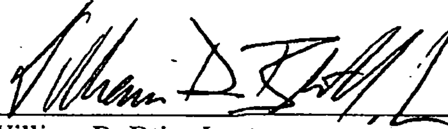
Appellants' most glaring failure, however, is the complete lack of any evidence at all of reliance. Appellants' Final Brief is devoid of the word "reliance" or any derivative, and their Petition likewise fails to address it. Further, reliance under section 62-1-106 refers to reliance by the probate court itself. See, e.g., Eoff v. Forrest, 789 P.2d 1262 (N.M. 1990). Appellants presented no evidence at trial that the probate court relied upon any filings to its detriment. In fact, because the Appellants filed suit before the probate court closed either the Estate of Clara Burch or the Estate of George Burch, Appellants foreclosed the possibility of any detrimental reliance. Ironically, Appellants' lawsuit defeated their fraud cause of action.

Appellants' Argument IV: Argument IV is not directed to Jacqueline Busbee, individually. Respondents Dennis and Laurie Burch, and Respondent Busbee, as personal representative, have responded to Argument IV in their joint Return, filed September 23, 2011. The arguments made by these Respondents' attorneys on this subject are incorporated herein by reference pursuant to Rule 208(b)(6), SCACR.

CONCLUSION

For the reasons appearing above, as well as the arguments contained in Jacqueline Busbee's Final Brief, which are incorporated herein by reference, the trial court did not err in granting a directed verdict in favor of Jacqueline Busbee, individually, on the causes of action for aiding and abetting a breach of fiduciary duty and fraud and "fraud benefit." The Appellant's Petition for Rehearing should be denied and the trial court's rulings should be affirmed.

Respectfully submitted,



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Attorneys for Respondent Jacqueline F. Busbee, Individually

September 30, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch, Dennis E. Burch and Laurie E. Burch .... Respondents.

PROOF OF SERVICE

I, Kim Warnock, a legal assistant in the firm of Bruner, Powell, Wall & Mullins, LLC, hereby certify that on September 30, 2011, I served a copy of the ***Return of Respondent Jacqueline F. Busbee, Individually, to Appellants' Petition for Rehearing*** on all counsel of record via United States Mail, postage pre-paid, and addressed as follows:

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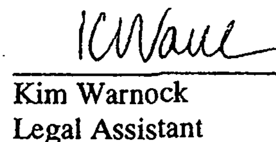

Kim Warnock
Legal Assistant

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS
The Honorable Doyet A. Early, III,
Circuit Court Judge

Case Number 2003-CP-02-0604

Charles E. Gordon and Barbara Gordon, as Personal
Representatives of the Estate of Clara Gordon Burch .... Appellants,

vs.

Jacqueline F. Busbee, Individually and as Personal
Representative of the Estate of George E. Burch; Dennis
E. Burch and Laurie E. Burch .... Respondents.

RESPONDENTS' JACQUELINE F. BUSBEE, AS PERSONAL

REPRESENTATIVE, DENNIS E. BURCH AND

LAURIE E. BURCH, PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Respondents Busbee, as Personal Representative of the Estate of George Burch, Laurie E. Burch and Dennis E. Burch petition the Court for rehearing of its published Opinion no. 4880 (the Opinion), filed on August 31, 2011. These Respondents received notice of the filing of the Opinion on August 31, 2011 and were granted an extension for filing a Petition for Rehearing through October 3, 2011.

These Respondents respectfully request that the Court rehear the following matters, which these Respondents respectfully submit were misapprended by the Court and wrongly decided, and alter or amend the Opinion to:

1. affirm the trial court's denial of Appellants' motion for directed verdict, and to thereby affirm the jury's verdict, with respect to (1) $79,495.11 and $4,778.46 withdrawn from Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 withdrawn from Clara's account at Security Federal on April 17, 2000; and (3) $39,552.98, $6,235.99 and $9,904.21 withdrawn from Clara's three accounts at Community Bank on April 17, 2000;
2. amend the portion of the Opinion that reads "We remand this matter to the circuit court for a determination of the interest that will be due to the Plaintiffs on these sums," to more clearly state that both (a) Appellants' entitlement to prejudgment interest, and if so entitled, (b) the amount of prejudgment interest, are left for the circuit court's determination.

Argument and Authorities

1. In its Opinion the Court has apparently expanded the law of Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985) to hold that there was not a scintilla of evidence presented that could take the transactions, even if considered to be non-gift transactions, out of the reach of Fender. The transactions at issue are identified in the Opinion as (1) $79,495.11 and $4,778.46 withdrawn from Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 withdrawn from Clara's account at Security Federal on April 17, 2000; and (3) $39,552.98, $6,235.99 and $9,904.21 withdrawn from Clara's three accounts at Community Bank on April 17, 2000.

The law of Fender, pursuant to its unambiguous language, is directed to gifts made by an agent to himself when authority for the gift is not in writing. The holding in Fender was very clearly stated: "Therefore, in order to avoid fraud and abuse, we adopt a rule **barring a gift** by any attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing." Id. (emphasis added).

Notwithstanding the limited scope of Fender, the Opinion applies Fender as if it prohibits any transfer or transaction, whether by gift or otherwise, that falls within the "construct of Fender," made without written authorization in the power of attorney. These Respondents submit that a non-gift transfer pursuant to an unwritten contract or agreement, and/or to accomplish a purpose that would benefit Clara or her estate, if a scintilla of evidence of such agreement or purpose is introduced, falls outside the reach of Fender. At trial, the expert witnesses testified about this very subject. Closing arguments and jury charges addressed the issue. The jury concluded that the transfers were not prohibited transfers.

Evidence satisfying the scintilla standard that justified denial of directed verdict. In its May 20, 2008 Order denying Appellants' post-trial motions, including a motion for JNOV, the trial court identified evidence in the record for four possible good faith, **non-gift**, non-crook explanations for George's conduct with respect to the bank account transactions. (1) The most cogent and compelling testimony on this point came from Attorney Steven Johnson, the probate expert offered by Busbee. Attorney Johnson testified that if the transfers were in consummation of some arrangement or contractual agreement between Clara and George, the absence of a gifting clause in the power of attorney would not invalidate the transfers because the transfers would not be in the form of gifts. (R. Vol. II, p.1042, l. 4 to 1044, l. 2). In fact, through their testimony and statements attributed to

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them, the Appellants gave credence to the existence of the "arrangement". (R. Vol. I, p. 429, l. 6 to 431, l. 7 and Vol. II, p. 1087, l. 13 to 1088, l. 22). Evidence indicated that Appellant Barbara Gordon said shortly after Clara' death that Clara did not leave her house to George but "that Clara had settled a good sum of money on [George] instead." (R. Vol. II, p. 1087, l. 23 to 1088, l. 19). Further, the Appellants and their expert Mr. Hardin acknowledged the existence of private conversations between husband and wives, the inference being that this arrangement was understood between George and Clara. (R. Vol. I, p. 705, l. 3 to 706, l. 22).

(2) Respondents also introduced at least a scintilla of evidence relative to George's attitude about the payment of taxes and that the transfers were part of a plan to minimize any estate taxes.(R. Vol. II, p. 951, l. 1 to 953, l. 9).

(3) Additionally, at least a scintilla of evidence was provided about George's decision to forego filing an elective share petition in Clara's estate. Had he done so, he would have been entitled to an amount equal to one-third of the value of Clara's estate. (R. Vol. I, p. 699, l. 22 to 701, l. 21 and p. 433, l. 5-12 and Vol. II, p. 812, l. 13 to 813, l. 24).

(4) Furthermore, far more than a scintilla of evidence was offered on the issue of the money transfers in the testimony from Barbara Gordon (R. Vol. I, p. 424, l. 8 to 427, l. 6), Agnes Asman (Appellants' accounting expert) (R. Vol. II, p. 801, l. 18 to 809, l. 8) and from Respondent Laurie Burch (R. Vol. II, p. 1119, l. 14 to 1121, l. 24) regarding the payment by George for Clara's medical care from joint funds rather than using accounts solely in Clara's name. Even though Appellants attempt to characterize George's pension, Social Security and retirement income as modest, the evidence presented by the Defendants was that he received over $400,000.00 from these sources over the years he was married to Clara and that he lived very modestly and never spent money

extravagantly. (R. Vol. II, p. 954, l. 23 to 955, l. 2). The evidence also showed that George was paying for the majority of Clara's nursing home care from their joint account, to which he had an entitlement as the survivor. (R. Vol. I, p. 425, l. 23 to 426, l. 16). One theory presented to the jury for the transfers was that George was reimbursing the joint account for funds used to pay for Clara's care, which he could have taken from Clara's funds using the Power of Attorney. (R. Vol. I, p. 425, l. 23 to 426, l. 16). Respondents submit that they presented a compelling case for the jury to conclude that George's transfers out of the joint account were meant to reimburse himself for his payment from the joint account of Clara's nursing home and related care. (R. Vol. II, p. 801, l. 18 to 809, l. 8). It was shown that the amount of the pre-death transfers closely approximated the total cost of her nursing care over the years, the substantial majority of which was paid from the joint account or from his personal funds. (R. Vol. I, p. 426, l. 6 to 427, l. 6 p. 708, l. 5 to 709, l. 7). Under the power of attorney, George, as attorney in fact, could have paid for Clara's care from her individual accounts and there would be no question as to the propriety of same. The balances in the joint accounts would have been preserved and would have passed upon death without question. The trial judge acknowledged that it was a jury question as to whether the transfers were for such non-gift purposes. (R. Vol. II, p. 809, l. 2-8). This fact situation was placed before the jury to determine and they, evidently, found it to be sufficient to support a verdict in George's favor. Transfers effected in this fashion would not have been gifts precluded by the Power of Attorney. (R. Vol. II, p. 1042, l. 4 to 1044, l. 2).

1(a). Additionally, the expansion of Fender's "bright-line rule" barring gifts by an agent to himself to now bar non-gift transfers not specifically authorized in writing is an inappropriate retroactive

change of the common law. Every person is charged with knowledge of the **existing** law. Labruce v. City of North Charleston, 268 S.C. 465, 234 S.E.2d 866 (1977). Predictability is an important component of our common law system. Hill v. Mayall, 886 P.2d 1188 (Wyo. 1994), citing Oliver Wendell Holmes, *The Path of The Law*, 10 Harv.L.Rev. 457 (1897); and H.L.A. Hart, *The Concept of Law* 143-44 (1961). Retroactive application of the law destroys predictability. Id.

If the Courts decide to change the common law to expand an existing bright-line rule, and thereby move the bright line to encompass transactions that were not absolutely barred previously, the new law should apply prospectively. It is critical to the review of this case that, pursuant to the law of Fender as that law existed at the time of trial, the trial judge ruled that there was a scintilla of evidence that, if believed by the jury, would take the subject transactions out of the reach of the Fender bright-line rule. And, even more importantly, the jury heard the evidence, the arguments of counsel and the charge on the existing law from the Court, and concluded that the transactions were not barred by the existing law of Fender.

1(b). The Opinion did not address application of the invited error doctrine, notwithstanding that the trial court's post-trial Orders were grounded, in part, on the application of that doctrine, and these Respondents' Final Brief devoted considerable attention to the doctrine. Application of the invited error doctrine supports the trial court's denial of Appellants' directed verdict motion, the jury's verdict and the trial court's denial of Appellants' post-trial motions.

2. The Opinion reads as though the Appellants' entitlement to prejudgment interest is a *fait accompli*, leaving as the only unresolved matter the amount of prejudgment to be paid. These

Respondents submit that the entitlement to prejudgment interest will be contested and that it is improper for this Court to rule otherwise at this time in the proceedings. Accordingly, these Respondents request that the Opinion be amended to clarify that this Court has not determined that Appellants are entitled to prejudgment interest and that the matter is being remanded to the circuit court to determine (a) whether Appellants are entitled to prejudgment interest, and if so entitled, (b) the amount of prejudgment interest. Of course, if the Opinion is amended pursuant to the reasons submitted in sections 1, 1(a) and 1(b) above, prejudgment interest is rendered moot.

Conclusion

The Court should not expand the reach of the Fender bright-line rule retroactively; it should uphold the trial court's application of the invited error doctrine to give the Appellants the result they, themselves, invited; and the Court should not decide in its Opinion the issue of the Appellants' entitlement to prejudgment interest.

Accordingly, the Court should amend its Opinion to affirm the trial court's denial of Appellants' motion for directed verdict, and to thereby affirm the jury's verdict, with respect to the following transactions: (1) $79,495.11 and $4,778.46 withdrawn from Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 withdrawn from Clara's account at Security Federal on April 17, 2000; and (3) $39,552.98, $6,235.99 and $9,904.21 withdrawn from Clara's three accounts at Community Bank on April 17, 2000. This amendment renders moot the issue of prejudgment interest.

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October 3, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2003-CP-02-0604

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch . . . . Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch, Dennis E. Burch and Laurie E. Burch . . . . Respondents.

PROOF OF SERVICE

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondent Jacqueline F. Busbee, as Personal Representative, in the above-captioned matter, do hereby certify that I have served counsel for the Appellants and Respondent Busbee, Individually with copies of **Respondent Busbee, as Personal Representative, Laurie Burch and Dennis Burch's Petition for Rehearing**, by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 3rd day of October, 2011, at the following addresses:

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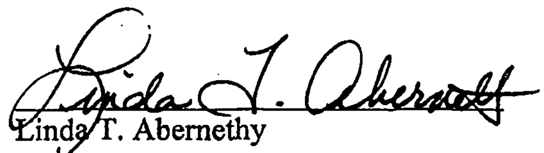

Linda T. Abernethy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch..............................Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch............Respondents.

APPELLANTS' REPLY TO RETURN OF RESPONDENTS JACQUELINE S. BUSBEE, AS P.R., DENNIS E. BURCH AND LAURIE E. BURCH TO APPELLANTS' PETITION FOR REHEARING

In the Appellants' Petition for Rehearing, they focused on the lower court's failure to include Wachovia CD #117232 as an account that should be returned to the plaintiffs, with interest. The Petition for Rehearing is based on the fact that the evidence was uncontradicted that the Wachovia CD was in fact owned by Clara Burch, individually, and that the Court of Appeals had

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misapprehended this fact because the Opinion noted erroneously that "it is a factual issue as to whether the CD was connected to an individual or to a retirement account." (Opinion, p. 10). This is not the case, as the evidence was undisputed that this CD was owned by Clara individually, not as an IRA or connected to one.

In their Return, Respondents Jacqueline Busbee, Dennis Burch and Laurie Burch ("Respondents") have argued that Wachovia banker, Jeremy Hall, testified that the Wachovia CD was held within an IRA. (R., p. 735-736). Respondents acknowledge that Hall later corrected his testimony, but they urge this Court to accept the argument that this created a factual dispute and the jury was free to accept either version of Hall's testimony. This is not the case. The CD was owned by Clara as a matter of law. George breached his fiduciary duty in transferring it to himself after her death. The lower court erred in denying Plaintiffs' motion for directed verdict which included this CD.

This is not a case in which a witness gave inconsistent testimony as to his own observations. He was presented by defendants to give testimony about a document as to ownership of the Wachovia CD.[1] Hall's initial testimony, based on one document (Plaintiffs' Exhibit 89), was that: "it looks like it was a CD held within an IRA." (R., p. 735). He admitted that he was contacted by the defense the week before trial and that he did not have any records of the CD account. (R., p. 737). Hall was essentially called as a records custodian to identify one document as to the issue of

1 Mr. Hall was called out of order during plaintiffs' case because he had to go on vacation. The trial lasted two weeks, and his initial testimony was clearly erroneous. The plaintiff s called Hall back at the end of the trial, after he had had a chance to review all of the records at Wachovia on this CD, to correct his previous, erroneous testimony.

the Wachovia CD's ownership, without the benefit of full information on the CD available from Wachovia Bank.

Hall was recalled as the last witness at trial by the plaintiffs "to correct the record." (R., p. 1143, l. 19). After he testified initially, he later had the records checked at Wachovia's home office. (R., p. 1146). Based on a full review of the bank records on this CD, he gave the following corrective testimony:

> "Q: ...Wachovia 117232...you have checked and who owns it?
> A: Clara G. Burch...or Clara Burch personally.
> Q: And there is no question that she had sole ownership rights according to the documentation here and according to what you've checked at your home office?
> A: Yes, sir.
> Q: So, any representation or implication that you may have made last week when you testified was erroneous about the IRA?
> A: Yes, sir...
> The Court: So, it's not an IRA, correct?
> A: It was not an IRA account."
>
> (R., p. 1144-1145)(emphasis added)

Counsel for all Respondents immediately characterized Hall's earlier testimony as "an honest mistake" on the record. (R., p. 1145, l. 18; R. 1146, l.6).

Hall admitted that his initial testimony was incorrect because he "didn't have the information" and had to get the information "from the home office in Charlotte." (R., p. 1146). He acknowledged that the plaintiffs called him "to come and straighten that fact out."

This is not the case of a fact witness offering inconsistent testimony about a fact in dispute about which the witness had personal knowledge. Mr. Hall had no personal knowledge about the Wachovia certificate. He was offered essentially as a records custodian, but he did not have full knowledge of the records until he testified at the end of the case. This is not a case of a witness giving testimony as to his factual observations. He was simply testifying from the records as to whether an account was individually owned or part of a retirement account. Hall's corrective testimony that Clara owned the Wachovia CD at her death is not disputed. This issue of this certificate being the property of Clara is not only important because of the directed verdict motion, but also because of its impact as to the causes of action for fraud/fraud benefit and aiding and abetting breach of fiduciary duty. Having served as fiduciary for both Clara's estate and George's estate, Busbee had fiduciaries duties to both estates. With the fact of Clara's ownership of the Wachovia CD being undisputed, Busbee should not join George's beneficiaries in seeking to retain Clara's funds (proceeds of the Wachovia CD) in George's estate.

The Opinion should be amended.

CONCLUSION

Respondents' argument that it was for the jury to decide on which version of banker Hall's testimony it wanted to believe is incorrect. The Opinion adopting this argument misapprehended or overlooked that Hall based his initial testimony on insufficient information. When he had full information from the Wachovia home office, he corrected his testimony to make it beyond dispute: the Wachovia CD was owned by Clara. The lower court should have

granted plaintiffs' motion for directed verdict. The Petition for Rehearing should be granted for this reason and for the reasons set forth in the previous Memorandum.

Respectfully submitted,

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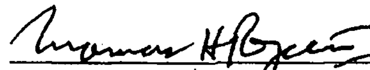
By: 

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Attorneys for Appellants Charles E. Gordon and Barbara Gordon

October 3, 2011
Newberry, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

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v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch.......Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that he has served Appellants' Reply to Return of Respondents Jacqueline S. Busbee, as P.R., Dennis E. Burch and Laurie E. Burch to Appellants' Petition for Rehearing dated October 3, 2011 on Respondents by depositing a copy same in the United States Mail, postage prepaid, properly addressed to each of the following counsel on October 3, 2011:

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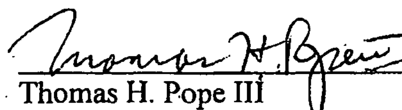
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October 3, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

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Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch............Respondents.

APPELLANTS' REPLY TO PETITION FOR REHEARING BY RESPONDENTS JACQUELINE F. BUSBEE, AS P.R., DENNIS E. BURCH AND LAURIE E. BURCH

In their petition for rehearing, Respondents Busbee, as Personal Representative, Dennis Burch and Laurie Burch assert that this Court should rehear this matter and amend its Opinion:

(1) to reinterpret Fender v. Fender, 329 S.E.2d 430 (1985) such that it does not apply to appellants' motion for directed verdict; and,

(2) to rule that appellants are not entitled to prejudgment interest on the bank accounts and certificates that the Opinion determined were the property of Clara Burch, and on which the lower court erred in failing to grant appellants' directed verdict motion as to same.

The appellants respectfully assert that respondents' petition for rehearing should be denied inasmuch as the Opinion of this Court did not overlook or misapprehend when it ruled as follows:

(a) the trial court committed reversible error when it denied appellants' motion for directed verdict as to the following accounts:

"(1) $79,495.11 and $4,778.48 withdrawn by George Burch without authority from Clara's accounts at Security Federal on 4/13/2000;

(2) $20,026.41 withdrawn by George Burch without authority from Clara's account at Security Federal on 4/17/2000; and,

(3) $39,552.98, $6,235.99, and $9,904.21 withdrawn by George Burch without authority from Clara's three accounts at Community Bank on 4/17/2000.

(b) "We remand this matter to the circuit court for a determination of the interest that will be due to the plaintiffs on these sums."

ARGUMENT

I. THE OPINION FOLLOWS THE LAW ESTABLISHED IN FENDER V. FENDER, 285 S.C. 260, 329 S.E.2d 430 (1985).

The law of Fender applied to all of Clara's accounts which were transferred by George to himself or for his own benefit, without written authority. In their Petition for Rehearing, the respondents argue that Fender only applies to "gifts by an attorney in fact to himself or a third party absent a clear intent to the contrary evidenced in writing." Id. Appellants have already

fully briefed Fender and its application to this case. Those arguments are adopted herein.

First, the respondents incorrectly assert that George's actions constitute non-gift transfers outside the scope of Fender. They do not challenge the fact that George had transferred Clara's accounts; that he made the transfers to himself; that his power of attorney specifically excluded the right to make transfers to himself; that he had no written authorization to make the transfers; and that he was excluded as a beneficiary of any of these assets under her will. Respondents also fail to mention that, at the time George made the transfers referenced herein, Clara had been mentally incapacitated for five years (since mid-1995). The transfers were all made within the last week of her life.

The respondents argue that the transfer by George to himself was not a "gift." This is incorrect. Any gratuitous transfer of money or property without consideration falls within the definition of "gift" and also falls within the ruling of the Supreme Court of South Carolina in Fender. Our Supreme Court in Fender laid out a bright line test that an agent must further his principal's interests and must exercise the utmost faith and loyalty. Id. at 431. There is no evidence in this case that George Burch, in making these transfers for his own benefit without any written authority, can escape the rule set forth in Fender v. Fender. Fender was designed for cases exactly like this.

It is important to understand also that respondents, Laurie Burch, Dennis Burch and Jacqueline Busbee, as personal representative, bore the burden of proving the validity of the transfers, as argued by appellants when the motion for directed verdict was made. (R., p. 1150). Respondents agreed that they had the burden of proof and responded to the lower court when the directed verdict motion was heard that "we feel that the burden has been met." (R., p. 1153).

Assuming *arguendo* that the appellants had the burden of proving George's transfers referenced above were improper under Fender, the burden has been met. The ruling in Fender is clear in its holding and in its intent. The Supreme Court established a bright line rule that persons with a power of attorney (George) cannot transfer assets of his principal (Clara) to himself absent clear, written authority. George did not have this authority.

The respondents re-argue that a "non gift transfer" pursuant to an oral agreement falls outside of Fender. First, these transfers were gifts from Clara by George to himself via his abuse of his power of attorney and without Clara's written authorization. Secondly, there was no oral "agreement." Respondents offer only speculation that there "could have been" four reasons for the transfers. All were properly rejected by this Court.

Respondents argue in two sentences that the Opinion did not address the application of the "invited error doctrine." For the reasons set forth in appellants' briefs to this Court, no error was invited by appellants, and the doctrine does not apply.

The Opinion correctly concluded that the lower court erred in denying appellants' motion for directed verdict as to the transfers made by George.[1] The respondents' petition for rehearing should be denied.

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1 See also Appellants' Petition for Rehearing where it is argued that this Court should amend its Opinion to include Wachovia Certificate of Deposit #117232, as it was also an improper transfer by George on September 21, 2000.

II. THE OPINION CORRECTLY REMANDED THIS MATTER TO THE LOWER COURT FOR A DETERMINATION OF THE INTEREST DUE TO APPELLANTS.

The respondents' petition for rehearing argues that "the entitlement to prejudgment interest will be contested." Respondents cannot challenge appellants' entitlement to interest. The Opinion remanded this matter back to the circuit court "for a determination of the interest that will be due to the plaintiffs on these sums." The sums are certain. The accounts and certificates that were transferred by George for his own benefit were the sole property of Clara, and each was for a specific sum (to the penny) at the time George transferred them.

It is the law in South Carolina that a party recovering liquidated damages is entitled to prejudgment interest up to the time of trial (and post judgment interest under §34-31-20(B) as of the date the judgment was entered or should have been entered). South Carolina Code §34-31-20(A) provides as follows:

> "(A) In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths per cent per annum."

The sums in dispute are for a certain amount. In Butler Contracting, Inc. v. Cort Street, LLC, 369 S.C. 1, 631 S.E2d 252 (2006), our Supreme Court recognized that prejudgment interest is allowed on a claim for liquidated damages – i.e., where the sum is capable of being reduced to a certainty. See S.C. Code §34-31-20. In Smith-Hunter Construction Co., Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005), our Supreme Court held that an award of prejudgment interest was proper even though

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when he was personal representative of Clara's estate. He received a full pay out of the Wachovia certificate six months after Clara's death and used these funds for a certificate in his name.

the defendants disputed the amounts on the invoices in the matter, because the amount owed to the builder was capable of being reduced to a sum certain. A claim for the return of bank accounts and/or certificates of deposit is a claim, by definition, for sums certain as of the date it is transferred.

CONCLUSION

For the reasons set forth in this Return, the appellants request that this Honorable Court deny the Petition for Rehearing of Respondents Jacqueline Busbee, as Personal Representative, Dennis Burch and Laurie Burch. The appellants request that this Honorable Court grant Appellants' Petition for Rehearing dated September 13, 2011.

Respectfully submitted,

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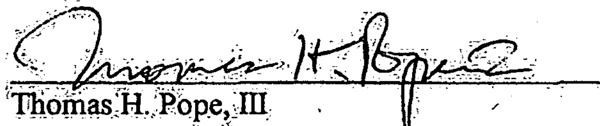
By: 
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October 7, 2011
Newberry, SC

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Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, ...Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch.......Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that he has served Appellants' Reply to Petition for Rehearing by Respondents Jacqueline F. Busbee, as Personal Representative, Dennis E. Burch, and Laurie E. Burch dated October 7, 2011 on Respondents by depositing a copy same in the United States Mail, postage prepaid, properly addressed to each of the following counsel on October 7, 2011:

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Thomas H. Pope III

October 7, 2011

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon, and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch..................................Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch, Dennis E. Burch and Laurie E. Burch..................Respondents.

APPELLANTS' REPLY TO RETURN OF RESPONDENT JACQUELINE F. BUSBEE, INDIVIDUALLY, TO APPELLANTS' PETITION FOR REHEARING

Appellants file this reply, pursuant to Rule 240 SCACR, to Respondent's Busbee Return which was received on October 3, 2011. Appellants have fully argued their position in their previous filings and will only address a few new matters herein.

ARGUMENT

II. THERE WAS EVIDENCE THAT BUSBEE HAD KNOWLEDGE THAT THE WACHOVIA CD BELONGED TO CLARA AND THAT BUSBEE AIDED AND ABETTED WITH GEORGE IN BREACH OF FIDUCIARY DUTY.

Respondent Busbee's records show that her office requested the date of death balance on the Wachovia CD and that on April 13, 2001, Respondent Busbee received a fax from Wachovia in response which showed on April 19, 2000, the date of death balance was $32,427.66 (R., p. 1753; R., p. 260). Further, Busbee herself affixed a note to the fax in her own handwriting; "Clara Burch Estate." (R., p. 260). The only inference to be drawn from this is that Respondent Busbee knew that Clara owned this CD. Notwithstanding this, she did not advise her client, fiduciary George Burch, P.R. of Clara's estate, to include this CD on Clara's estate inventory. George signed the inventory two months before he died, but Busbee filed this inventory with the Probate Court after he died. (R, p. 1458). George signed Clara's inventory on October 1, 2002; he died on January 18, 2003; and Busbee filed it in the Probate Court on February 7, 2003. (R., p. 1458). Respondent's Return has overlooked these facts.

There is evidence in the record of each element of the cause of action for aiding and abetting breach of fiduciary duty. There is evidence that (1) George breached his fiduciary duty; (2) Busbee knowingly participated in the breach; and (3) Clara's estate was damaged. All of the elements of the cause of action under Vortex Sports and Entertainment, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008) rehearing denied (2008). It is important to understand that when George died on January 18, 2003, while Clara's estate was still open, Busbee became statutory fiduciary for Clara's estate under S.C. Code §62-3-609. All of this evidence was sufficient for the cause of action

to go to the jury. The Opinion misapprehended or overlooked this.

CONCLUSION

For the reasons set forth in this Memorandum and the Appellants' previous filings, Appellants request that this Honorable Court grant the Petition for Rehearing and issue its Amended Opinion as requested in the Petition.

Respectfully submitted,

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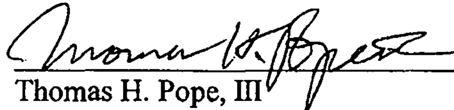
By: 
Thomas H. Pope, III
Attorneys for Appellants Charles E. Gordon and Barbara Gordon

October 11, 2011
Newberry, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, ...Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch.......Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that he has served Appellants' Reply to Return of Respondent Jacqueline F. Busbee, Individually, to Appellants' Petition for Rehearing dated October 11, 2011 on Respondents by depositing a copy same in the United States Mail, postage prepaid, properly addressed to each of the following counsel on October 11, 2011:

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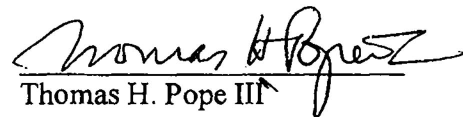

Thomas H. Pope III

October 11, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, Appellants,

v.

Jacqueline F. Busbee, individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch, Respondents.

In the Matter of:

The Estate of Clara Gordon Burch

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880
Heard March 8, 2011 – Filed August 31, 2011
Withdrawn, Substituted and Refiled January 4, 2012

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Adele J. Pope, of Columbia, and Thomas H. Pope, of Newberry, for Appellants.

B. Michael Brackett, of Columbia, for Respondent Jacqueline F. Busbee, as Personal Representative of the Estate of George E. Burch; Warren C. Powell, Jr. and William D. Britt, Jr., of Columbia, for Respondent Jacqueline F. Busbee, individually; and Carlos W. Gibbons, Jr., of Columbia, for Respondents, Dennis E. Burch and Laurie E. Burch.

KONDUROS, J.: Charles and Barbara Gordon appeal the circuit court's denial of their motions for directed verdict and the grant of directed verdict to the defendants on various causes of action. They further appeal various matters related to jury instructions as well as the circuit court's refusal to grant equitable relief. We affirm in part, reverse in part and remand.

FACTS

Clara Gordon Burch and her fourth husband, George E. Burch, were married in 1984. Clara was 75 at the time of their marriage and George was almost 70. Clara had no children, while George had two, Dennis E. Burch and Laurie E. Burch. Clara's will, executed in 1985, left a life estate in her home to George, but ceded her remaining assets to her Gordon family members, including her nephew, Charles, and other nieces and nephews. In October 1994, Clara entered a nursing home and was experiencing "cognitive defects." She had amassed a sizable estate composed primarily of bonds, certificates of deposit, and other funds received incident to her previous marriages. In February of 1995, Clara executed a power of attorney (POA) in George's favor. The POA did not contain a gifting provision. George's attorney, Jacqueline Busbee, prepared the POA, although she did not meet or confer with Clara before doing so. Thereafter, George removed funds in CDs or accounts owned by Clara or from their joint account totaling approximately $400,000. Clara passed away in April of 2000, and, per the provisions in her will, George was named personal representative (PR) of her estate. Busbee began advising George in his capacity as PR. George died on January 18, 2003, and, per the provisions of his will, Busbee was named PR of his estate. Charles was appointed successor PR of Clara's estate on February 27, 2003. Charles filed this lawsuit in April 2005.[1]

At trial before the circuit court, Charles's wife, Barbara, and George's daughter, Laurie, testified George mentioned an arrangement between Clara and him to handle their estate finances. Laurie also testified George gave her a loan in the amount of $170,000 that was to be considered an advance against her inheritance if it was not repaid at the time of his death.

The Gordons presented expert accounting evidence through Agnes Asman, a certified public accountant. She testified she had examined all the records available to her and created a chart that represented transfers made from Clara's funds into accounts or CDs held solely in George's name or in their joint account that had been used to pay for Clara's nursing home care. In her estimation, George had misappropriated approximately $450,000 exclusive of interest. On cross-examination, Asman conceded the examination she had conducted was not a forensic accounting that would demonstrate the source of the funds into the accounts and specifically trace the funds to their final destination. She further admitted she had not examined the signature cards for the various accounts but had relied on the Internal Revenue Service form 1099s to determine who had ownership of various accounts and assets. In at least one instance when Asman's chart showed ownership of an account by Clara, George was also a signator on the account. Additionally, Asman testified she had not considered George's contribution to the parties' joint bank account when determining that he had withdrawn money that belonged to Clara.

With respect to Busbee, the Gordons alleged she had operated as George's attorney in his capacity as PR and as attorney for Clara's estate. They claimed Busbee failed to check the status of Clara's estate at the time of her death by failing to inventory Clara's safety deposit box and by neglecting to obtain Clara's last bank statements prior to the death. They also argued Busbee's filing of the inventory of assets in Clara's and George's estates was inaccurate and/or fraudulent. They contended Dennis and Laurie knew of George's transfer of funds from Clara's accounts and estate and received the benefit of those transfers either directly or as his devisees.

At the close of the Gordons' case, the circuit court granted Dennis Burch's directed verdict motion as to all claims against him. With respect to Laurie, the court granted a directed verdict in her favor as to all claims with the caveat that she may be called upon to repay the

loans from George to his estate. The circuit court granted a directed verdict in favor of Busbee on all claims against her individually with the exception of the causes of action for legal malpractice and breach of fiduciary duty. It also allowed the conversion claim against her as PR of the estate to remain but only insofar as she was the representative of George's estate in the action, not based on her actions in converting any assets.

At the close of all evidence, the Gordons moved for directed verdict against George's estate, arguing the money transferred by George should be returned to Clara's estate because he had transferred the funds without Clara's permission. That motion was denied, apparently based on the argument that George and Clara had made an oral contractual arrangement for the execution of these transfers.

After closing arguments, court was dismissed for the day. The following morning, the Gordons submitted additional jury charge requests relating to the proportional ownership of joint bank accounts with right of survivorship and other matters. The circuit court refused the charges, determining the request was untimely pursuant to Rule 51, SCRCP. After the jury was charged, the Gordons took exception to the charge on conversion. They argued the circuit court had placed the burden of persuasion on the plaintiff when the burden should have been shifted to the defendant to prove the transfers were valid in the absence of authorization to make them. The circuit court stood by its original charge.

The jury found in favor of Busbee and George's estate on the remaining causes of action. The Gordons then sought equitable relief from the circuit court including (1) the removal of Busbee as PR of George's estate; (2) a declaration that the bank accounts and loan to Laurie were receivable assets of Clara's estate; (3) the appointment of a special administrator to account to Clara's estate; and (4) the imposition of a constructive trust on all liquid assets of George's estate to the extent of the transfers with interest. The circuit court denied this motion and all post-trial motions. This appeal followed.

LAW/ANALYSIS

I. Denial of Directed Verdict (George's Estate)

The Gordons contend the circuit court erred in failing to direct a verdict in their favor concerning the transfers George made after Clara's undisputed incompetence in the summer of 1995. We agree in part.[2]

In reviewing the denial of a directed verdict motion, this court employs the same standard as the trial court—we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418 (Ct. App. 2000).

At the close of evidence, the Gordons moved for a directed verdict "as to all transfers of the assets of Clara Burch by George Burch from and after June 30 of [1995]." On appeal, George's estate argues this motion was not sufficiently specific as required by Rule 50(a), SCRCP, which states "[a] motion for a directed verdict shall state the specific grounds therefor." We disagree.

The Gordons relied upon Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985), in making their motion. In Fender, the attorney in fact for the decedent transferred to himself 37.4 acres of land, a car, and the proceeds of two bank accounts prior to the decedent's death.

Id. at 262, 329 S.E.2d at 431. The POA did not contain a gift-giving provision and the South Carolina Supreme Court adopted a bright-line rule in this area. Id. "[I]n order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing." Id. (emphasis added). Fender's mandate is designed to protect the vulnerable from improper conduct by those in whom they place the greatest trust. Accordingly, the Gordons' directed verdict motion to disallow the transfers under Fender was sufficiently specific to operate as a directed verdict motion for breach of fiduciary duty.

In this case, no one disputes Clara's POA did not contain a gift-giving provision and the record contains no written evidence of her authorization for George to make the transfers he did. The circuit court based its decision on the existence of evidence, however slight, showing an arrangement between Clara and George to allow him to make transfers to avoid estate taxes. However, under Fender, the existence of such an oral agreement is insufficient to authorize the transfers. Any transactions involving George taking funds that were undisputedly Clara's and transferring them into a fund solely owned by him would fit within the construct of Fender. Therefore, the circuit court erred in failing to grant the Gordons' directed verdict motion as to those transactions.

The transactions made during April 2000 and listed in the record as Plaintiff's Exhibit 6, with the exception of the $70,000 withdrawal made from George and Clara's joint account, fall within this category. With respect to these transactions all evidence indicates George took funds belonging solely to Clara and opened CDs for those amounts exclusively in his name. Likewise, the evidence demonstrates George closed a Wachovia CD belonging to Clara in his capacity as PR and opened a CD in his name the same day in the same amount.[3] Even if these transfers were made in furtherance of some oral agreement between George and Clara, they are exactly the types of transactions prohibited by Fender as a matter of law. [4] Our supreme court has drawn a bright line in such situations so as to avoid the defrauding of vulnerable adults by fiduciaries.

Because the evidence relating to each transaction in this case is not identical, the transactions should be considered individually. Some of the transactions involve facts that arguably bring them outside the clear scope of Fender. For example, one transaction at issue involved George closing a CD and depositing the funds into the joint account that was used to pay for Clara's care while in the nursing home. Another transaction involved the removal of $70,000 from the joint account and conversion into a $50,000 CD for George and a $20,000 deposit into his own bank account.[5] Yet another transaction involved the removal of funds from a joint account, although it is disputed when the account was made joint. In each of these instances, George at least arguably had an initial claim to the funds as proceeds in a joint account or he put Clara's funds into a joint account that paid for her care, an act that would arguably be for her benefit. With respect to some of the transactions, how the funds were expended is unclear. In those cases, determining whether George had breached a fiduciary duty was within the jury's province.

In sum, Fender mandated a grant of directed verdict on transactions in which the evidenced demonstrated Clara's solely-owned assets were transferred by George for his sole benefit. Therefore, the following funds taken from Clara's estate pursuant to the transactions listed on Plaintiff's Exhibit 6 should be returned to the plaintiffs: (1) $79,495.11 and $4,778.46 withdrawn from two of Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 received upon the closing of one of Clara's accounts at Security Federal on April 17, 2000; (3) $39,552.98, $6,235.99, and $9,904.21 withdrawn from three of Clara's accounts at

Community Bank[6] on April 17, 2000. Additionally, $33,309.87, received by George upon the closing of Wachovia CD Account #117232 in September of 2000, constitutes an improper transfer. We remand this matter to the circuit court for a determination of whether and in what amount interest will be due to the plaintiffs on these sums. The issue of the propriety of the remaining transactions was properly submitted to the jury because they involved questions of disputed fact.

II. Grant of Directed Verdict

A. Aiding and Abetting a Breach of Fiduciary Duty (Busbee – Individually and as PR)

The Gordons contend Busbee knew or should have known of George's activities and she was therefore guilty of aiding and abetting his conduct. We disagree.

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Anderson v. Augusta Chronicle, 355 S.C. 461, 470, 585 S.E.2d 506, 511 (Ct. App. 2003). "If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper." Id.

"The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Future Group, II v. NationsBank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

The Gordons presented no evidence Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them. George acted as attorney-in-fact for Clara prior to her death and as PR for her estate until his own death in 2003. Busbee testified George wanted to handle his responsibilities as PR on his own as much as possible and she "took him at his word." Even if Busbee should have conducted additional investigation into the assets of Clara's estate, that does not constitute evidence of actual knowledge of improper activity on George's part. Therefore, the circuit court did not err in granting a directed verdict in Busbee's favor.

B. Fraud/Fraud Benefit under Section 62-1-106 (Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons contend the circuit court erred in granting a directed verdict in Busbee's favor, individually and as PR, and in favor of Dennis and Laurie Burch as to this cause of action. We disagree.

Section 62-1-106 of the South Carolina Code (2009) provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or

> not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Here, the circuit court determined no evidence was presented that Dennis had committed any sort of fraud in connection with this matter and he had yet to receive any of the funds transferred from Clara's estate to George's estate. Therefore, he had not committed fraud or benefited from any other party's fraud. We agree with the circuit court. Evidence showed the only participation Dennis had was evaluating the contents of George's safety deposit box after his death, and a bank employee testified the examination was conducted properly.

With respect to Laurie, the record contains no evidence that she herself committed fraud. Although she received a benefit from George's conduct in the form of the loan from her father, the circuit court indicated those funds might be owed to Clara's estate pending the resolution by the jury of the remaining claims against George's estate. Therefore, we find the circuit court did not err in granting directed verdict on this claim.

As to Busbee, individually and as PR, she did not benefit from the alleged fraud. Therefore, the only question is whether she perpetrated fraud by filing the inventory of assets of George's estate that listed the transfers as part of his estate. The record contains no evidence Busbee knew any representations she made in those filings were false at the time they were made. Consequently, the circuit court did not err in granting a directed verdict in Busbee's favor.

C. Conversion (Busbee – Individually and as PR)

The Gordons argue Busbee continued George's conversion of Clara's assets by including them in George's estate's inventory of assets. We disagree.

"Conversion is the 'unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights.'" Bank of New York v. Sumter Cnty., 387 S.C. 147, 158, 691 S.E.2d 473, 479 (2010) (quoting Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009)). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003).

Nothing in the record demonstrates Busbee assumed the control of any funds without authorization. At the time she became PR, the assets were in accounts held by George and she properly exercised control over them as the PR of his estate. The individual claim of conversion fails because she exercised no control over the assets in her individual capacity. Therefore, we affirm the circuit court's grant of directed verdict.

D. Civil Conspiracy
(Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons maintain the circuit court erred in granting a directed verdict in favor of Busbee, individually and as PR, and Dennis and Laurie Burch with respect to their civil conspiracy claim.. We disagree.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). "The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design." Cricket Cove Ventures, LLC v. Gilliand, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010).

The record contains no evidence, only speculation, that any of the parties conspired with each other for the purpose of harming Clara or her estate. Furthermore, civil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. See Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Accordingly, we conclude the circuit did not err in granting a directed verdict.

III. Jury Charges

A. Joint Bank Accounts

The Gordons argue the circuit court erred in failing to give the following jury charge: "Funds placed in a joint account with right of survivorship remain property of the contributing party until that party's death, unless there is clear and convincing evidence of a different intent." We disagree.

The principal embodied in this charge emanates from the case of Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001). In Vaughn, the decedent opened several joint bank accounts with her nephew, and the decedent was the sole contributor to those accounts. Id. at 197, 547 S.E.2d at 869. The nephew withdrew the funds a week prior to the decedent's death and deposited the monies in an account titled solely in his name. Id. The court determined the statute governing such accounts was unambiguous and required a holding that funds withdrawn from such an account prior to a decedent's death were no longer presumed to belong to the survivor but became assets of the decedent's estate. Id. at 199, 547 S.E.2d at 870. A survivor would have to establish entitlement to the funds by "other evidence of intent" without the presumption of right of survivorship. Id. at 200, 547 S.E.2d at 871.

The circuit court disallowed the jury charge on the procedural grounds in Rule 51, SCRCP, which states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its

> proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This charge was requested after closing arguments, but before the circuit court charged the jury. While Rule 51 makes clear that it is preferable to have all requested charges submitted prior to closing arguments, it is not an absolute rule. In Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996), this court discussed the discretion vested in the trial court with respect to the allowance of late instructions. "[T]he trial court's discretion to refuse a charge because it is not timely requested should be sparingly and cautiously exercised." Id. at 541, 466 S.E.2d at 372. "While Rule 51 contains permissive language with respect to the timing of the filing of a request to charge, [it] does not specifically bar a request to charge that is made after the jury is charged . . . ." Id.

Of the transactions remaining at issue, some could be impacted by the failure to give the requested instruction. For example, a check for $70,000 was drawn on Clara and George's joint account in the week prior to her death. George subsequently opened a $50,000 CD in his own name and deposited $20,000 in his own account. These facts fit squarely within the situation presented in Vaughn. Furthermore, the defense was not prejudiced by the fact that the instruction was requested after closing arguments. The defense strategy as to George's estate was that he and Clara had an arrangement and he would have been entitled to these joint account funds upon Clara's death. That argument was made to the jury.

However, to warrant a new trial, the failure to give the requested instruction must have been prejudicial. See Dalon, 320 S.C. at 540, 466 S.E.2d at 372 ("In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial."). In this case, the proportion of contribution to the joint accounts was a disputed factual point. Furthermore, the jury's verdict makes clear that it adopted the version of events presented by George's estate. Evidence of the financial "arrangement" between George and Clara is at least some other evidence of her intent that he have the monies in the joint account. The jury clearly believed the defense in the case, because it did not find against the estate as to any transfer or cause of action. Therefore, we conclude the failure to give the requested instruction was not prejudicial to the Gordons and did not constitute reversible error. See Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 484, 18 S.E.2d 331, 335 (1942) (holding the giving of erroneous charge was harmless error when it could not have affected the action of the jury).

B. Conversion

The Gordons contend the trial court's instruction regarding the burden of persuasion in a conversion claim was confusing and prejudicial warranting a mistrial. We disagree.

At the beginning of his jury charge, the circuit court instructed the jury as follows:

> There is one exception to [the general rule that plaintiff bears the burden of proof], and that is because of the confidential relationship between Mr. Burch and his wife. The estate of Mr. Burch has the burden to prove that all transfers to himself under the power of attorney and all transfers, assets from the name of

> Clara Burch or her estate are valid. He has to prove that by the preponderance or greater weight of the evidence. He also has the burden or preponderance of greater weight of the evidence to show that all transfers by Mr. Burch to himself or to any third party from Clara's funds are valid by the greater weight or preponderance of the evidence. So, it shifts to him on that issue, but everything else the plaintiff is – has their burden except for the transfers, and that is on Mr. Burch and his estate.

Later, when addressing the specific causes of action, the circuit court instructed:

> In order to prove conversion, the plaintiff must (1) prove by the preponderance or greater weight of the evidence first that the plaintiff owned or had a right to possess a certain piece of personal property.
>
> In other words, they must prove either title to or a right to possess the personal property. That would include, money, bank accounts at the time of conversion. Ordinarily, an immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the plaintiff to maintain his action.
>
> Next, the plaintiff must (2) show by the preponderance or greater weight of the evidence that the defendant gained control and possession of the property or prevented the plaintiff from using the property. The wrongful detention of another person's property may give rise to an action for conversion, and, finally, the plaintiff must show (3) by the preponderance or greater weight of the evidence that the defendant did this without the plaintiff's permission. If the plaintiff expressly or impliedly agreed to or approved the defendant's taking, use, retention, or disposition of the property, the plaintiff cannot recover for conversion of the property. . . .
>
> If you find that a conversion did take place, you should return a verdict for the plaintiff for the value of the property taken with interest. Of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence.

The Gordons objected to the charge arguing it was inconsistent and could be construed by the jury as not requiring George's estate to prove the validity of the transfers in question. The circuit court declined to make any changes or additions to its original charge.

While the jury charge on conversion may have been somewhat confusing, it does not constitute prejudicial error. No South Carolina case discusses the burden-shifting scheme in a conversion claim against a power of attorney or PR. However, in Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005), this court discussed the burden-shifting scheme as between will or deed contestants and fiduciaries.

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The

presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Id. at 288, 613 S.E.2d at 68 (quoting Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003)).

The court went on to interpret the Restatement as it pertains to cases in South Carolina.

> We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will.

Id. at 288, 613 S.E.2d at 68-69.

While Howard is not directly on point, it illustrates the unusual nature of the burden-shifting scheme in cases involving decedents and their fiduciaries. While the fiduciary may have the burden to offer some evidence to establish a lack of undue influence, or in this case the validity of the transfers, the ultimate burden of proof remains with the complaining party unless the fiduciary offers no evidence to rebut the relevant presumption. In this case, the circuit court's instruction indicated the ultimate burden of proof was on the Gordons and also indicated that George's estate, as his representative, was required to offer a valid explanation for the transfers he made. These statements appear to accurately represent the burden-shifting scheme that should be employed. Therefore, the instruction was not erroneous and did not constitute reversible error.

IV. Equitable Relief

Finally, the Gordons argue the trial court erred in failing to grant the equitable relief requested. We disagree.

"A constructive trust results when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (internal quotation marks omitted).

> In general, a constructive trust may be imposed when a party obtains a benefit which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.

Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009) (internal quotation marks omitted).

In this case, evidence was presented that George was an attentive and loving husband to Clara and at least some evidence showed that the two of them had arranged a plan for him

to transfer funds for his benefit. Furthermore, a large portion of the transfers did not occur until the end of Clara's life was near and she would no longer need them for her own benefit. Furthermore, under the statutory law of the state, George was entitled at least to his elective share of Clara's estate. Based on the record as a whole, the circuit court did not err in declining to create a constructive trust in favor of Clara's estate.

The Gordons also sought an accounting, requested the removal of Busbee as PR of George's estate, and raised the Statute of Elizabeth. However, they fail to advance any argument as to why the circuit court's ruling as to these specific equitable matters was error. Therefore, we deem these issues abandoned. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding that an issue is abandoned if the appellant's brief treats it in a conclusory manner).

CONCLUSION

We find the circuit court erred in denying the Gordons' directed verdict motion as to the transfers listed on Plaintiff's Exhibit 6 excluding the first-listed transaction in which George withdrew monies from his and Clara's joint account and as to the transfer of money from Clara's Wachovia CD. We remand this matter to the circuit court for a determination as to interest due Plaintiffs on these sums. However, we find the circuit court did not err in granting a directed verdict in Busbee's and Dennis and Laurie Burch's favor as to the claims for aiding and abetting a breach of fiduciary duty, fraud, conversion, and civil conspiracy. As to the jury charges, we conclude the failure to give the requested instruction on joint bank accounts did not constitute prejudicial error and the failure to modify the instruction on the conversion claim was not erroneous. Finally, we affirm the circuit court's decision not to impose a constructive trust on the disputed funds in favor of Clara's estate, and we conclude the remainder of the Gordons' equitable claims have been abandoned on appeal. Consequently, the ruling of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and THOMAS, J., concur.

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[1] The matter was dismissed on a procedural ground but remanded for trial on appeal. Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

[2] Respondents argue because the Gordons painted George as a "crook" and the jury did not agree with that proposition, the Gordons cannot now claim any error in the jury's verdict under the invited error doctrine. This is a misapplication of the doctrine. An appellant cannot cause or invite the trial court to err and then complain about the court's actions on appeal. See 5 C.J.S Appeal and Error § 872 ("One may not complain on review of errors below for which he or she is responsible, or which he or she has invited or induced the trial court to commit."). That is not the case presented here. In this case, the Gordons simply took a trial strategy that did not convince the jury. That does not touch upon an error by the court and is without the bounds of the invited error doctrine.

[3] With respect to the Wachovia CD, Jeremy Hall, a financial specialist with Wachovia, testified there was a denotation in the bank's system indicating the CD might be connected to an individual retirement account (IRA). If it was connected, the surviving spouse would be the beneficiary of the CD upon the decedent's death unless another beneficiary was named.

Hall was recalled later in the trial and testified that after checking additional records from Wachovia's main office, the CD was not connected to an IRA.

[4] When asked a hypothetical at trial, Steve Johnson, a defense expert, opined if the transfers were made pursuant to a contract between Clara and George, George could have made the transfers under the POA's authority to execute and carry out contracts on Clara's behalf. However, the purpose of the contractual power is to benefit Clara. Here, even if the arrangement was her desire, the transfers benefited George, not her, and such an interpretation would effectively eliminate the prohibition expressly stated in Fender.

[5] We recognize Asman testified the funds contributed to the joint account were primarily Clara's and that would render the joint account funds her property until the time of her death as discussed in Section III.A. However, the cross-examination of Asman revealed enough uncertainty in her testimony to make the question of ownership of the joint account funds a jury issue.

[6] According to the record Community Bank is now Capital Bank.

The South Carolina Court of Appeals

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, Appellants,

v.

Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch, Respondents.

In the Matter of:

The Estate of Clara Gordon Burch

The Honorable Doyet A. Early, III
Aiken County
Trial Court Case No. 2003-CP-02-00604

ORDER GRANTING PETITIONS FOR REHEARING

PER CURIAM: After careful consideration of the Petition for Rehearing submitted by Appellants, the Court finds a material fact was disregarded as to a certain transfer made by George Burch and therefore grants Appellants' petition for rehearing.

Furthermore, after careful consideration of the Petition for Rehearing submitted by Respondents, the Court grants Respondents' petition for rehearing as to the issue of interest.

It is, therefore, ordered that opinion number 4880, filed August 31, 2011, be withdrawn and that the attached opinion be substituted therefor.

C.J.

J.

J.

Columbia, South Carolina

cc: Adele Jeffords Pope, Esquire
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FILED
4 January 2012

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MAR 16 2012
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880 (S.C. Ct. App. filed January 4, 2012)

Charles E. Gordon and Barbara Gordon, as Personal
Representatives of the Estate of Clara Gordon Burch ....Petitioners-Respondents,

v.

Jacqueline F. Busbee, Individually and as Personal Representative
of the Estate of George E. Burch; Dennis E. Burch; and
Laurie E. Burch...Respondents-Petitioners.

PROOF OF SERVICE

On behalf of the above petitioners-respondents, the undersigned hereby certifies that he has served the revised Appendix in the above case on each of the following counsel for respondents-petitioners via email and by depositing copies of same in the United States

Mail, postage prepaid, properly addressed to each of the following counsel on the 15th day of March 2012:

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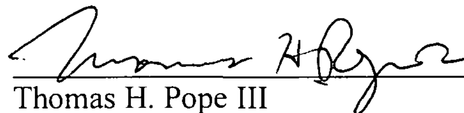

Thomas H. Pope III

March 15, 2012