

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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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court err in denying appellants' motion for directed verdict as to the Estate of George Burch?
- II. Did the lower court err in granting directed verdicts at the conclusion of appellants' case?
 - A. Did the lower court err in granting directed verdict on the cause of action for aiding and abetting and breach of fiduciary duty as to Respondent Busbee, individually and as PR? ✓
 - B. Did the lower court err in granting directed verdicts on the cause of action of fraud/fraud benefit under S.C. Code §62-1-106 as to Respondents Busbee, individually and as PR, Laurie Burch, and Dennis Burch? ✓
 - C. Did the lower court err in granting directed verdict on the cause of action for conversion as to Respondent Busbee, individually and as PR?
 - D. Did the lower court err in granting directed verdict on the cause of action for civil conspiracy as to Respondents Busbee, individually and as PR, Laurie Burch and Dennis Burch?
- III. Did the lower court err in refusing to charge the jury on the applicable law and in denying a new trial?
 - A. Did the lower court err in denying plaintiffs' Request to Charge No. 36 as to the law of joint bank accounts?
 - B. Did the lower court err in charging the wrong burden of proof on the cause of action for conversion as to Respondent Estate of George Burch? ✓
- IV. Did the lower court err in denying equitable relief to appellants?

STATEMENT OF THE CASE

In this appeal, plaintiffs-appellants are the personal representatives (“PRs”) of the Estate of Clara Gordon Burch. They seek reversal of the rulings of the circuit court relative to causes of action against the Estate of George Burch, its PRs and devisees, as well as against its attorney, Jacqueline Busbee. The circuit court refused to grant appellants’ motion for directed verdict against the Estate of George Burch; it granted directed verdicts as to the causes of action against Respondents Laurie Burch and Dennis Burch; it granted Respondent Busbee’s motion for directed verdict on several causes of action; it refused a number of requests to charge submitted by appellants; and, it denied appellants’ post trial motions for judgment notwithstanding the verdict, new trial and equitable relief.

The summons and complaint in this matter were filed initially in the Probate Court for Aiken County on April 15, 2003, and an amended complaint was filed August 18, 2004. The complaint sought the return to the Estate of Clara Burch of more than \$600,000 in cash and other assets (with prejudgment interest) held by the Estate of George Burch and by its PR, the respondent Jacqueline F. Busbee. It alleged multiple causes of action for conversion, breach of fiduciary duty, professional negligence, fraud/fraud benefit under §62-1-106, and related actions against defendants/respondents. The answers of respondents denied the causes of action. On April 28, 2003, the case was removed to circuit court by Order of Probate Judge Sue H. Roe.

After substantial discovery¹ the trial of the case commenced on October 1, 2007, with The Honorable Doyet A. Early III, Circuit Judge, presiding. At the end of the

¹ During discovery, the defendants moved to dismiss the complaint, and The Honorable James C. Williams, Jr. granted the motion. (R. p. 52). Thereafter, the Court of Appeals reversed this ruling and remanded the

presentation of the plaintiffs' case, the lower court granted a directed verdict on all causes of action as to the defendants/respondents, Laurie E. Burch and Dennis E. Burch². The lower court also granted directed verdicts for Respondent Busbee as to the causes of action for conversion, aiding and abetting, civil conspiracy, and fraud. The lower court ruled that the case would proceed as to Respondent Busbee only on causes of action for breach of fiduciary duty and legal malpractice. The case against the Estate of George Burch proceeded on conversion, negligence, breach of fiduciary duty, and fraud.

At the conclusion of all evidence, appellants-plaintiffs moved for directed verdict against the Estate of George Burch as to all transfers of the assets of Clara Burch and her estate by George Burch from and after June 30, 1995 (including numerous bank accounts and certificates of deposit, plus interest at the legal rate from the dates of the takings), for the liquidated amount of \$683,983. The grounds of the motion were that under Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985), any transfers under a power of attorney that are not authorized are void, and a directed verdict should be entered in favor of the plaintiffs against the Estate of George Burch. The further grounds of the motion were that the funds belonged to the Estate of Clara Burch, and Respondent Estate of George Burch had failed to meet its burden to prove that the transfers were authorized, including the transfers under the power of attorney dated February 25, 1995, which were made by use of that power of attorney after June 30, 1995 at a time when the decedent, Clara

case back to the Circuit Court of Aiken County. Charles E. Gordon, et al. v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (2005). After remand, on June 14, 2007, the lower court filed its Order granting plaintiffs' motion to amend the caption to add Barbara Gordon, as PR, as a party-plaintiff with her husband Charles. (R. p. 46).

² The causes of action which were dismissed as to Laurie Burch and Dennis Burch included: conversion, negligence, breach of fiduciary duty, aiding and abetting, civil conspiracy, fraud/fraud benefit under S. C. Code §62-1-106.

Burch, was incapacitated. (R. pp. 1149-1153). The motion related to both pre-death and post-death transfers pursuant to S.C. Code §62-3-713 while George was PR of Clara's estate. The Court denied that motion. (R. p. 1154). The case was submitted to the jury, and its verdict was rendered on October 10, 2007 in favor of the remaining defendants on all causes of action.

On October 18, 2007, the plaintiffs filed a motion for judgment notwithstanding the verdict, in the alternative, for new trial, and for equitable relief. (R. p. 140). The motion included the Court's denial of plaintiffs' motion for directed verdict as to the Estate of George Burch; the Court's granting a directed verdict to Defendants-Respondents Busbee, Laurie Burch and Dennis Burch; the Court's failure to instruct the jury on certain relevant legal points; and the Court's denying appellants equitable relief.

By Order entered on May 20, 2008 (R. p. 6), the lower court denied all of appellants' post trial motions. The appellants filed a notice of appeal dated June 12, 2008 from the Order of the lower court dated May 20, 2008 which was received on May 22, 2008. The plaintiffs moved for reconsideration of the Order of May 20, 2008, under Rules 59 and 52, SCRCPP, on June 2, 2008. (R. p. 197) Thereafter, plaintiffs-appellants moved for a stay and remand in the Court of Appeals. (R. p. 201). The Court of Appeals granted the motion for stay and remand on July 17, 2008 so that the lower court could rule on the motion for reconsideration. On October 6, 2008, the lower court filed its Order Denying Plaintiffs' Motion for Reconsideration. (R. p. 1). Appellants filed a notice of appeal dated October 20, 2008 appealing the lower court order filed on October 6, 2008 and received on October 7, 2008. By Order of the Court of Appeals, this notice of appeal was combined with the previous notice of appeal.

STATEMENT OF FACTS

The case involves the estate and property of Clara Gordon Burch ("Clara"), who died on April 19, 2000, at the age of 91. The plaintiffs, Charles Gordon and Barbara Gordon, are the PRs of Clara's estate. The suit involves principally the recovery of funds taken from Clara and her estate, and the causes of action include breach of fiduciary duty, conversion, legal malpractice, negligence, civil conspiracy, fraud (and fraud benefit under §62-1-106), aiding and abetting breaches of fiduciary duty, and related actions (complaint and amended complaint).

A. Facts As To Clara's Mental Incapacity

By September 1994, Clara was 85 years old and had become mentally incapacitated. She was placed in the National Health Care Nursing Home in North Augusta, South Carolina. Because Clara had "cognitive deficits," (R. p. 282) on October 11, 1994, the nursing home administered a mini-mental status examination. (R. p. 1297). She could not give the date and was not oriented as to place. (R. p. 1297). Clara was scored as having "absolute dementia" (i.e., a score of 6 out of 30), the lowest category on the dementia scale. (R. pp. 1298, 288).

Clara had previously been diagnosed in the Aiken County Hospital in September 1994 with cerebral atrophy³. (R. pp. 1363, 1365). The records at the nursing home in February 1995 reflect that she was delusional (R. pp. 1388, 1389) and "unable to make safe and reasonable decisions." (R. p. 1390). Only one witness, Reverend Robinson, testified that she might have had competence in February 1995. That same witness agreed that Clara was "totally mentally incompetent" in the summer of 1995 for the rest

³ She was later diagnosed at the nursing home on January 19, 1995, with "chronic cognitive deficit" and "confusion."

of her life. (R. pp. 946-947). Clara remained in the nursing home from October 1994 until her death on April 19, 2000.

B. Statement of Overall Facts

The plaintiffs seek the recovery of over \$650,000 of cash and other assets taken from Clara between 1995 and 2000 while she was incompetent, and from her estate from between 2000 and 2003 while her fourth husband, George, was PR. (R. pp. 1359, 753). It includes approximately \$229,000 that George transferred to himself between April 10 and April 17, 2000, in the last 10 days before Clara's death. (R. pp. 1334-1357, 305-309). The transfers were not discovered by appellants or Clara's other beneficiaries until 2003.

Clara Burch had been widowed three times prior to meeting George Burch ("George") and had inherited substantial assets from her prior husbands. (R. pp. 371-375). In 1984, at the age of 75, she married George, who was a retired divorced man of modest assets and means. George's retirement income never exceeded \$25,000 per year⁴. (R. pp. 763-764, 809). Clara had no children, and she had accumulated real estate, numerous bank accounts and certificates of deposit during and from her prior marriages. (R. p. 375).

Clara's will was executed on July 22, 1985. (R. pp. 1748, 249). Because George was her fourth husband and because he had two children by a prior marriage, Clara's will provided him only a life estate in her home (R. pp. 1748-1751, 249). She named him PR under her will, but left him nothing else. All other assets were left to her

⁴ George retired as an E-5 from the Army and thereafter became a truck driver, retiring at age 65. (R. p. 407). His retirement pensions made up his income. (R. pp. 809, 459, 488, 490, 809, 1125).

Gordon family members, including appellant Charles Gordon⁵ and other nephews and nieces. (R. p. 249).

In February 1995, Attorney Busbee prepared a power of attorney (POA) for Clara⁶, the terms of which did not include a provision to allow gift-giving. (R. p. 1745). At the time she prepared the POA, Busbee did not interview Clara, although she knew Clara was in a nursing home and that her competence would be an issue. (R. p. 341). On February 27, 1995, George procured the signature of the incompetent Clara on the POA. (R. p. 1745). Between February 1995 and April 19, 2000, George, using the POA, transferred to his own name and/or for his own benefit more than \$400,000 (exclusive of interest) of Clara's assets.

In 1997, George began to transfer Clara's funds to his daughter⁷, Respondent Laurie Burch ("Laurie"). (R. pp. 478-480). These transfers accelerated after Clara's death. (R. pp. 2100-2101, 2281). Within the month before Clara's death in April of 2000, George took more than \$229,000 from Clara's Security Federal and Community Bank accounts and certificates and put them in his name⁸. (Plaintiffs' Exhibits 7, 7A, R. pp. 1334-1357). Respondent Busbee acknowledged that the bank records for the last month of Clara's life showed the April 2000 transfers. (R. p. 362).

⁵ Clara was very close to Charles and Barbara Gordon. The Gordons, residents of North Carolina, visited Clara 3 or 4 times per year. (R. pp. 375-376).

⁶ In the 10 years before her incompetence, Clara had never given George her POA.

⁷ According to the testimony of Dennis Burch, he had never known his father to loan money at any time. (R. p. 494).

⁸ Between 2000 and 2002, he transferred over \$200,000 to Laurie. (R. p. 2281).

The former branch manager of Security Federal Bank in Wagener, Sharon Swift, testified from the bank records that, between April 10, 2000 and April 17, 2000⁹, George transferred funds in accounts and certificates of deposit owned by Clara to himself as follows:

- (a) With Clara's fund, he opened a certificate of deposit in the amount of \$50,000 in his name on April 10, 2000. (R. pp. 305, 1335).
- (b) With Clara's funds, he opened a second certificate of deposit in the amount of \$50,000 in his name on April 13, 2000. (R. pp. 306, 1338).
- (c) With Clara's funds, he opened a third certificate of deposit in the amount of \$34,273 on April 13, 2000. (R. pp. 306, 1339).
- (d) With Clara's funds, he opened a fourth certificate of deposit in the amount of \$20,026 on April 17, 2000. (R. pp. 306, 307, 1340).
- (e) With Clara's funds, he opened a fifth certificate of deposit in the amount of \$55,693 on April 17, 2000. (R. pp. 307, 1335, 1341).

Mrs. Swift reviewed the banks' back-up documents and identified that the source of all of these funds was accounts and certificates of deposit owned by Clara Burch. (R. pp. 305-310, 1334). In closing these certificates of Clara's, George incurred penalties for premature withdrawals. (R. pp. 1359, 757-758, 807). Clara died on April 19, 2000. Between 2000 and 2003, George Burch served as PR of Clara's estate and Busbee served as attorney for Clara's estate. George died on January 18, 2003, and Busbee became PR of his estate shortly thereafter. (R. p. 1449).

Between George's death on January 18, 2003 and the date that Appellant Charles Gordon was appointed successor PR for the Estate of Clara Burch on February 27, 2003, Busbee undertook various actions for both estates with the Probate Court. On

⁹ Clara died on April 19, 2000. (R. p. 1299).

January 22, 2003, Busbee received from Laurie the bank records of George, including two bank record searches on October 17, 2002 and December 17, 2002 showing the improper transfers. (R. pp. 1410, 1602, 1573, 364). Thereafter, she filed a third I&A signed by George prior to his death.

On May 29, 2003, Busbee filed an I&A in the Estate of George Burch claiming that the following accounts, all traceable to funds taken from Clara and Clara's estate, belonged to George's estate:

<u>Name</u>	<u>Amount</u>
Wachovia Checking Acct. #311007629	\$ 2,017.74
Wachovia Money Market Acct. #311452544	\$ 43,322.10
Wachovia CD Acct. #414212049101818	\$ 25,000.00
Security Federal Checking Acct. #1005281304	\$ 39,881.94
Security Federal CD Acct. #10460680461	\$ 24,641.81
Security Federal CD Acct. #10470689345	\$ 31,898.49
Security Federal CD Acct. #104906381509	\$ 56,728.70
Security Federal CD Acct. #10470681521	\$ 63,527.70
Security Federal CD Acct. #10710681512	\$ 57,723.16
Security Federal CD Acct. #10710881513	\$ 39,567.57
TOTAL.....	\$384,309.21

(R. p. 1644).

Agnes Asman, CPA, was qualified by the Court as an expert in the field of accounting. Ms. Asman reviewed all of the available financial documents of Clara and George, including tax returns for the years 1985 through 2000, fiduciary income tax returns, probate accountings, probate inventories and appraisements, estate tax returns, safe deposit box information, bank records, certificates of deposit, bank statements, 1099 forms, and the like. (R. pp. 746-748). Ms. Asman was specifically looking for assets that were in Clara's name prior to the marriage to George and at the beginning of 1994, when plaintiffs contend she became mentally incapacitated, she then traced those assets and determined which assets had later transferred out of Clara's name. (R. p. 747).

Ms. Asman traced the transfers and calculated the loss of income as a result of these assets being transferred out of Clara's name or out of her estate. She also calculated interest at the legal rate from the date of each transfer. (R. pp. 1359, 746-748).

Asman prepared a chart summarizing her findings. (R. p. 1359). The chart showed that Clara owned 15 accounts and certificates in 1994. Ms. Asman determined that Clara was the sole source of the funds in all of these accounts and that between 1994 and 2001 they were transferred by George to himself or to accounts in his name only. The institutions involved were: Atlanta Postal¹⁰/Carolina First (bank account closed by George on 8/24/95). (R. p. 753); Bank of America (municipal bond which matured in January 2000 and was cashed by George) (R. p. 755); Bank of Barnwell (certificate of deposit closed by George on 9/23/99) (R. p. 755); Commercial Bank (bank accounts closed and put into a certificate of deposit in George's name at Security Federal) (R. p. 756); Palmetto Federal/Regions Bank account and certificate of deposit, (which were closed and paid to George on 4/13/01) (R. pp. 756-757); Security Federal (seven accounts and certificates of deposit closed in April 2000 and placed in certificates of deposit in George's name) (R. pp. 1334, 757-760); Wachovia (certificate of deposit placed in a certificate in George's name on 9/21/00). (R. pp. 1752-1755, 753-760, 1144-1145, 1148); and American Enterprise Investment Services, Inc. (check dated 1/31/02 payable to George as PR cashed by George and never placed in Clara's estate). (R. pp. 1391, 1123).

Ms. Asman also identified timber sales proceeds of \$13,006 in 1997 (R. pp. 761-762) when Clara was in the nursing home. There is no evidence that the proceeds were ever deposited in Clara's account. (R. pp. 761-762). She also calculated interest losses

¹⁰ Clara's first husband was a retired postal employee. (R. pp. 753-754).

because of Ms. Busbee's seven months' delay in delivering Smith Barney checks issued on 10/31/01. (R. p. 762). Ms. Asman concluded that her chart showed a total principal loss of \$698,968, plus simple interest of \$354,211 at the legal rate, for a total loss of \$1,053,400. All of Ms. Asman's opinions were rendered to a reasonable degree of certainty in the field of accounting¹¹. (R. p. 761). The record shows that George made the transfers by means of Clara's POA that contained no gift-giving provision.

Clara's account at Security Federal (Acct. #...320) was the joint account into which Clara's monthly retirement income was deposited and from which the vast majority of Clara's nursing home expenses were paid. (R. pp. 784-786). George's retirement income was deposited into a separate account of his. (R. p. 785). The total income that Clara received from 1994 through 2000 (the years that she was in the nursing home) was \$247,617. (R. p. 2282). The total amount of Clara's medical and nursing home expenses during those years was \$238,446. (R. p. 806).

Based upon all of the evidence, the plaintiffs moved for directed verdict against the Estate of George Burch in the amount of \$682,983. This amount includes the value of all the funds transferred by George to himself after Clara became totally incompetent, with interest at the legal rate to September 30, 2007¹². The breakdown of these transfers is as follows:

¹¹ The respondents called no accounting witness.

¹² The directed verdict motion did not include any amounts transferred before 7-30-95, nor did it include attorneys' fees or accounting fees.

TRANSFERS OF CLARA'S FUNDS BY GEORGE BURCH TO HIMSELF AFTER 7-30-95

Clara's Accounts	When Transferred	Amount at Time of Transfer	Interest to 9/30/07	TOTAL
Atlanta Postal / Carolina First	August 24, 1995	\$20,489	\$21,231	\$41,720
Bank of America Municipal Bond	January 19, 2000	\$15,002	\$9,759	\$24,760
Bank of Barnwell	September 23, 1999	\$48,505	\$32,925	\$81,429
Comm Bank & Trust	April 17, 2000	\$55,693	\$35,041	\$90,734
Pal Fed / Regions Bank	April 13, 2001	\$8,386	\$5,272	\$13,658
Security Fed 1	April 13, 2000	\$86,247	\$54,347	\$140,593
Security Fed 2	April 17, 2000	\$20,026	\$12,600	\$32,626
Security Fed 3	April 10, 2000	\$70,000	\$44,159	\$114,159
Security Fed 4	August 7, 2002	\$8,472	\$3,620	\$12,092
Wachovia 2	January 1, 1996	\$30,000	\$30,152	\$60,152
Wach. #117232	September 21, 2000	\$33,310	\$18,720	\$52,030
American Ent.	01/31/02	\$13,062	\$6,967	\$20,029
TOTAL				\$683,983
				(As of 9-30-07)

The directed verdict motion was based on the fact that all of the money transferred was owned by Clara (or her estate), and the transfers were made without authorization. Plaintiffs argued to the Court that the Estate of George Burch had the burden of proving that these transfers were properly authorized in writing or by clear and

convincing evidence, and that there was no evidence to support same. (R. pp. 1149-1154).

The following exchange took place on this motion:

THE COURT: WHAT EVIDENCE IS IN THE RECORD THAT ALL – SHE BECAME MENTALLY INCOMPETENT OR SHE BECAME AS DESCRIBED IN THE MINI-MENTAL EXAM AS ABSOLUTE DEMENTED. ALL OF THESE TRANSFERS THEN TOOK PLACE AFTER THAT. WHEN I VIEW IT IN THE LIGHT MOST FAVORABLE TO THE ESTATE OF GEORGE BURCH, HOW CAN I DO ANYTHING BUT? ...

THE COURT: YOU'RE HANGING BY A THREAD.
THAT'S ALL YOU'RE HANGING BY.

MR. GIBBONS: WELL, YOUR HONOR, THAT'S A THREAD...

THE COURT: WELL, QUITE HONESTLY, I SHOULD DIRECT A VERDICT....

MRS. POPE: YOUR HONOR, JUST TO CLARIFY, MY MOTION DID ONLY RELATE TO JUNE 30, 1995, AND AFTER THE DATE BEYOND WHICH THERE WAS NO EVIDENCE THAT SHE HAD ANY CAPACITY AND BASED ON THEIR BURDEN.

THE COURT: YES, MA'MAM. RELUCTANTLY, I AM GOING TO DENY YOUR MOTION.... (R. pp. 1151-1154).

C. Facts as to Attorney Busbee

On February 27, 1995, Attorney Jacqueline Busbee prepared a power of attorney for Clara Burch. Clara was in the nursing home when Busbee prepared it, and Respondent Busbee did not visit with Clara with regard to the power of attorney or with regard to her capacity. Busbee gave the power of attorney to George Burch, and he had it executed at the nursing home. (R. pp. 978, 1745). Four months before this, the nursing home determined that Clara had “absolute dementia.” (R. pp. 1297-1298).

When she prepared the power of attorney for Clara Burch, Attorney Busbee was aware that Clara's competence would be an issue. (R. p. 341). Attorney Busbee later prepared a will for George Burch which was executed on June 5, 1996, naming herself PR of George's estate. (R. p. 540). In 1996, Busbee also prepared a power of attorney whereby George appointed Busbee as his attorney-in-fact. (R. pp. 540, 980-981).

After Clara's death on April 19, 2000, Attorney Busbee represented George Burch as PR of Clara's estate. In various probate court filings and letters, Attorney Busbee declared that she was both "attorney for the estate and attorney for the PR." (R. pp. 1397-1403, 1684-1701). In the application for formal appointment dated June 26, 2000, which was prepared by Ms. Busbee's office, it was noted that Clara had a safe deposit box at Security Federal Bank in Wagener, SC and that it would be accessed. (R. p. 1299). This bank was one block from Busbee's office during this time period, and Ms. Busbee or a member of her staff was in the bank virtually every day. (R. pp. 245-246).

Attorney Busbee's paralegal, Mitchel Keadle, testified that there was never an inventory prepared of the safe deposit box of Clara and, according to Keadle, Ms. Busbee was aware of the safe deposit box. (R. p. 242). Keadle also testified that Clara's estate was open longer than any other estate file in Attorney Busbee's office. (R. p. 240). Keadle also acknowledged that no inquiry was made to obtain the last bank statement of Clara's prior to her death. (R. p. 249). The bank statements for the last month of Clara's life reflect that seven of Clara's certificates were transferred by George to himself during a 10-day period. (R. pp. 1334-1357, 305-309).

George Burch died on January 18, 2003, and the Estate of Clara Burch was still open. Pursuant to SC Code §62-3-609 upon his death, Attorney Busbee, as the

representative for the now-deceased PR, became the statutory fiduciary of the Estate of Clara Burch. (R. pp. 533-535). Approximately ten days later, on January 28, 2003, she was appointed to serve as PR of the Estate of George Burch. (R. p. 1449). It was not until after George Burch died in 2003, over three years after Clara's death, that Attorney Busbee, accompanied by George's family, went into Clara's safe deposit box at Security Federal Bank. (R. pp. 300, 358, 474-475, 515, 535, 537, 986-987).

On May 29, 2003, Attorney Busbee, as PR of the Estate of George Burch, filed an inventory claiming over \$400,000 of assets transferred from Clara and her estate as owned by George's estate (R. pp. 1638, 1644). According to the bank records and uncontradicted testimony, these were the assets transferred from Clara's name to either George Burch or for his benefit shortly prior to Clara's death. (R. pp. 1359, 1334-1357, 1410-1448, 304-309).

There was no estate bank account ever opened for the Estate of Clara Burch. Ms. Busbee's paralegal, Mitchel Keadle, agreed that it was unusual not to have an estate account, particularly since George Burch, the PR of Clara Burch's estate, was not a beneficiary of any funds under the will of Clara Burch, but he was handling the money as PR. (R. pp. 274-275).

James C. Hardin, a specialist in estate planning, probate and estate administration, testified as an expert witness for the plaintiffs. He testified that the Gordon family members were the real beneficiaries of Clara's estate plan, since George was her fourth husband. Mr. Hardin said this plan was not unusual for individuals who married late in life and had no children. (R. p. 504). Mr. Hardin gave his opinion that the actions of Attorney Busbee fell below the standard of care, both in her preparing the power of

attorney and in assisting George Burch in the administration of the Estate of Clara Burch. He further testified that she breached her fiduciary duties.

Hardin pointed out that a power of attorney is a very dangerous instrument “because of the sheer magnitude of what a power of attorney can be used or misused to do.” (R. pp. 508-509). He said that when Busbee failed to ascertain that Clara was not competent to give that power to George, she put into George’s hands a very powerful instrument for him to convert monies of hers to himself. (R. p. 509).

As to the matter of probate administration, Expert Hardin said that the effect of Busbee’s deviations from the standard of care in effect “allowed Mr. Burch to destroy his wife’s estate plan.” (R. p. 550). He further said that Busbee should have asked the PR, George, to furnish at least one month’s bank statements prior to Clara’s death¹³. (R. p. 510). Further, if Busbee had asked for those bank statements, she would have seen over \$200,000 transferred out of Clara Burch’s name to George. (R. pp. 510-511).

D. Facts as to Respondents Laurie and Dennis Burch

Laurie Burch was the recipient of \$235,000 in transfers from George Burch from 1997 through 2002. (R. pp. 1127, 1135). The records reflect that these funds came to George from Clara by his use of the power of attorney and from her estate. Laurie and Dennis Burch are the sole beneficiaries of George’s estate. Laurie Burch and Dennis Burch were not close to their father. The record indicates that they rarely saw him. (R. pp. 471, 489, 1073). Neither Laurie nor Dennis Burch attended Clara and George’s wedding. (R. pp. 471, 489).

¹³ After George’s death in 2003, Busbee did instruct Laurie to gather up the bank statements for the last month of George’s life. (R. p. 1103).

Beginning in 1997, three years after Clara went into the nursing home, Laurie received transfers from her father totaling over \$235,000. (R. pp. 478-479, 1135). She received more than \$200,000 between 2000 and 2003. Laurie alleges that she paid back some of the \$235,000 but admits that there is still a balance. Her own testimony was that she owed a balance of \$170,000. (R. pp. 1107, 1110, 1135). Laurie initially testified that this was not a loan. She later testified that she “may” have to pay it back. (R. p. 1135). Laurie Burch, a resident of Maryland, testified that she spent the money she got from her father for a vacation home in West Virginia. (R. p. 1107). Dennis testified that he was not aware of his father ever making anyone a loan in his lifetime. (R. pp. 494-495).

There is no evidence in the record that Clara had any intention to benefit either Dennis or Laurie in her estate plan. According to the Probate Court filings in the Estate of George Burch, Dennis and Laurie are the purported recipients of over \$600,000 in assets which are listed in George’s estate but which belong to Clara. (R. p. 1638).

ARGUMENT I

THE LOWER COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANTS' MOTION FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO DEFENDANT ESTATE OF GEORGE BURCH.

At the conclusion of all of the evidence, plaintiffs moved for directed verdict in their favor against the Estate of George Burch for all of the transfers of Clara Burch's assets that George made after June 30, 2005, which is the date after which it is undisputed that Clara Burch was totally mentally incapacitated. (R. pp. 995, 997-998, 1149-1151, 1297, 1369). The plaintiffs' motion sought a directed verdict in the amount of \$683,983.

The evidence is without contradiction that George Burch converted Clara's funds while she was incompetent and during those times when he was her attorney-in-fact and funds of her estate when he served as PR. His actions in making unauthorized transfers of Clara's monies are the assumption and exercise of ownership or control over the property of another which excludes the owner's rights to the property. Crane v. Citicorp National Services, Inc., 313 S.C. 70, 437 S.E.2d 50 (1993). To prevail in a conversion action, a plaintiff must prove either title to or a right to possession of the personal property at the time of the conversion, Robinson v. Saxon Mills, 124 S.C. 415, 117 S.E. 424 (1923), and that the defendant converted the property to his own use without plaintiff's permission. Ralph King Anderson, Jr., S.C. Requests to Charge – Civil (2002) §3-2. The actions of George Burch, for which the Estate of George Burch is responsible, amounted to the unauthorized assumption and exercise of the right of ownership of money belonging to Clara's estate. Defendant Estate of George Burch is, therefore, liable

for the money taken, with interest. Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981).

It is a well-established rule in South Carolina that an attorney-in-fact may not gift to himself from his principal's monies. See Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985), where the Supreme Court unequivocally held as follows:

“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., at 431. (emphasis added).

In Fender, the Court pointed out that an agent must further his principal's interests and must exercise the utmost faith and loyalty. Id., at 431. Consistent with those basic fiduciary principles, the South Carolina Supreme Court held that transfers by an attorney-in-fact with alleged oral authorization for the transfers are invalid.

In Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E. 869 (2001), the Supreme Court addressed S.C. Code §62-6-103(a) which relates to the issue of ownership rights of contributing and non-contributing parties with regard to joint survivorship accounts. S.C. Code §62-6-103(a) provides:

“A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contribution by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.” (emphasis added).

There, the Supreme Court held that, even though funds remaining on deposit at the time of the death of one of the parties to the account belong to the surviving party as against the estate, the non-contributing joint account holder could not withdraw funds prior to the death of the contributing account holder. Since he was not named in Clara's will, nor was he the contributor to any of her bank accounts, George Burch was not entitled to the

vast majority of Clara's funds either under her will or as a surviving party to a joint account.

The Supreme Court in the Vaughn case concluded that the non-contributing party was not entitled to a presumption of survivorship as to funds withdrawn prior to the decedent's death. Id., at p. 870. The Court in Vaughn applied the plain meaning rule and held that the funds removed by Bernhardt (the non-contributing party) belonged to the decedent. As in Vaughn, there was no evidence to show that the decedent intended for the funds to go to Bernhardt. In the instant case, there was no evidence to show that Clara intended for her funds to go to George.¹⁴

In fact, Clara's will clearly left George Burch, her fourth husband, no bank accounts or cash assets¹⁵. When the evidence yields only one inference, a directed verdict is proper, and our Supreme Court has ruled that a trial court will be reversed when there is not evidence to support the ruling. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999) (affirming the Court of Appeals in reversing the trial court's failure to direct a verdict). See also Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d 588 (2003) (holding that if the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created, and a directed verdict motion is properly granted).

¹⁴ By contrast, in Kemp v. Rawlings, 358 S.C. 28, 594 S.E.2d 845 (2004), the Supreme Court acknowledged the holding in Vaughn but found that it did not apply to the facts of Kemp. In the Kemp case, the circuit court had affirmed the probate court's imposition of a constructive trust on the funds held by the widow, where the widow, the non-contributing party to the account, had transferred funds from the joint account with the testator prior to his death. Id. The Supreme Court held that this was error because the testator's will left bank accounts to the widow and showed that he intended her to have those assets. Also, in Kemp the lawyer who drafted the will of the testator testified as to the testator's intent for the wife to have the accounts. This is unlike the case at bar where Clara Burch's will showed no such intent.

¹⁵ The Burch devisees did not present any witness to testify that Clara ever expressed an intention for George to have the funds he transferred to himself, either under the POA or from her estate.

It is the law that, in ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Gamble v. International Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996). The Estate of George Burch has not presented evidence to meet its burden of proving that the subject transfers by George to himself were authorized, as they were made during the time that Clara Burch was mentally incompetent (by use of a power of attorney) and from her estate when he was a fiduciary.

Whether George's estate had the burden by a "clear and convincing" evidence standard, or by a preponderance of the evidence, to prove an arrangement, it failed to do so¹⁶. The Estate of George Burch met neither burden of proof. The Estate of George Burch argued that the transfers were appropriate. First, it argued that there was an alleged "arrangement" between George and Clara whereby he could do this to avoid estate taxes. (R. pp. 228-229). There was no documentation or testimony establishing such arrangement. Further, George's aversion to taxes does not justify transferring Clara's funds to himself and away from her chosen beneficiaries. No attempt was made to justify the post-death transfers by George to himself when he served as PR.

It is mere speculation that any "arrangement" made before June 30, 1995 when Clara became permanently incompetent, could have authorized George, more than five years later, to take more than \$231,000 from Clara the last 10 days of her life and more than \$33,000 from her estate after her death. This is especially so where such "arrangement" was never expressed in writing, was not known to George Burch's lawyer from 1995 through his 3-year probate of Clara's estate, and was not known to Jacqueline

¹⁶ The result should be the same even if appellants had the burden of proof.

Busbee, as PR of George's estate, or to any other person. After the permanent onset of her mental incapacity by 1995, the only way Clara could have authorized George to transfer money from herself was by a valid power of attorney which authorized gifts or from her estate through her will. She did neither.

Finally, it was argued that George supposedly hated taxes and that the transfers were part of a plan to minimize estate taxes. However, the testimony of Busbee, who drafted George's will in 1996 and served as his PR, did not reveal any such arrangement or tax planning.

The Burch defendants also argued in the lower court that the transfers by George to himself in the last ten days of Clara's life, totaling over \$231,000 were, in essence, paying himself back for medical expenses. This argument has no merit and ignores the fact that Clara's medical care was paid from her own funds¹⁷. It also ignores the fact that Clara was a vulnerable adult under SC Code §43-35-5¹⁸, et seq.

¹⁷ Between 1995 and April 2000, George made only six monthly payments of Clara's nursing home bill from his account, yet he transferred improperly more than \$400,000 during the same period. No proof was submitted as to whether any of the six payments were from George's actual funds, rather than monies taken from Clara.

¹⁸ The respondents' estate expert, Steve Johnson, agreed that Clara was a vulnerable adult under the South Carolina statute and that the crime of exploitation of a vulnerable adult includes improper, unauthorized use of funds, assets, property or power of attorney of a vulnerable adult for the benefit of another person. Mr. Johnson also testified as follows:

Q: Do you agree that a transfer to oneself under a POA, whether that POA was invalid when created or not, and does not authorize gifts; when a principal is incompetent and cannot consent is improper?

A: It's improper. (R. p. 1050).

Mr. Johnson went on to say that if transfers were made by the attorney-in-fact at a time when Clara was incompetent, these transfers would "be owed back to Clara's estate." (R. p. 1051).

The Burch defendants have also argued in the lower court that the costs of Clara's care were paid for from the joint account or from George's own funds. (R. p. 1124).

This is incorrect. According to the undisputed testimony of expert witness Asman and the exhibits, Clara was the owner and sole contributor to the joint account from which the vast majority of her care was paid, and this was the account into which her retirement funds were deposited¹⁹. (R. pp. 1359, 2282-2284). By contrast, George's retirement funds went to a separate account in his sole name. The evidence shows that there was no agreement or authorization by Clara for these transfers. The power of attorney did not authorize it. Her will did not provide for George. A PR may not transfer estate funds to himself. There was not a scintilla of evidence produced by the Burch defendants to withstand a motion for judgment notwithstanding the verdict. The lower court erred in denying the motion. This Court should reverse that ruling and direct that judgment be entered in favor of the plaintiffs against the Estate of George Burch for \$683,983, plus interest from September 30, 2007.

ARGUMENT II

THE LOWER COURT ERRED IN GRANTING DIRECTED VERDICTS AT THE CONCLUSION OF PLAINTIFF'S CASE.

The lower court granted a directed verdict in favor of Respondent Busbee on five causes of action. The lower court allowed the jury to consider only the causes of action for legal malpractice and breach of fiduciary duty against Respondent Busbee.

¹⁹ Plaintiffs argued at trial that George Burch should never have procured the POA because, prior to her incompetency, Clara had already set up this account with adequate funds to be deposited to pay for her nursing costs. (R. p. 637).

There was sufficient evidence that Busbee had knowledge of wrongful acts, should have known of other wrongful acts and, in fact, participated with the wrongdoer, George, who converted Clara's funds both before Clara's death when he was her attorney in fact and after her death when he was personal representative ("PR") and Busbee was his attorney.

The Court also granted directed verdicts of all causes of action as to Respondents Laurie Burch and Dennis Burch at the conclusion of plaintiffs' case. In considering defendants' motions for directed verdict the Court was required to view the evidence and inferences that reasonably could be drawn from the evidence in the light most favorable to Clara's estate. Gadson ex rel Gadson v. ECO Services of S.C. Inc., 374 S.C. 171, 175, 648 S.E.2d 585, 588(2007).

A. There was sufficient evidence to go to the jury on the cause of action for aiding and abetting as to Respondent Busbee, individually and as PR.

A defendant is liable for aiding and abetting the wrongdoing of another person, provided that three elements are established:

- (1) a breach of fiduciary duty owed to the plaintiff;
- (2) defendant's knowing participation in the breach; and,
- (3) damages.

Vortex Sports and Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008); see also Future Group II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1995); Josephine T. Willis, To Be or Not To Be: The Future of Aider and Abettor Liability in South Carolina, 51 S.C. L.Rev. 387 (2000) (summarizing Restatement Second) of Torts §876(b) (1979).

The wrongful breaches of fiduciary duties of George Burch are listed throughout this brief – i.e., his converting over \$400,000 of Clara's funds while she was incompetent and while he was acting as POA and after her death when he was acting as PR of her

estate. In this case, there is substantial evidence that Respondent/Attorney Busbee had knowledge of the wrongful acts in at least one instance before George died; the Wachovia certificate of deposit (R. pp. 1752-1755). Documents were faxed to Busbee from Wachovia Bank on April 13, 2001²⁰, which enclosed date of death information on Wachovia Certificate No. 117232 in the name of Clara G. Carter Burch with a date of death balance of \$32,427.66. (R. p. 1752). Notwithstanding that this certificate was owned solely by Clara, Busbee did not list it as an asset of Clara Burch's, rather she listed those funds as an asset of the Estate of George Burch (R. p. 1654) after he had transferred it to his name on September 21, 2000, over five months after Clara's death. (R. pp. 1755, 1638-1654). Aside from the conflicts of interest aspects of this action by Busbee,²¹ this is sufficient evidence of active participation by Busbee to survive directed verdict.

There is substantial evidence Busbee learned of many more of the takings on January 22, 2003 based on documents given to her then by Laurie Burch. (R. pp. 358-366, 1410, 1602).

In addition to Busbee's clear knowledge of the Wachovia account at the time she was serving as attorney for Clara's estate and as personal representative of George's estate, she had duties to place these funds in Clara's estate. Busbee also reasonably should have known of other acts of wrongdoing by George even before his death.

²⁰ On the fax in Busbee's file is written "Clara Burch Estate," which clearly shows Busbee knew this asset was not owned by George. (R. p. 1752). Respondents' expert, Cravens Ravenel admitted that the Wachovia account was not listed on the Third Supplemental Inventory filed on February 6, 2003. (R. pp. 1059, 1458).

²¹ As stated herein, Busbee was Clara's attorney in preparing the power of attorney; she was George's attorney; she was George's attorney-in-fact; she was statutory fiduciary of Clara's estate after George died under §62-3-609; she was PR of George's estate after he died. As statutory fiduciary of Clara's estate, Busbee had an obligation to account for all of Clara's assets. The Wachovia bank account, it could be inferred, was fraudulently included in George's estate when it should have been in Clara's on the plain face of the available documents in Busbee's file. (R. pp. 1752, 1755).

Specifically, plaintiffs' expert witness James Hardin stated that it was a breach of the standard of care for Busbee not to look at the bank statements for the last month of Clara's life. (R. p. 510). He further stated that, if she had seen those bank statements, she would have seen over \$210,000 transferred by George out of Clara's name to himself in the last 10 days of her life. (R. pp. 510-511). In a filing in the Probate Court in Aiken County in June 2000, Busbee acknowledged that Clara owned a safe deposit box to which she would get access. (R. p. 1299). The safe deposit box contained voluminous records of Clara's assets which were not accounted for by George. (R. pp. 1334-1335, 1484-1489). These assets were converted by George, and Busbee should have reasonably known this. Therefore, there was sufficient evidence of Busbee's knowledge of the wrongful act(s).

The evidence is ample that Busbee substantially assisted George, the primary violator in the commission of the wrongful act. The placement of \$33,000 as an asset on the Estate of George Burch's inventory²², as set forth above, when said asset should have been listed on Clara's estate, was substantial assistance to George in breach of his fiduciary duties. Busbee also participated in George's wrongful acts by filing on February 6, 2003, after George's death, the third supplemental I&A of the Estate of Clara Burch dated and signed by George on October 1, 2002. This filing did not list the Wachovia account or any other of Clara's assets which had been converted by George. At the time that Busbee filed this document after George's death, she was not only PR of

²² Hardin testified about the fact that because there were assets in George's estate which actually belonged in Clara's estate, the fiduciary of Clara's estate would have a duty to retrieve those assets from George's estate, and that was the position that Busbee was in. (R. p. 547). But because Busbee was the PR of the estate that was inappropriately holding Clara's assets, she would "be, in effect, making a claim against herself...." (R. p. 547).

George's estate, but also the fiduciary of Clara's estate. Under S. C. Code §62-3-609, it is provided that when a PR dies:

“...the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate...and shall account for and deliver the estate assets to a successor...personal representative...”

Busbee had a duty to protect Clara's estate and deliver her estate assets to Appellant Charles Gordon, the successor PR of Clara's estate. She failed to do so. Such conduct amounts to “substantial involvement” by Busbee in the wrongdoing of the tortfeasor.

In Vortex Sports and Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), our appellate court ruled that the trial court properly denied the defendant's motion for directed verdict on plaintiff's cause of action for aiding and abetting a breach of fiduciary duty. The defendant in that case argued that the plaintiff had not produced evidence from which a jury could find that the defendant CSMG knowingly assisted and participated in attorney Ware's breach of fiduciary duty. The Court of Appeals rejected that argument.

It noted that Ware, as attorney, owed Plaintiff Vortex a fiduciary duty and that the record showed that Defendant CSMG encouraged attorney Ware not to pay certain monies to plaintiff. Plaintiff presented evidence in that case that CSMG knew that attorney Ware was one of the partners and the attorney for plaintiff and that Ware had financial obligations to plaintiff. The Court ruled that, therefore, there was evidence that CSMG knowingly encouraged Ware to breach his fiduciary duty by withholding certain fees from Plaintiff Vortex. The Court concluded that the plaintiff had presented evidence that CSMG aided and abetted in a breach of fiduciary duty and, thus, the Court did not err in denying the directed verdict motion.

In the instant case, there is ample evidence that George Burch breached fiduciary duties as an attorney-in-fact for Clara and as PR, as he transferred Clara's assets to himself while serving in both fiduciary capacities. There was also evidence submitted, and cited herein that the Respondents Busbee and Laurie Burch assisted George in his self-dealing.

Significantly, in the Vortex case, the Court of Appeals placed significance on the testimony of plaintiff's expert witness, Professor John Freeman, who testified that the acts of the defendants in that case constituted participation in the principal wrongdoer's breaches of fiduciary duty. In the instant case, Professor Freeman testified that the standard of care for a lawyer with regard to aiding and abetting is that a lawyer is liable for aiding and abetting if the lawyer either knowingly or recklessly assists a wrongdoer and becomes a participant. (R. p. 834-835). He elaborated that a lawyer who assists in covering up can become accountable and that he had found evidence of such conduct in this case. When Busbee represented to the Probate Court in George's estate that he owned those assets when they actually belonged to Clara, this was an active effort on behalf of Busbee to further George's claim and to further his wrongdoing. Freeman characterized it as "active assistance in the face of knowledge of impropriety." (R. p. 835).

As pointed out by Mr. Freeman, as fiduciary for Clara's estate, Busbee had a duty to protect, preserve and look after Clara's estate which is a "clear cut obligation." (R. p. 828). At the same time, Busbee, as PR of George's estate, had money that was wrongfully taken from Clara and, that being the case, it would need to go back. (R. p. 828). Freeman then pointed out that when Clara's estate brought suit "to get to the bottom of

things,” Attorney Busbee’s position was to seek sanctions (R. p. 94) and accuse plaintiffs of frivolous bad faith. (R. pp. 829, 94). Professor Freeman noted that Busbee benefits from her actions by being paid out of an estate from which, as a fiduciary, she had an obligation to recover money. He says that Busbee had “rampant...flagrant, impermissible conflicts of interest.” (R. p. 829). These actions by Busbee made her an aider and abettor. In granting a directed verdict, the lower court overlooked this evidence.

The lower court erred in directing a verdict in favor of Respondent Jacqueline Busbee on the cause of action for aiding and abetting and in denying appellants’ motion for new trial.

B. The Court erred in dismissing the cause of action for Fraud/Fraud Benefit under §62-1-106.

Section 62-1-106, in pertinent part, provides:

62-1-106. Effect of fraud and evasion.

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) benefitting from the fraud, whether innocent or not, but only to the extent of any benefit received...
(emphasis added).

Under the directed verdict standard, at the conclusion of the plaintiffs’ case, many facts and reasonable inferences supported a finding by the jury that one or more of George, Laurie and Busbee were perpetrators of fraud, including §62-1-106 Fraud/Fraud Benefit, and that all benefitted from such fraud. There were numerous facts in the record regarding Clara’s valuable separate assets, George’s modest income and assets, and

Laurie's knowledge of George's modest lifestyle.²³ Busbee had named herself PR in George's Will and POA.²⁴ Busbee knew that Clara, for the eight years between making her will and being confined in the nursing home, made no changes in her will. Busbee knew that for the 10 years between the 1984 marriage and Clara's being confined in the nursing home Clara elected not to give George a POA. Busbee knew Clara's estate plan gave George only a life estate in her home. (R. pp. 1748-1749).

Standing alone, the facts and reasonable inferences related to Laurie, Dennis and Busbee's interaction between January 18 and January 22, 2003 support a jury finding of fraud/fraud benefit under §62-1-106. They include the unauthorized January 22nd entry into Clara's Security Federal safe deposit box, Laurie's destroying bank records; Laurie taking home Clara's critical 2000 income tax returns (R. p. 1134); and Laurie's delivering to Busbee on January 22, 2003, other financial documents and information about Security Federal CDs, which clearly indicated George's April 2000 Security Federal transfers. (R. pp. 1334, 364-366, 1410, 1602). Busbee never called these to Charles Gordon's attention. It could be also reasonably inferred by the jury that she actually deceived Charles Gordon, injuring Clara's beneficiaries, by entering Clara's safe deposit box again on March 4, after Charles Gordon was PR and when she had no authority to do so, and keeping, while withholding information from Charles Gordon, certain CDs. (R. pp. 1492, 1484-1490).

²³ In 1989, Laurie and George worked on the sale of the modest home George owned with his ex-wife. He made no gifts to Laurie or Dennis before 1997. He made only small loans to Laurie. In 1987, for example, Clara had \$27,496 of interest income. George had only retirement income and paid \$5,726 alimony. (R. pp. 1740, 746-764, 1359). In 1994, Clara, in addition to retirement income, had \$28,500 of interest income in her name alone. (R. p. 384)

²⁴ Busbee holds herself out as having fiduciary experience. Busbee formed "prudent man" investment rules and procedure for recognizing givers for the endowment committee for her church. (R. p. 1555).

The jury could have concluded that Laurie and Busbee both had ample information about George's takings on or before January 22, 2003, from multiple sources, including the October and December Security Federal searches and CDs which showed that all of George's accounts at Security Federal except one were created after 1996 (R. pp. 1602-1617), and that hundreds of thousands of dollars had gone through George's Security Federal account since Clara's incapacity – more than \$200,000 since Clara's death.²⁵ This was coupled with Laurie's knowledge, shared with Dennis and Busbee on January 22, 2003, that she had received more than \$170,000 in transfers from George and still had not repaid \$170,000. It gives rise, along with other facts, to a reasonable inference that at least Laurie and Busbee knew more than \$200,000 was taken from Clara and Clara's estate.

Busbee's and Laurie's January and March meetings, and Busbee's second unauthorized entry into Clara's safe deposit box after she knew Charles Gordon had been appointed Clara's PR, create a reasonable inference that Busbee and Laurie were hiding something, and attempting to prevent Clara's successor PR and the Court from finding out about it.

Busbee's failure to enter or report Clara's safe deposit box for three years, followed by two unauthorized entries without notifying Charles Gordon, one with Laurie and Dennis, provide a factual basis for the jury to infer and conclude that she was attempting

²⁵ The jury could reasonably infer that Busbee, Dennis and Laurie all had actual knowledge of Clara's incapacity from 1994 since Busbee had been George's appointed fiduciary since 1996; and, Busbee knew Clara's competence was an issue as early as February of 1995 (R. pp. 341, 836, 1018-1019).

to prevent Clara's beneficiaries from receiving assets to which they were entitled under her Will²⁶.

While Busbee and George were working together on Clara's estate, significant financial transfers were being made to Laurie.²⁷

George and Busbee filed Clara's estate's first I&A in December 2000 showing \$70,259.34 in bank accounts, excluding the Wachovia accounts (R. pp. 1721-1723).²⁸ None of the subsequent I&As was correct. (R. pp. 1727-1739).

By April 2001, Busbee had learned of George's \$32,427.66 Wachovia transfer from Clara's estate.²⁹ As George's PR, Busbee now claims them for Laurie and Dennis. By 2001, Busbee was working on records showing Clara had 15 accounts, seven at Security Federal in 2000.³⁰

²⁶ Busbee held what she represented to be contents of Clara's safe deposit box for almost a month. The only persons to enter Clara's safe deposit box since 1992 (R. pp. 299-300) were Dennis, Busbee and George. (R. pp. 1404-1407). Even though Clara's safe deposit box contained evidence of more than 30 accounts, many NCNB, Security Federal's predecessor, Busbee did not notify Charles Gordon.

²⁷ Between 2000-2002 George transferred more than \$200,000 to Laurie and \$25,000 to Amanda Rochelle. (R. pp. 1618-1622). In 2000, George purchased a new \$30,000 Cadillac. (R. p. 2281). On July 26, 2000, George transferred \$8,000 to Laurie (R. p. 2281). In September 2000, George closed and took \$32,427.66 from Clara's estate Wachovia Acct. 117232. (R. pp. 1752-1754).

²⁸ George's transfers to Clara began in 1997. After Clara's death, George transferred the following to Laurie: 7/26/2000: \$8,000; 12/12/2000: \$15,000; 3/27/2001: \$20,000; 1/25/2002: \$20,000; 3/8/2002: \$15,000; 8/12/2002: \$13,000; 9/12/2002: \$117,000. (R. p. 2281).

²⁹ Busbee received a fax confirming that George closed the Wachovia account "9-00". (R. pp. 1752-1755, 1359).

³⁰ Busbee annotated and gathered information for Clara's and Clara's estate's 2000 income tax returns and from banks. She received information showing Clara had 15 accounts in 2000 including many at SF, a bank Busbee and her staff entered every day. (R. pp. 1595-1597). George gave Busbee full authority to assist in administration of Clara's estate and, receive any and all information about Clara, Clara's estate. (R. p. 1358).

By June 2002, Busbee received detailed information about seven Security Federal accounts that Clara had in 2000, none of which was reported to the Court.³¹ In June 2002, George Busbee filed Clara's estate's "Final Accounting." (R. pp. 1716-1719). Busbee's actions between June 2002 and when she became George's PR on January 28, 2003, would support a finding under § 62-1-106 of fraud and fraud on the Court, including false and misleading filings and representations to the Court.

By the fall of 2002, beneficiaries were complaining about Busbee's omissions and suggesting a hearing might be necessary to correct her errors. (R. p. 1684).

The October 17, 2002 Security Federal research, which Busbee got at least by January 22, reveals CDs George opened in 2000 with Clara's funds. (R. pp. 1602-1604). Also included in Busbee's file was the time deposit inquiry on December 17, 2002 of Clara's Security Federal account which showed withdrawal of \$70,000 on April 10, 2000 from that one account. (R. p. 1421).

By January 24, 2003, Busbee had verified an application to be George's PR. She stated that George has a personal estate valued at about \$400,000.00. (R. p. 1450). This was followed on February 7 by Busbee's representation to the Probate Court that she had properly completed Clara's estate's final accounting, when there was abundant evidence she had not.³² (R. p. 1465).

³¹ Busbee had information that in 2000 Clara had in her name and Social Security number, 7 Security Federal accounts and CDs, with interest of \$7,177.45, 669.02, and \$348.92. (R. p. 1392). Busbee also had abundant information of a number of unaccounted for funds in Clara's name before Clara became incapacitated. (R. pp. 1658-1682).

³² In November 2002, Laurie signed a paper acknowledging \$130,000 of the debt. (R. p. 1764). On February 5, Busbee made a Security Federal Inquiry. It showed George had \$314,883.43 in 7 accounts. (R. p. 1457). On February 6, with notice that Charles Gordon was attempting to be appointed PR (R. p. 1458), Busbee filed a 3rd Supplemental I&A for Clara's estate which she could be deemed to know was both false and misleading. It showed only \$163,988 of bank accounts, none outright at Security Federal. Busbee

On May 29, 2003 Busbee filed the I&A for George's estate claiming for George's beneficiaries \$409,673.75 of Clara's funds.³³

From the above facts, a jury could find³⁴ that George and Busbee and/or George, Laurie and Dennis perpetrated a §62-1-106 fraud on the Court. They could conclude that all four benefitted from the fraud. Recovery to the extent of the benefit, is available even as against innocent persons, provided they have benefitted. Laurie received more than \$200,000 of Clara's funds from George while Busbee served as attorney for George and Clara's estate. She had reason to know these were not his. Busbee, by January 2003 – before she became George's PR – had in hand, from Laurie, records which indicated George's takings. (R. pp. 364-366, 1134, 1410, 1602). She did not deliver them to Charles Gordon, as was her duty under §62-3-609. The facts and reasonable inferences at the conclusion of plaintiffs' case showed that she went to great lengths to prevent Charles Gordon's appointment by filing an I&A prepared and signed by George five months earlier which she had clear reason to know to be false.

Busbee filed documents with the Probate Court that a jury could conclude she knew to be false or misleading. She relied on a false final accounting to assert the estate should be closed. The fact that George signed the false documents before he died did not

told the Court "(s)he has cancelled checks" to show all money and Clara's estate had been properly distributed. (R. p. 1465). She then obtained checks to try to prove to the court the Estate should be closed. (R. pp. 1467-1468).

³³ Of accounts: 3 Wachovia, 7 SF (all directly traceable to takings from Clara/Clara's estate). As to \$235,000 transferred to Laurie, Busbee placed it on Schedule F – not part of the estate – as \$170,000 with the statement: "It is unknown whether this was an advance on inheritance or gift." No attempt in 5 years to secure these funds for possible return to Clara's estate. Busbee gave no notice to Probate Court of possibility that this belonged to Clara's estate. She has refused to resign as George's PR.

³⁴ And appellants assert that the facts would have compelled a directed verdict at the conclusion of the evidence.

release her, both as lawyer and interim fiduciary for Clara's estate, from her duty to be truthful with the Court and properly account and deliver. Busbee has never relinquished the \$25,000 or greater commission from Clara's funds held by George's estate. Her attempts to close Clara's estate and prevent the appointment of Charles Gordon were extraordinary.

George's and Busbee's statements and filings with the Court provide clear and convincing evidence to support fraud in statements filed and fraud to avoid or circumvent the provisions or purposes of the Probate Code, which include "to discover and make effective the intent of a decedent in the distribution of (her) property." SC Probate Code §62-1-102.

Whether the Court holds that "fraud" as contemplated under §62-1-106 is ordinary, common-law fraud or a less demanding species of fraud³⁵ the facts and inferences at the conclusion of plaintiffs' case supported all elements as perpetrators as to Busbee, Laurie and George, and benefit to all defendants. See Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (N.M. 1990) (citing Cargill v. Sherrod, 96 N.M. 431, 432-433, 631 P.2d 726, 727-28 (N.M. 1981)).³⁶ The false and misleading filings and representation to the Court constitute a fraud upon the Court which "does or attempts to defile the Court

³⁵ See Treider v. Doherty & Co. 86 N.M. 735, 527 P.2d 498 (Ct. App.), *cert.denied*. 86 N.M. 730, 527 P.2d 493 (1974) and Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (NM 1990) . Reviewing the cases of New Mexico and other UPC states promotes another purpose of the Probate Code, "to make uniform the law among the various jurisdictions. (Probate Code Section 62-1-102(b)(5)).

³⁶ Under Section 62-1-106 "Fraud on the Court," Eoff construed the "other party" whose reliance is essential for a valid cause of action to be the court to which the representation is made. Though the court produced an affidavit in Eoff, appellants submit that the court should find that probate courts have a right to rely on statements and representations of attorneys and verified filings.

itself or which is perpetrated by officers of the court so that the judicial system cannot perform in a usual manner.” Eoff, 699, 789 P.2d at 1266.

Clara’s estate and beneficiaries have been injured by the fraud and Laurie, Dennis, George’s estate and Busbee have benefitted.

C. There was sufficient evidence to go to the jury on the cause of action for conversion

The lower court erred in granting a directed verdict on the conversion cause of action as to Respondent Busbee, individually and as PR. Conversion is the unauthorized assumption and exercise of the right of ownership over the goods or personal property belonging to another to the exclusion of the owner’s rights. Powell v. A.K. Brown Motor Co., 200 S.C. 75, 200 S.E.2d 636 (1942); Young v. Corbitt Motor Truck Co., 148 S.C. 511, 146 S.E.534 (1929). A significant part of the assets of Clara Burch which were converted by George are listed on the Inventory of the Estate of George Burch (R. p. 1638). Busbee, as attorney and fiduciary for the Estate of Clara Burch, failed to list the \$33,000 Wachovia certificate owned by Clara and in Clara’s estate, despite clear evidence in her own file that it belonged to Clara. (R. pp. 1752-1755).

Notwithstanding that Busbee received a fax in September 2001 from Wachovia Bank verifying that the Wachovia certificate was owned by Clara at her death, on February 6, 2003, after George’s death and at a time when Busbee was a statutory fiduciary under §62-3-609, Busbee filed a false third supplemental I&A in the Estate of Clara Burch which had been signed by George four months prior to his death. Further, as PR of George’s estate, Busbee filed the original I&A in the Estate of George Burch which claimed the Wachovia funds which had been converted into a Wachovia certificate in George’s name after Clara’s death, on September 21, 2000. (R. pp. 1752-1755).

There was evidence that Busbee converted, at a minimum, this Wachovia account. She exercised the right of ownership as fiduciary of George's estate over property belonging to another (i.e., Clara's estate).

Under S.C. Code §62-3-719, Busbee is entitled to up to five (5%) per cent PR commission on probate assets in George's estate. By including Wachovia funds in George's name which had been converted from Clara's estate in September 2000, she stands to benefit from this transaction.

There was sufficient evidence to withstand Busbee's directed verdict motion. The lower erred in granting a directed verdict on the conversion cause of action as to Respondent Busbee and also erred in denying plaintiffs' motion for new trial on this ground.

D. The Court erred in granting directed verdict on the cause of action for civil conspiracy.

The lower court erred in granting a directed verdict at the close of plaintiffs' case on the cause of action for civil conspiracy as to Respondents Jacqueline Busbee, individually and as PR, Laurie Burch, and Dennis Burch. South Carolina defines civil conspiracy as consisting of three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; and, (3) which causes him special damage. LaMotte v. Punch Line of Columbia, Inc. 296 S.C. 66,370 S.E. 2d 711 (1988). The plaintiffs submitted sufficient evidence of each of these elements to defeat the motion for directed verdict.

Each of these respondents combined with George Burch and/or themselves to injure the plaintiffs, who were caused damage in that Clara's assets are now under claim of Respondents Busbee, Laurie and Dennis. The facts supporting appellants on this cause

of action are recited thoroughly hereinabove. Busbee's actions, as fiduciary for Clara's estate, in failing to marshal and account for Clara's assets³⁷ and claiming them as George's assets to the benefit of Laurie and Dennis reflect that Busbee was combining with George and also later the beneficiaries of his estate to harm Clara's estate.

The evidence established circumstantially that there was joint assent of the minds of George, the principal wrongdoer, and his attorney, fiduciary and attorney-in-fact Busbee. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 SE 2d 150 (Ct. App. 1987). It is inferential, at a minimum on April 13, 2001, when Wachovia faxed the date of death balance info on Certificate No. 117232 that was owned by "Clara G. Carter Burch" that Busbee at that point had absolute knowledge that the sole owner of this certificate of deposit was Clara. Her handwritten note on the Wachovia fax even said "Clara Burch Estate." (R. p. 1752).

Notwithstanding this knowledge, Busbee later filed three I&As in Clara's estate on October 16, 2001 and January 9, 2002 (R. pp. 1721-1739) and one after George's death on February 6, 2003. All omitted this certificate. Further on May 29, 2003, Busbee filed an I&A in George's estate claiming the Wachovia funds as owned by George. Even though she claims no conflict of interest, Busbee, as PR, refuses to return this asset to Clara's estate. She and the Burches benefit from this conspiracy. Laurie has "loans" of over \$200,000 from 2000 to 2003 that she says she does not have to repay (R. pp. 1108-1109, 1127, 1135-1136, 2100-2101). She admitted that she destroyed bank records of Clara and of George immediately after George's death. (R. pp. 1094-1095,

³⁷ Busbee, at a minimum knew the \$33,000 Wachovia certificate (R. pp. 1752-1755) was owned by Clara at her death but Busbee claimed it as an asset in George's estate. (R. pp. 1639-1644). See also the transfers of George to himself in the last ten days of Clara's life, about which Busbee knew. (R. pp. 1334-1354).

1134). Further, Laurie combined with Busbee to report her loan as a possible “gift” on George’s estate inventory. (R. pp. 1027-1029, 1638-1641).

Exclusive of the \$230,000 that George transferred to himself from April 10-17, 2000, the \$33,000 Wachovia clearly constitutes damage to Clara’s estate. The evidence is both direct (R. pp. 1752-1755) and circumstantial. As established in Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E. 2d 150 (Ct. App. 1987), a conspiracy may be shown by direct or circumstantial evidence. In this case, there is a reasonable inference that there was joint assent between George Burch, his devisees, and Busbee, his fiduciary and attorney who had multiple conflicts of interest.

Laurie and Dennis are the children of George Burch, the wrongdoer, and they stand to gain one-half each of all Clara’s remaining assets which were improperly transferred by George. Their actions, as set forth above, are significantly furthering the wrongdoing of George. Laurie has already benefitted to the extent of over \$230,000 of “loans.” Dennis and Laurie both went in Clara’s safe deposit box after George’s death but before Clara’s third estate inventory had been filed and had seen that Clara had substantial assets. (R. pp. 300, 358, 474-475, 515, 535, 537, 986-987). Both Laurie and Dennis knew their father had very little funds of his own, and both knew that George was not a beneficiary of Clara’s estate plan in any way other than a life estate in the home. All of these circumstances and facts together were sufficient for this cause of action to be presented to the jury.

It was error for the lower court to grant respondents’ motion for directed verdict and to deny appellants’ motion for new trial.

ARGUMENT III

THE COURT ERRED IN REFUSING TO CHARGE THE JURY ON THE APPLICABLE LAW AND IN DENYING A NEW TRIAL.

A. The Court erred in failing to charge the law of joint accounts (Plaintiffs' Requests to Charge No. 36).

In Plaintiffs' Requests to Charge No. 36, it was requested that the Court charge the following statement of law:

"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."

S.C. Code §62-6-103(a); S.C. Code §34-11-10; Vaughn v. Bernhardt, 528 S.E.2d 82 (Ct. App. 2000). (R. p. 2671).

In the instant case, the Estate of George Burch argued that some of the funds transferred by George to himself were held in the joint account with Clara³⁸. In the case of Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001), the Supreme Court addressed S.C. Code §62-6-103(a) which relates to the issue of the ownership rights of contributing and non-contributing parties with regard to joint survivorship accounts. S.C. Code §62-6-103(a) provides as follows:

"A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contribution by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (emphasis added).

In Bernhardt, the Supreme Court held that, even though funds remaining on deposit at the time of the death of one of the parties to the account belonged to the surviving party as against the estate, the non-contributing joint account holder could not

³⁸ Clara was the source of the funds in that account, as her retirement funds were placed there. George's retirement went into his own account. Nevertheless, respondents argued that some, unspecified funds which were transferred by George were from joint accounts. (R. pp. 1189, 1193-1194).

withdraw funds prior to the death of the contributing account holder. Since George was not named in Clara's will nor was he a contributor of any of her bank accounts, George was not entitled to Clara's funds either under her will or as a surviving party to a joint account. The Court in Bernhardt applied the plain meaning rule and held that the funds removed by Bernhardt (the non-contributing party) prior to the death of the decedent belonged to the decedent. In the instant case, this law applied and should have been charged to the jury.

In Argument I above, the principle of law set forth in this request to charge would compel that a directed verdict be entered into in favor of plaintiffs for all of Clara's funds which were transferred by George. In the alternative, it was error for the lower court to deny this request to charge, and a new trial should have been ordered.

B. The Court erred in charging the wrong burden of proof on the cause of action for conversion.

George Burch had the burden of proving all transfers to himself from Clara Burch or from her estate were valid. See Fender, supra. The judge did correctly charge this in the introductory portion of his jury charge³⁹. (R. p. 1220). However, when the Court charged the jury on the cause of action for conversion against the Estate of George Burch, he charged the jury as follows:

"A conversion consists of any act whereby the defendant deprives the plaintiff of his goods either wholly...once again, they must prove that the plaintiff had an interest in the thing converted, the defendant converted to his or her own use, and the use was without the plaintiff's permission...of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence." (R. p. 1235).

³⁹ The Court noted initially that George's estate "has the burden to prove that all transfers to himself under the power of attorney and all transfers...from her estate are valid." (R. p. 1220).

At the conclusion of the judge's charge, after the jury was excused temporarily, the Court asked for any objections, deletions or additions to his charges. (R. p. 1245).

Plaintiffs' counsel pointed out that

"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 arguments herein and 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, it has long been the law of this state that 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). Which party holds the burden of proof to any given issue is material and fundamental to the outcome of the case, and our courts have consistently held that a conflict with respect to the burden of proof is confusing and cause for reversal.

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 of our Supreme Court 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. Likewise, this Court in Cole v. SCE&G, 355 S.C. 183, 584 S.E.2d 405, 412 (Ct. App. 2002), noted that the placement of the burden of proof is fundamental and, where placed on the wrong party by the trial court's charge, prejudicial. There, the trial court failed to place the burden of proving an affirmative defense on the defendant, which this Court determined was reversible error. Id.

Appellants were prejudiced because the jury was misled as to which party had the burden of proof. Since it is normally the plaintiff who has the burden, and because the plaintiffs did in fact have the burden of proving certain causes of action, the jury was misled, and the plaintiffs were prejudiced, by the Court's error. Because the Court instructed the jury that the burden was on the plaintiffs as to the cause of action for conversion, when in fact the burden of proof was on the Defendant Estate of George

Burch, this is a fundamental error that requires reversal. The lower court committed reversible error in its charge. This Court should reverse and order a new trial.

ARGUMENT IV

THE COURT ERRED IN DENYING EQUITABLE RELIEF TO APPELLANTS.

The lower court Order dated May 20, 2008 (R. p. 6) denying post trial motions relied on the Doctrine of Invited Error. (R. p. 16). This doctrine, even if it applies under South Carolina law, which is denied, does not apply to this case. The reliance of the lower court on this tainted the legal and equitable issues. The judge premised his conclusion that this doctrine applied by stating that appellants' sole theory of the case was that "George was a crook." (R. p. 19). The record shows this assertion to be incorrect. Anyone who is liable under a civil cause of action for conversion could be considered, in common parlance, a thief or a crook⁴⁰. Furthermore, throughout the transcript there are references by plaintiffs' counsel to the fact that George "converted" (R. p. 736) or "improperly transferred" Clara's funds to himself. (R. pp. 1050, 1058).

In closing argument, plaintiffs' counsel stated as follows:

"First, I'm going to address for a minute what he said you have to find that George was a crook. You don't have to find that George was a crook. We don't know whether he was an old man who simply thought he was building an inheritance for his children who had no relationship to Clara. We don't know whether he was mistaken and went to the bank and decided... or delusional. It doesn't matter....He took the money. He transferred it." (R. p. 1206).

⁴⁰ A thief is one who "steals." According to American Heritage Dictionary (4th Ed.), p. 1696, the word "steal" is defined, among other things, as "...taking property of another without permission." Under South Carolina law, conversion is taking control of property that does not belong to you.

In denying equitable relief, the lower court erred in failing to grant the following equitable relief:

1. removing Busbee as PR of George's estate;
2. declaring the bank accounts and Laurie Burch loan receivable assets of Clara's estate;
3. appointing a Special Administrator to account to Clara's estate; and
4. imposing a constructive trust on all liquid assets of George's estate to the extent of the transfers with interest.

George's transfers from the incompetent Clara and her estate were wrongful and voidable under applicable law, either through direct equitable relief, declaration of a constructive trust; or otherwise as equity requires. Fender, supra.; S.C. Code Ann. §62-3-713.

A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. McNair v. Rainsford, 220 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998). It is resorted to by equity to vindicate right and justice or frustrate fraud. Id. Because an action to declare a constructive trust is in equity, this Court may find the facts in accordance with its own view of the evidence. Lollis v. Lollis, 291 S.C. 525, 530, 354, S.E.2d 559, 561 (1987).

A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. Lollis, 291 S.C. at 529, 354 at 561. A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. Id. A constructive trust arises whenever a party has obtained money which does not equitably belong to her and which she 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. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990).

The burden is on the plaintiff to establish a constructive trust by clear and convincing evidence. McNair, 330 S.C. at 357, 499 S.E.2d at 501; see also Lollis, 291 S.C. at 530, 354 S.E.2d at 561 (“In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.”). Although fraud is generally cited as an element to establish a constructive trust, a party need not show actual fraud. McNair, 330 S.C. at 357, 499 S.E.2d at 501. Further, “equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust.” Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E. 2d 160, 163 (1979). The respondents’ estate expert, Steve Johnson, admitted that if funds of Clara are transferred to George by his use of a POA, a “constructive trust [would be] imposed upon the funds” (R. p. 1051) and that if the transfers were made at a time when Clara was incompetent, they would also be “owed back to Clara’s estate” under constructive trust. (R. pp. 1051-1052).

Busbee, as George’s PR, holds title to Clara’s funds, including the Laurie loan, claiming them for George’s beneficiaries. They equitably belong to Clara’s estate. The same is true of the Amanda Rochelle debt. This has been demonstrated by clear and convincing evidence.

Under these facts, a constructive trust should be imposed on the accounts of George’s estate and the Laurie Burch loan.

With notice of the facts herein, in the 3 years between George’s death and trial, Busbee took no steps to secure any of the \$235,000 transferred to Laurie. (R. p. 1359).

Laurie has still not returned \$170,000.00. Further, Busbee claims for George the \$34,000 Wachovia funds (R. pp. 1752-1755, 1638) and American Enterprise funds (that belong to Clara's estate). (R. p. 1391). After the trial, the lower court erroneously adopted Busbee's claim that Clara's estate and her beneficiaries are "strangers to the estate". (R. p. 38).

On January 28 Busbee, with knowledge of George's transfers became George's PR. She abandoned her duty to Clara's estate, which was higher, and before, her duty to George's estate. She has an irreconcilable conflict. She should not be allowed to remain.

The removal of Busbee as PR of George's estate and appointment of Barbara Gordon as Special Administrator to marshal and hold the Laurie debt and bank accounts should have been granted, and should be granted by this Court.

In the lower court Order dated May 20, 2008 denying plaintiffs' post trial motions, the lower court erroneously denied equitable relief to appellants. The Court made the following erroneous finding:

"...by denying post trial motions...plaintiffs are strangers to the George Burch Estate." (R. p. 38) and are entitled to no equitable relief.

The Court then denied appellants' causes of action for accounting, constructive trust, Statute of Elizabeth and removal of Busbee as PR. The Court committed legal error in making these findings and conclusions. The lower court's Order in this regard should be reversed, and this Court, sitting as an equity court, should grant all equitable relief as requested hereinbelow. In the alternative, this Court should reverse and remand the issue of equitable relief to the lower court with instructions to grant relief for the appellants.

CONCLUSION

For the reasons set forth herein, the lower court committed reversible error in denying plaintiffs' directed verdict motion against the Estate of George Burch; in granting directed verdicts to respondents on causes of action for aiding and abetting, fraud/fraud benefits, breach of fiduciary duty, conversion and civil conspiracy; in refusing requests to charge; and in denying equitable relief to appellants.

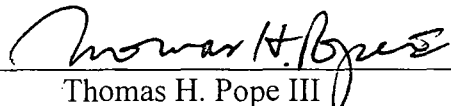
This Honorable Court should reverse the lower court's rulings and direct that

- (a) judgment be entered in favor of plaintiffs against the Estate of George Burch for \$683,983, plus interest since September 30, 2007 (the day before trial);
- (b) a new trial be granted on the causes of action against the Respondents for aiding and abetting, fraud/fraud benefits, conversion, and civil conspiracy;
- (c) a new trial be granted because of erroneous charges to the jury; and,
- (d) equitable relief should be granted to the plaintiffs on constructive trust, removal of Busbee as PR, the Statute of Elizabeth, and an accounting.

Respectfully submitted,

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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

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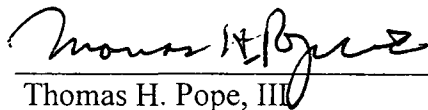
Charles E. Gordon and Barbara Gordon, as Personal
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v.

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

CERTIFICATE OF COUNSEL

I, Thomas H. Pope III, Esquire, do hereby certify that the Final Brief of Appellants
complies with Rule 211(b).



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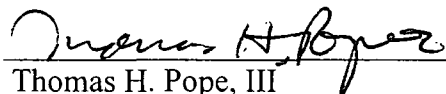
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CERTIFICATE OF COMPLIANCE

I, Thomas H. Pope III, Esquire, do hereby certify that the Final Brief of Appellants
complies with Supreme Court Order of August 13, 2007.



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FINAL BRIEF OF RESPONDENT
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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for aiding and abetting a breach of fiduciary duty by George Burch when Appellants:
 - A. Failed to appeal the jury's verdict in favor of the Estate of George Burch on the cause of action for breach of fiduciary duty, which is now the law of the case; and
 - B. Failed to put forth any evidence from which a jury could reasonably conclude that Jacqueline Busbee, individually, "knowingly participated" in any breach of fiduciary duty by George Burch?
- II. Did the trial court err in directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for fraud and "fraud benefit" under S.C. Code Ann. § 62-1-106 when Appellants:
 - A. Failed to present clear and convincing evidence of any false and material representations of fact made to Appellants by Jacqueline Busbee, individually;
 - B. Failed to present clear and convincing evidence of any material representations made to Appellants by Jacqueline Busbee, individually, that she knew to be false;
 - C. Failed to present clear and convincing evidence that Appellants relied to their detriment upon any representation made by Jacqueline Busbee, individually;
 - D. Failed to present clear and convincing evidence that Appellants sustained any damage proximately caused by any such representation of Jacqueline Busbee, individually;
 - E. Failed to present clear and convincing evidence of the probate court's detrimental reliance on any representation of Jacqueline Busbee, individually; and
 - F. Failed to present clear and convincing evidence of any benefit by Jacqueline Busbee from any fraud?
- III. Did the trial court err in directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for conversion when the evidence, including Appellants' own testimony, demonstrated that Jacqueline Busbee never received any money belonging to the Estate of Clara Burch and had no knowledge of any transfers made from any accounts or certificates of Clara Burch?

- IV. Did the trial court err in directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for civil conspiracy when Appellants:
- A. Failed to offer any evidence of a joint assent of the minds of Jacqueline Busbee and another party for the prosecution of an unlawful enterprise for the purpose of injuring Appellants;
 - B. Failed to offer any evidence of "special damages"; and
 - C. Failed to demonstrate any independent duties owed to them and breached by Jacqueline Busbee, individually?
- V. Did the trial court err in directing a verdict in favor of Jacqueline Busbee, individually, on the causes of action for aiding and abetting a breach of fiduciary duty, fraud and "fraud benefit" under S.C. Code Ann. § 62-1-106, conversion and civil conspiracy, when Appellants failed to allege or prove that Jacqueline Busbee, individually, acted in her own personal interest outside the scope of her representation of George Burch, and failed to demonstrate any independent duties owed to the Appellants by Jacqueline Busbee?

STATEMENT OF THE CASE

As pertains to Respondent Jacqueline F. Busbee, individually, this is an appeal from the trial court's ruling in which it directed a verdict in favor of Jacqueline Busbee, individually, on the causes of action for aiding and abetting a breach of fiduciary duty, fraud/fraud benefit under section 62-1-106 of the Probate Code, civil conspiracy, and conversion.

The action involves a dispute between the heirs of the Estate of George Burch and the heirs of the Estate of Clara Burch over ownership of assets amid allegations of improper transfers of money by George Burch. The successor personal representative of the Estate of Clara Burch filed the summons and complaint in the Probate Court for Aiken County on April 15, 2003. (R. p. 60).¹ Appellants brought suit against Jacqueline Busbee, individually, and in her capacity as personal representative of the Estate of

¹ Appellant Barbara Gordon was later appointed as co-personal representative and was added to the caption by Order dated June 14, 2007. (R. p. 46).

George Burch. Appellants also named George Burch's children, Laurie and Dennis Burch, as defendants. By order dated April 28, 2003, the matter was removed to the Aiken County Court of Common Pleas. (R. p. 58).

Appellants filed an Amended Complaint on August 18, 2004. (R. p. 97).

A motion to dismiss the case was made based upon procedural deficiencies and was granted. (R. p. 52). On appeal, the Court of Appeals reversed and remanded the matter to the Circuit Court where the action continued. See Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

The claims against Jacqueline Busbee, individually, arose out of her representation of George Burch as personal representative of the Estate of Clara Burch. Causes of action against Jacqueline Busbee, individually, included negligence/gross negligence, aiding and abetting a breach of fiduciary duty by George Burch, breach of fiduciary duty, attorney malpractice, fraud, civil conspiracy, tortious interference with expected inheritance rights, and conversion. (R. pp. 111-116).

The claims against Jacqueline Busbee, in her capacity as personal representative of the Estate of George Burch, included causes of action for negligence/gross negligence, breach of fiduciary duty, fraud, civil conspiracy, tortious interference with expected inheritance rights, and conversion. (R. pp. 111-116).

The claims against George Burch and George's Estate included causes of action for conversion, fraud, civil conspiracy and breach of fiduciary duty. (R. pp. 111-116).

The claims against Laurie and Dennis Burch, George Burch's only children, included causes of action for negligence/gross negligence, fraud, civil conspiracy,

tortious interference with expected inheritance rights, conversion, and fraudulent conveyance as against Laurie Burch. (R. pp. 111–116).

Respondents denied all allegations of wrongdoing. (R. pp. 71–93; pp. 119–140).

In addition to the legal causes of action, Appellants also brought equitable claims against Jacqueline Busbee, as personal representative of the Estate of George Burch, which included a cause of action for an accounting, constructive trust, and removal of Jacqueline Busbee as personal representative of George's estate. (R. p. 114; pp. 116–117).

Trial began on October 1, 2007, concluding with a jury verdict on the legal claims on October 11, 2007. (R. p. 1252, line 5–p. 1253, line 6; pp. 2701–2702). At the order of the trial judge, equitable issues were held until the end of trial to be decided by the court following the jury's verdict.

At the close of Appellants' case, all Respondents made motions for directed verdict. (R. p. 870, line 1–p. 897, line 10). The trial judge ruled as follows:

- As to Dennis Burch, directed verdict granted on all causes of action. (R. p. 897, line 11–14).
- As to Laurie Burch, directed verdict granted on all causes of action, subject to the possibility that she may be called on to repay \$170,000 to the estate of George Burch depending upon the verdict with respect to the surviving causes of action. (R. p. 897, line 14–21).
- As to Jacqueline Busbee, individually, directed verdict granted as to aiding and abetting, fraud, conspiracy, conversion, and intentional interference with inheritance rights. Directed verdict denied as to legal malpractice/negligence and breach of fiduciary duty. (R. p. 897, line 22–p. 898, line 25).
- As to Jacqueline Busbee in her capacity as personal representative of the estate of George Burch, directed verdict granted as to all legal causes of action except conversion, which would be defended by the estate of George Burch as to George's actions prior to his death. (R. p. 899, line 1–8).

- As to Appellants' claims for punitive damages, directed verdict granted to all Respondents, except as against the Estate of George Burch. (R. p. 899, lines 12-16; p. 906, lines 15-19).

At the conclusion of the directed verdict motions, the causes of action for negligence/legal malpractice and breach of fiduciary duty remained against Jacqueline Busbee, individually; the causes of action for negligence, breach of fiduciary duty, fraud and conversion remained against the Estate of George Burch – not Busbee as PR; and punitive damages remained only as to the Estate of George Burch. (R. p. 903, line 12-p. 904, line 8).

Additional motions followed the close of all evidence. Those motions, and the court's rulings, included the following:

- Appellants moved for directed verdict asking the court to declare as void all transfers of the assets of Clara Burch by George Burch from and after June 30 of 2001. (R. p. 1149, line 16-p. 1154, line 4). Appellants' motion was denied. (R. p. 1154, lines 5-6).
- The court revisited the granting of directed verdict as to punitive damages against Jacqueline Busbee, individually. The court did not change its ruling, and punitive damages remained in the case only as to the Estate of George Burch. (R. p. 1154, line 6-p. 1156, line 24).
- Jacqueline Busbee, individually, moved for directed verdict on the causes of action for legal malpractice/negligence and breach of fiduciary duty. (R. p. 1156, line 25-p. 1160, line 23). The court denied the motion. (R. p. 1160, line 24-p. 1161, line 3).
- The Estate of George Burch moved for directed verdict as to the cause of action for fraud. (R. p. 1161, lines 4-21). The court denied the motion. (R. p. 1161, lines 22-23).
- Jacqueline Busbee, as personal representative, moved for dismissal of the claim for removal of Jacqueline Busbee as personal representative. (R. p. 1161, line 24-p. 1162, line 12). The court reserved ruling on the motion until the equitable causes of action were considered following the jury's verdict on the remaining legal causes of action. (R. p. 1162, lines 13-16).

The jury returned a verdict in favor of the Respondents on all causes of action. (R. pp. 2701–2702; R. p. 1252, line 3–p. 1253, line 20). The court then allowed Appellants ten days to submit post-trial motions.

On October 18, 2007, Appellants served a “Motion for Judgment Notwithstanding the Verdict, in the alternative for New Trial, and for Equitable Relief.” (R. p. 140). By Order dated May 20, 2008, the court denied Appellants’ post-trial motions. (R. p. 6).

Appellants filed a notice of appeal dated June 12, 2008 from the Order of the lower court dated May 20, 2008.

By written motion dated and served June 2, 2008, Appellants’ moved the trial court to reconsider. (R. p. 197).

Appellants then moved the Court of Appeals for a stay and remand, which was granted on July 17, 2008, in order that the trial court could rule on the motion for reconsideration.

By Order dated September 30, 2008, Appellants’ motion for reconsideration was denied. (R. p. 1).

Appellants filed a notice of appeal dated October 20, 2008.

STATEMENT OF FACTS

George E. Burch and Clara G. Burch were married on July 30, 1984. (R. p. 375, lines 5–8). At the time of their marriage Clara was approximately seventy-five (75) years of age (R. p. 375, lines 12–13), and George was approximately two (2) months shy of his seventieth (70th) birthday. (R. p. 405, line 23–p. 406, line 3). It was Clara’s fourth (4th) marriage and George’s second (2nd) marriage. (R. p. 375, lines 5–11).

Clara had no children by any of her previous three (3) husbands. (R. p. 370, lines

16-17). George had two (2) children from his prior marriage – Defendants Laurie Burch and Dennis Burch. (R. p. 375, lines 9-11).

About one (1) year after their marriage, on July 22, 1985, Clara signed her Last Will and Testament. (R. p. 99, ¶ 15; R. p. 1748). An attorney other than Jacqueline F. Busbee prepared Clara's Will which named George as Clara's Personal Representative. (R. p. 696, lines 23-25).

For over ten (10) years George and Clara lived together in Wagener, South Carolina, until October 13, 1994, when Clara began residing in a retirement home in North Augusta, South Carolina. (R. p. 378, lines 19-24).

In February, 1995, George asked Ms. Busbee, who is a sole practitioner in Wagener, South Carolina to draft a power of attorney for Clara's signature making him attorney-in-fact to assist him in taking care of his wife. (R. p. 977, line 21-p. 978, line 2). Ms. Busbee drafted the power of attorney, which did not contain a gifting provision. (R. p. 1745). Ms. Busbee then instructed George to have two (2) witnesses sign the power of attorney and verify that Clara was competent and knew what she was signing. (R. p. 978, lines 3-10). Clara signed the power of attorney on February 27, 1995, while a resident of the North Augusta retirement home. (R. p. 1745). Two (2) employees from the retirement home signed the power of attorney as witnesses. Ms. Busbee did not travel from Wagener to North Augusta in order to participate in the execution of the power of attorney. (R. p. 978, lines 11-19). Amanda Hammond, an employee of the North Augusta retirement home, witnessed Clara's execution of the power of attorney and testified she would not have done so if there had been any indication to her that Clara did not understand the document. (R. p. 914, line 5-p. 916, line 22).

Several times from 1995 through April 19, 2000, George transferred funds from accounts held in the joint names of Clara and George and from accounts solely in Clara's name into accounts held jointly by Clara and George and into accounts in George's name only. (R. p. 1334 & p. 1359).

At George's request, Jacqueline F. Busbee prepared a Last Will and Testament for George which he signed on June 5, 1996. Under the terms of the Will, George named Ms. Busbee as his Personal Representative. On the same day he executed his Will, George signed a power of attorney naming Ms. Busbee as attorney-in-fact. Ms. Busbee never exercised the power of attorney given to her by George. (R. p. 979, line 14-p. 981, line 7).

Clara died on April 19, 2000. (R. p. 982, lines 1-15). At the time of her death, Clara and George had been married for almost seventeen (17) years.

On July 6, 2000, George was appointed as Personal Representative of the Estate of Clara Gordon Burch. (R. p. 982, lines 1-9). George, as Personal Representative of Clara's estate, retained Ms. Busbee as his attorney in his role as personal representative. (R. p. 982, lines 10-15).

Ms. Busbee advised George that it was his responsibility as Personal Representative of the Estate of Clara G. Burch to account for the assets of Clara. (R. p. 1020, lines 12-21). Furthermore, if there was a safe deposit box, Ms. Busbee instructed him to go and see if there were any assets in the box. (R. p. 998, lines 20-25). Mr. Burch reported no assets in the safe deposit box. (R. p. 999, lines 1-5). The only items in the safe deposit box which should have been included on Clara's estate inventory, but were not included, were some coins. (R. p. 1000, lines 2-10).

Ms. Busbee accepted as true George's report of Clara's assets and did not investigate her client's representations by personally going into the safe deposit box. In fact, she could not have done so under the law until January 23, 2003, when she was appointed Personal Representative of George's estate. (R. p. 1021, line 18–p. 1025, line 22).

None of the inventories or interim accountings filed with the Aiken County Probate Court were signed by Ms. Busbee. They were all signed by George as Personal Representative of the Estate of Clara Burch. (R. pp. 2543, 2548, 2560, & 2566). Appellant Charles Gordon testified that Jacqueline F. Busbee made no representations to him regarding Clara's assets, and he had no evidence that Ms. Busbee knew anything about the transfers from the subject bank accounts. (R. p. 959, line 16–p. 961, line 11; R. p. 963, line 16–p. 971, line 11). He also admitted Ms. Busbee had not signed any of the Probate Court filings having to do with the Estate of Clara Burch. (R. p. 961, line 12–p. 963, line 15). Appellants' expert John Freeman concurred that no evidence existed that Ms. Busbee was aware Ms. Burch had made transfers from the subject accounts. (R. p. 844, line 20–p. 845, line 5). Mr. Gordon also admitted he could offer no evidence that Ms. Busbee had any information that old financial records which had belonged to George Burch were being discarded. (R. p. 972, lines 1–11). Mr. Gordon testified, contrary to Appellants' allegations, that he had no evidence that Ms. Busbee prepared and filed tax returns for George Burch as Personal Representative of the Estate of Clara Burch. (R. p. 973, line 1–p. 974, line 20). Further, Mr. Gordon acknowledged that he had no evidence that Ms. Busbee was aware of any transfers of funds from Regions Bank. (R. p. 975, line 22–p. 976, line 4).

Between April 18, 1996 and April 19, 2000, and between July 26, 2000 through September 12, 2002, George made loans to his daughter Laurie, some of which Laurie has repaid. (R. p. 1106, line 14–p. 1111, line 15). The initial Inventory and Appraisement filed in the George Burch Estate disclosed the existence of these transactions and expressed uncertainty as to whether the transactions were loans or gifts. (R. p. 2580). At trial, Laurie Burch testified that any balance due to her father was to be considered an advance on her distribution from the estate. (R. p. 1111, line 22–p. 1112, line 17).

George died on January 18, 2003. On January 22, 2003, Ms. Busbee and the Burch children visited Security Federal Bank to ascertain if George's original Will was in the safe deposit box. (R. p. 300, line 21–p. 301, line 4; p. 316, line 20–p. 317, line 18). Ms. Busbee and the others were not allowed to look through the contents of the box. The Will was not in the box and nothing from the box was removed. (R. p. 986, line 6–p. 987, line 20; p. 321, line 8–p. 322, line 5).

On January 28, 2003, Ms. Busbee was appointed Personal Representative of George's estate. Thirty (30) days later, on February 27, 2003, Appellant Charles Gordon was appointed successor Personal Representative of Clara's estate. (R. p. 988, lines 10–15).

On March 4, 2003, Security Federal employees inventoried the safe deposit box. A list of the contents was created by the bank's employees. (R. p. 317, line 19–p. 319, line 20; p. 989, line 5–p. 990, line 14).

On March 30, 2003, at the request of Appellants' attorney Adele Pope, Ms. Busbee personally delivered to Adele Pope's office in Columbia her entire legal file and

all the paper contents of the safe deposit box at Security Federal, as well as the notarized list of the contents of the safe deposit box. (R. p. 990, line 17–p. 996, line 3). Ms. Pope initially refused to accept the rolls of coins in the box, but later agreed. (R. p. 992, line 20–21; R. p. 1001, line 21–24).

Again at the request of Adele Pope, from April 1, 2003 through April 12, 2003, Ms. Busbee requested financial records be copied from financial institutions on Clara's and George's accounts and had those records delivered to Ms. Pope's office. (R. p. 992, line 22–p. 996, line 3).

On April 15, 2003, Appellant Charles Gordon, as successor Personal Representative represented by Adele Pope, filed suit against Ms. Busbee and the other named Respondents. (R. p. 60). Mr. Gordon's wife, Barbara, was later named as an additional plaintiff. (R. p. 49).

During Ms. Busbee's representation of George as Personal Representative of Clara's estate she occasionally referred to herself in her written communications as Attorney for the Personal Representative of the Estate of Clara G. Burch and as Attorney for the Estate of Clara G. Burch. (R. p. 996, line 18–p. 997, line 6).

Ms. Busbee received none of the funds transferred by George, was not a signatory on any account in the name of Clara Burch or her estate, and the account statements did not come regularly to her office. (R. p. 949, lines 7–19; p. 960, lines 9–19).

There existed no written employment agreement between Ms. Busbee and the Appellants or any of the Burch heirs. (R. p. 996, line 11–17).

No assets of the Clara Burch estate were shown to have been lost or wasted during the period January 18, 2003 to February 27, 2003. (R. p. 409, line 16–p. 410, line

13). No assets of the George Burch estate were shown to have been lost or wasted after January 28, 2003. (R. p. 415, line 14–p. 416, line 2).

This case was tried for nine (9) days during October, 2007. According to information revealed during the qualification and seating of the jury, the jury was composed of educated jurors; the jurors were allowed to take notes; Appellants introduced copious exhibits, most without objection; there were over three hundred (300) exhibits introduced cumulatively; Appellants called numerous witnesses; the Court recited in its post trial order that it did not recall that Appellants were denied the opportunity to call a single witness; Appellants called three (3) experts for opinion testimony; practically all of Appellants' timely requests to charge were given by the Court, and of those that were not given, most were substantively contained in the Court's charges; there were charges requested by Appellants after closing arguments that were untimely pursuant to Rule 51 and which were not specifically considered independently of the charge as settled upon prior to closing argument; witnesses and issues were vigorously challenged during the trial by all parties; Appellants had the benefit of the Rule allowing them two (2) arguments to the jury during closing arguments; to lessen the chance for jury confusion, a special verdict form, which was drafted by Appellants, was used to lead the jury through the causes of action in a logical and organized sequence calling the jury's attention to the separate theories and remedies advocated by Appellants; Appellants had a full and fair opportunity to make points with the jury on Appellants' theory of the case; the trial court found that it was a fundamentally fair trial. (R. pp. 10–11). The trial court was further guided in this matter by the principle that litigants are entitled to fair trials but not to perfect trials. (R. p. 11) (citing Orangeburg Sausage Co. v.

Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994)).

All post-trial motions were denied in the trial court's Order of May 20, 2008. Appellants' motion for reconsideration was denied in the trial court's Order of September 30, 2008. Appellants appealed the trial court's order denying Appellants' directed verdict motion as to the Estate of George Burch; granting Busbee's directed verdict motion as to causes of action for aiding and abetting a breach of fiduciary duty, fraud/fraud benefit, conversion and civil conspiracy; granting directed verdict motions as to both Burch defendants; refusing to grant a new trial and make a requested charge to the jury on joint accounts and conversion; and, finally, denying equitable relief to Appellants. (Appellants' Final Brief; Appellants' Statement of Issues on Appeal).

SCOPE OF REVIEW

When ruling on a motion for directed verdict, appellate courts apply the same standard as the trial court viewing evidence and all reasonable inferences in the light most favorable to the non-moving party. Gadson ex rel. Gadson v. ECO Servs. of South Carolina, Inc., 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). A court should deny a motion for directed verdict "when the evidence yields more than one inference or its inference is in doubt." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury. Proctor v. Dep't of Health & Env'tl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct.App.2006). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in that party's favor. Harvey v. Strickland, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002); Proctor at 293, 628 S.E.2d at 503. The

Court of Appeals will reverse only when no evidence exists to support the ruling or when the ruling is controlled by an error of law. Law v. South Carolina Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006).

ARGUMENT

- I. **The trial court did not err in directing a verdict in favor of Jacqueline F. Busbee, individually, on the cause of action for aiding and abetting a breach of fiduciary duty by George Burch because Appellants failed to appeal the jury's verdict in favor of the Estate of George Burch on the cause of action for breach of fiduciary duty, which is now the law of the case, and because Appellants failed to put forth any evidence from which a jury could reasonably conclude that Jacqueline Busbee, individually, "knowingly participated" in any breach of fiduciary duty by George Burch.**

"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).

- A. **Appellants failed to appeal the jury verdict in favor of the Estate of George Burch on the cause of action for breach of fiduciary duty, which is now the law of the case.**

South Carolina's rules are clear regarding issue preservation. Even if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court. See Fields v. Fields, 342 S.C. 182, 191, 536 S.E.2d 684, 689 (Ct. App. 2000) (stating "issues not argued in the brief are deemed abandoned and will not be considered on appeal") (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)); see also Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81,

557 S.E.2d 689, 691 (Ct. App. 2001) (stating “a one sentence paragraph raised in an appellants’ brief was insufficient to preserve the argument for review”). An appellant’s initial brief must contain a “statement of each of the issues presented for review Broad general statements may be disregarded by the appellate court. *Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.*” Rule 208(b)(1)(B), SCACR (emphasis added). “No new arguments may be made in the final briefs. Moreover, an appellant may not use the reply brief as a vehicle to argue issues not argued in the appellants’ brief.” Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina 75 (2d Ed. 2002) (citing Rule 211(b), SCACR; Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989)).

At the close of Appellants’ case, all the Respondents moved for directed verdict. (R. p. 870, line 2–p. 908, line 7). The Court granted those motions in part and denied those motions in part. *Id.* As to Jacqueline Busbee, as personal representative of the Estate of George Burch, the Court granted the motion as to all legal causes of action so that no causes of action against Jacqueline Busbee, as personal representative of the Estate of George Burch, went to the jury; however, “the Court did not dismiss the fraud, conversion and *breach of fiduciary duty* causes of action *as to the decedent George Burch.*” (R. p. 11, lines 19–21) (emphasis added). The cause of action for breach of fiduciary duty against the Estate of George Burch went to the jury, and the jury found in favor of the Estate of George Burch. (R. p. 1252, lines 22–24).

Appellants made five (5) post-trial motions: “(1) Motion for Judgment Notwithstanding the Verdict against the Estate of George Burch for money transferred from the Clara Burch accounts by George Burch pursuant to the Power of Attorney (Rule

50); (2) Motion for Judgment Notwithstanding the Verdict against Jacqueline Busbee, individually, for breach of fiduciary duty and negligence; (3) Motion for New Trial Absolute as to All Defendants for all Causes of Action pursuant to the Thirteenth Juror Doctrine; (4) Motion for New Trial Absolute as to all Defendants pursuant to Rule 59; and (5) Motion for all Equitable Relief reserved at the end of trial.” (R. p. 12, lines 3–10). Only the motions at items three (3) and four (4) sought a review of the verdict in favor of the Estate of George Burch on the cause of action for breach of fiduciary duty. All of Appellants’ post-trial motions were denied, and this appeal followed.

On appeal, Appellants narrowed their issues from those cited in their post-trial motions. The issues on appeal now include:

1. Whether the trial court erred in denying Appellants’ motion for directed verdict as to the Estate of George Burch;
2. Whether the trial court erred in granting directed verdicts at the conclusion of Appellants’ case to Jacqueline Busbee, individually and as personal representative, on the causes of action for aiding and abetting a breach of fiduciary duty, fraud/fraud benefit, conversion, and civil conspiracy;
3. Whether the trial court erred in granting directed verdicts at the conclusion of Appellants’ case to Laurie Burch and Dennis Burch on the causes of action for fraud/fraud benefit and civil conspiracy;
4. Whether the trial court erred in refusing to charge the jury on the applicable law and in denying a new trial:
 - a. Based upon a jury charge pertaining to joint accounts; and
 - b. Based upon a jury charge pertaining to the burden of proof on a cause of action for conversion;
5. Whether the trial court erred in denying equitable relief to the appellants.

(Appellants’ Initial Brief, p. vi).

Appellate issue 1 pertains to Appellants’ motion for directed verdict. Appellants did not move for directed verdict on the cause of action for breach of fiduciary duty

against the Estate of George Burch. (R. p. 1149, line 16–p. 1150, line 14; Appellants’ Initial Brief, p. 2).

Appellate issues 2 and 3 pertain only to the granting of directed verdicts to Jacqueline Busbee, Laurie Burch and Dennis Burch.

Appellate issue 4(a) pertains to a jury charge concerning joint accounts. According to the Appellants, “the principle of law set forth in this request to charge would compel that a directed verdict be entered into in favor of plaintiffs for all of Clara’s funds which were transferred by George.” (Appellants’ Initial Brief, p. 40).

Appellate issue 4(b) pertains to a jury charge concerning the burden of proof for the cause of action for conversion.

Appellate issue 5 pertains to the causes of action for equitable relief.

None of these issues on appeal have anything at all to do with the cause of action for breach of fiduciary duty against the Estate of George Burch. Consequently, there is no issue on appeal which, if resolved in Appellants’ favor, would give the Court of Appeals jurisdiction to send the cause of action for breach of fiduciary duty against the Estate of George Burch back to the trial court. The jury verdict in favor of the Estate of George Burch on the cause of action for breach of fiduciary duty is now the law of the case and final between the parties. Therefore, Appellants cannot establish the first element of the aiding and abetting cause of action against Jacqueline Busbee, and the Court of Appeals should affirm the trial court’s directed verdict on this separate and independent ground.

B. Appellants failed to put forth evidence from which a jury could reasonably conclude that Jacqueline Busbee, individually, knowingly participated in any breach of fiduciary duty.

In addition to proving that George Burch breached a fiduciary duty owed to Clara

Burch or her estate, Appellants bear the burden of proving that Jacqueline Busbee, individually, “knowingly participated” in George Burch’s breach. See Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

According to the South Carolina Supreme Court, “[t]he 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. In Future Group II, the South Carolina Supreme Court faced, *inter alia*, the question of whether a lender should have been found liable by the trial judge in a non-jury trial for aiding and abetting a breach of fiduciary duty by the director of a corporation. In reversing the trial court’s ruling, the Supreme Court placed significant emphasis upon evidence of the lender’s “knowing participation.” The Supreme Court recognized that the director breached a fiduciary duty to the corporation by failing to obtain a shareholder’s consent for the transaction in question, in contravention of corporate by-laws. However, the Supreme Court stated that “[t]here is no evidence in the record . . . that Bank had *actual knowledge* [the corporation’s] by-laws required shareholder approval.” Future Group II, 324 S.C. at 99, 478 S.E.2d at 50 (emphasis added). Consequently, the Court concluded “the record contains no evidence Bank knowingly participated in [director’s] alleged breach of his fiduciary duty” Future Group II, 324 S.C. at 100, 478 S.E.2d at 50.

In the present action, Appellants admit they have no evidence that Jackie Busbee knew of any improper transfers by George Burch. When asked under oath whether he had any evidence that Jackie Busbee knew anything about the transfers made by George, Appellant Charles Gordon answered, “No.” (R. p. 949, lines 7–19). As a follow up question, Charles Gordon was asked to provide proof that Jackie Busbee knew of any

transfers of Clara's assets. Mr. Gordon replied, "I have no proof." (R. p. 960, lines 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, lines 12–15).

In order to circumvent Future Group II and their own admissions, Appellants cite to Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), rehearing denied (2008), for the premise that something less than actual knowledge is all that is required to prove "knowing participation." Despite Appellants' explanation, Vortex is consistent with the "actual knowledge" standard in Future Group II.

In Vortex, defendant CSMG argued that it could not be liable for aiding and abetting a breach of fiduciary duty because it had "no actual knowledge of Ware's breach of fiduciary duties to Vortex nor did it substantially assist Ware with the breach." Vortex, 378 S.C. at 205, 662 S.E.2d at 449. The Court of Appeals disagreed:

Vortex presented evidence that CSMG *knew* Ware was one of several partners and the attorney for Vortex, not simply an employee. There is also evidence 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. Further, there is evidence CSMG *knowingly encouraged* Ware to breach that duty because there is evidence it encouraged Ware to withhold the SRA fees from Vortex.

Vortex, 378 S.C. at 205, 662 S.E.2d at 449 (emphasis added).

The Court of Appeals in Vortex makes it clear that the defendant not only knew that a fiduciary duty existed but knowingly encouraged its breach. In the present action, no such evidence exists. As recited above, Appellants Barbara Gordon and Charles Gordon both testified that Jacqueline Busbee had no actual knowledge of any transfers

being made by George Burch at the time of the transfers. From the Appellants' own testimony the Court of Appeals should affirm.

Even more damning is the testimony of Appellants' two experts, Jim Hardin and John Freeman. Both experts were privy to all of the documents and information now before the Court of Appeals. After years of analysis in service of the Appellants, upon examining all of the evidence presented to them, both experts concluded that Jacqueline Busbee had no actual knowledge of any transfers being made by George Burch at the time of the transfers. (R. p. 637, line 21–p. 638, line 1; p. 844, lines 20–24).

Appellants attempt to skirt their own testimony and the testimony of their experts by relying upon a “standard of care for a lawyer with regard to aiding and abetting” that John Freeman testified to over objection of Jacqueline Busbee. (Appellants' Initial Brief, p. 27; R. p. 832, line 15–p. 834, line 2). Mr. Freeman would supplant South Carolina's “actual knowledge” standard, adopted in 1996 and affirmed as recently as 2008, with his own “reckless assistance” or “active assistance in the face of knowledge of impropriety” standard that better suits his views. (Appellants' Initial Brief, p. 27). Mr. Freeman should not have been allowed to testify as to the law, much less a standard that stands in direct contradiction to South Carolina Supreme Court precedent. However, even under the Freeman standard, Appellants cannot prevail.

Appellants hang their hats on the Wachovia certificate and the filing of an inventory and appraisal in the Estate of Clara Burch after George's death. Neither of these considerations refutes the Appellants' own testimony that Jacqueline Busbee had no actual knowledge of any improper transfers and is merely argument of counsel.

The Wachovia certificate involves a certificate of deposit originally in the name

of Clara Burch. (R. pp. 1752–1753; R. p. 735, line 17–p. 736, line 4). Wachovia Bank sent a fax to Jacqueline Busbee’s office April 13, 2001 regarding the certificate, including information regarding ownership of the account by Clara Burch and date of death balance. (R. pp. 1752–1753). When George Burch, as personal representative, filled out and signed several inventories and appraisements for the Estate of Clara Burch, he did not include the Wachovia account on the inventories. (R. pp. 1638–1657). Appellants argue that, despite the fact she had no actual knowledge of any transfers made by George, because Jacqueline Busbee’s office filed these inventories, the omission of the Wachovia account rises to the level of “sufficient evidence of active participation by Busbee.” (Appellants’ Initial Brief, p. 24).

In reality, had Jacqueline Busbee realized the Wachovia account was not included in the inventories, all that she would have known was that it was not included on the inventories. It is pure speculation that had she inquired about the omissions that she would have learned about any improper transfers. In fact, 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, line 24–p. 737, line 4). Had she inquired about the Wachovia certificate, the best information available to Jacqueline Busbee would have been 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 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, lines 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.

The evidence in the record regarding the Wachovia certificate is far from nefarious. Considering that Appellants and their experts agree that Jacqueline Busbee had no actual knowledge of the transfers of George Burch, the only reasonable inference that could be drawn from the evidence is that Jacqueline Busbee could have known no more about the Wachovia certificate than was originally testified to by Jeremy Hall, the bank's employee. Upon receipt of that information, Ms. Busbee's inquiry ends. In light of Mr. Hall's testimony, it is pure speculation to argue that the absence of the Wachovia certificate on the inventories transforms the omission from an honest mistake to "substantial assistance" in aiding and abetting a breach of fiduciary duty. 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). The trial court followed the standard.

The filing of the inventory and appraisalment after George's death is likewise a red herring. George Burch signed a third supplemental inventory and appraisalment in October 2002. (R. p. 1059, line 2-4; R. pp. 1458-1464). The document was filed in the probate court by Jacqueline Busbee's office on February 6, 2003, after George Burch's death on January 23. (Id.). Appellants contend that filing the document after George's death amounts to participation in George's wrongful acts. (Appellants' Initial Brief, p. 25). On the contrary, as explained by Respondent Busbee's expert, Cravens Ravenel, under cross-examination by Appellants' attorney, Ms. Busbee had no choice but to file the document:

Q: [To Mr. Cravens Ravenel] . . . Did you know that [the third supplemental inventory and appraisalment] was signed by George Burch before his death?

A: I did.

Q: And that it was filed by Mrs. Busbee February 6, 2003 after his death?

A: As she should have done. Otherwise, it would have been concealing a document that was – that should have been filed in the probate records. (R. p. 1059, lines 2-9).

The filing of the third supplemental inventory and appraisalment does not rise to the level of "knowing participation" in the breach of a fiduciary duty, particularly in light of the fact that Ms. Busbee had no choice but to file the document.

The Appellants put forth no evidence from which a jury could reasonably infer that Jacqueline Busbee had actual knowledge of any improper transfers or "knowingly participated" in any breach of fiduciary duty. The trial court correctly directed a verdict

in favor of Jacqueline Busbee, individually, on the cause of action for aiding and abetting a breach of fiduciary duty, and the Court of Appeals should affirm that order on this separate and independent ground.

II. The trial court did not err in directing a verdict in favor of Jacqueline F. Busbee, individually, on the cause of action for fraud and “fraud benefit” under S.C. Code Ann. § 62-1-106 because Appellants failed to present clear and convincing evidence of any false and material representations of fact made to Appellants by Jacqueline Busbee, individually; failed to present clear and convincing evidence of any material representations made to Appellants by Jacqueline Busbee, individually, that she knew to be false; failed to present clear and convincing evidence that Appellants relied to their detriment upon any representation made by Jacqueline Busbee, individually; failed to present clear and convincing evidence that Appellants sustained any damage proximately caused by any such representation of Jacqueline Busbee, individually; failed to present clear and convincing evidence of the probate court’s detrimental reliance on any representation of Jacqueline Busbee, individually; and failed to present clear and convincing evidence of any benefit by Jacqueline Busbee from any fraud.

Although somewhat unclear from their Complaint, Appellants’ cause of action for fraud against Jacqueline Busbee, individually, appears to be based upon both common law fraud and “fraud benefit” under S.C. Code Ann. § 62-1-106 (Supp. 2009). (R. p. 104, ¶ 39–p. 105, ¶ 44(d); and R. pp. 113–114, Fifth Cause of Action; Appellants’ Initial Brief, p. 28).

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)).

The failure to prove any element of fraud is fatal to the action. See id. “Furthermore,

'[f]raud cannot be presumed; it must be proved by clear, cogent, and convincing evidence.'" Robertson v. First Union Nat. Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002) (quoting Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 374, 404 S.E.2d 912, 917 (Ct. App. 1991)).

A. Appellants presented no clear and convincing evidence that Jacqueline Busbee made any false and material representations of fact to the Appellants.

Appellants cite numerous "facts" in their Initial Brief that they contend warrant the reversal of the trial court's directing a verdict on the cause of action for fraud. However, these recitations cannot negate one of the most major flaws in Appellants' argument: Jacqueline Busbee did not make any representations of fact to Appellants.

Charles Gordon is one of the two named Appellants. According to his own testimony, he is the single best source of information regarding Appellants' claims against Jacqueline Busbee:

Q: [To Mr. Charles Gordon] Is there any one other individual other than you for the [Appellants'] side of this case that knows more about the issues in this lawsuit than you do?

A: No.

Q: So for questions – for the critical questions or material questions related to this action, we properly present those question to you, sir?

A: Right. (R. p. 948, lines 12–19).

In his examination, Mr. Gordon admitted that Jacqueline Busbee made no verbal representations to the Appellants; to the contrary, Mr. Gordon stated that the entire case for fraud against Jacqueline Busbee involved filings in the probate court. (R. p. 965, lines 1–20; p. 966, lines 2–9; p. 966, line 20–p.967, line 4; p. 969, lines 4–25; p. 970, lines 17–24; p. 971, lines 7–11). Those filings included mostly inventory and

appraisements and deeds of distribution. (R. pp. 2543–2571; R. pp. 1458–1464; R. pp. 1559–1572; & R. pp. 1721–1739). However, as Appellants admitted, Jacqueline Busbee did not sign the forms or fill out the information. All of that information was provided by and attested to by George Burch, personal representative of the Estate of Clara Burch. (R. p. 962, lines 17–24). In fact, Appellant Charles Gordon admitted that he had no document filed with the Probate Court in which Jacqueline Busbee represented anything to anyone:

Q: [To Mr. Charles Gordon] Do you have any document that was filed with the Probate Court, any of the forms that are normally reported in probate estates that Jackie Busbee signed representing anything to anybody?

A: No.

Q: No?

A: I don't have anything representing, but when you have the accounting –

Q: Did she sign the accounting?

A: Well –

Q: Did she sign the accounting, Mr. Gordon? That's my question.

A: Well, the accounting she's responsible for. Kittle [sic] signed it, and the girl working with her signed it.

Q: Did Jackie Busbee sign the accounting that was filed with the court for Clara's estate?

A: No. (R. p. 961, line 12–p. 962, line 3).

Appellants presented no evidence that Jacqueline Busbee made any representations to the Appellants, much less clear and convincing evidence. To the contrary, Appellants freely admitted that Ms. Busbee made no verbal representations to them whatsoever. They rely, instead, on the materials filed in the probate court as “clear and convincing evidence” of a representation. The filings with the probate court are plain

and unambiguous and reveal that Jacqueline Busbee never signed any of the documents on which Appellants rely. Appellant Charles Gordon admitted that he had no document in which Jacqueline Busbee represented anything to anyone. Because Appellants failed to present any evidence, clear, convincing, or otherwise, that Jacqueline Busbee made any representations to the Appellants, the Court of Appeals, based on this separate and independent ground, should affirm the trial court's order directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for fraud.

B. Appellants failed to present clear and convincing evidence of any material representations made to Appellants by Jacqueline Busbee, individually, that she knew to be false.

Having skipped any mention in their Initial Brief of material representations of fact made by Jacqueline Busbee, Appellants instead argue that the "facts" recited in their Initial Brief give rise to "reasonable inferences" that Jacqueline Busbee knew about the transfers made by George Burch prior to Mr. Burch's death. See, e.g., Appellants' Initial Brief, p. 30 ("It gives rise, along with other facts, to a reasonable inference . . ."). If Jacqueline Busbee knew of transfers made by George Burch prior to his wife's death, the Appellants argue, then Jacqueline Busbee had to have known of the falsity of her representations to the Appellants – representations that Appellants admit were never made. As occurred with the representation element of fraud, Appellants' testimony negates their arguments that Jacqueline Busbee knew of the falsity of her nonexistent representations.

Appellant Charles Gordon testified under oath that he had no evidence that Jacqueline Busbee knew anything about transfers made by George Burch from his wife's accounts:

Q: [To Mr. Charles Gordon] Do you have any evidence at all, through a document or a witness, that Jackie Busbee knew anything about those transfers that George made from Clara's funds, either jointly or funds held in her separate name which occurred before her death?

A: No. But it would seem to me that she would have to for a full accounting. You would have to know something about those things.

Q: Well, you don't have any evidence to offer us here today that Jackie knew any of – about any of the transfers George made from Clara's separate funds either before or after Clara's death?

A: No. (R. p. 949, lines 7–19).

Further on in his testimony, Mr. Gordon again admits that he has no evidence of knowledge on the part of Jacqueline Busbee:

Q: [To Mr. Charles Gordon] And in the next paragraph, 24, you say – and, again, this is an allegation you've made under oath as a fact, Mr. Gordon – Defendant Busbee knew of the fraudulent transfers of Clara's Property to George.

Please tell me right now, sir, what evidence you have that Jackie Busbee knew of any transfers of Clara's assets.

I don't want you to say that it's your logic and your common sense that tells you that's what happened. That's not what I am asking for. Do you have proof, evidence?

A: I have no proof. (R. p. 960, lines 9–19).

Appellant Barbara Gordon likewise testified that Jacqueline Busbee did not know of any of the transfers made by George Burch:

Q: [To Mrs. Barbara Gordon] Okay. And you also agree that there is no evidence in the case that when George is making these transfers Mrs. Busbee knew anything about that?

A: During the time, no. (R. p. 404, lines 12–15).

If Jacqueline Busbee did not know about any transfers made by George Burch, and the only representations on which Appellants' base their claim are the representations made in the probate court filings for Clara's estate, then the only "reasonable inference" that can be made is that Jacqueline Busbee did not make any material representations of

fact to the Appellants that she knew to be false. The clear and convincing evidence presented at trial from the Appellants' testimony supports the trial judge's ruling directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for fraud. On this separate and independent ground, the Court of Appeals should affirm.

C. Appellants failed to present clear and convincing evidence that Appellants relied to their detriment upon any representation made by Jacqueline Busbee, individually.

Very much like their failure to address the first element of a cause of action for fraud – a representation – Appellants likewise fail to discuss the seventh element – reliance. In fact, a careful review of Appellants' Initial Brief reveals a complete failure on their part to even mention the word "reliance" or any derivative of the word in the context of their fraud cause of action. Appellants do not confront the element of "reliance" because no evidence in the record shows that Appellants relied upon any representation of Jacqueline Busbee. To the contrary, it is without question that the Appellants flatly refused to rely upon any filings in the probate court and, instead, brought suit against the Respondents before the Estate of Clara Burch or the Estate of George Burch was closed.

Because Appellants failed to present any clear and convincing evidence of reliance upon any representations of Jacqueline Busbee, the Court of Appeals should affirm the trial court's order directing a verdict in favor of Jacqueline Busbee on the cause of action for fraud on this separate and independent ground.

D. Appellants failed to present clear and convincing evidence that Appellants sustained any damage proximately caused by any representation of Jacqueline Busbee, individually.

Appellants make countless accusations concerning improper transfers of money, incorrect filings in the probate court, and malevolent motivations on the part of all

Respondents. Lost in the shuffle is the fact that no action or inaction, representation or misrepresentation, real or imagined, of Jacqueline Busbee resulted in any damage to the Appellants.

The money involved in the present action, including the damages claimed by Appellants, can be broken down into three groups: Group I, Group II, and Group III. Group I money consists of the money that was transferred by George Burch up and until the time of Clara Burch's death. (R. p. 398, lines 2-6; p. 399, lines 17-24). Group II money consists of the money that George Burch reported in the court filings for the Estate of Clara Burch. (R. p. 400, lines 3-10). Group III money consists of the money that was in George Burch's name when he died. (R. p. 401, lines 19-22).

It is undisputed that the Appellants, the heirs, and the beneficiaries of Clara Burch received all of Group II money. (R. p. 400, lines 3-10; p. 400, line 24-p. 401, line 18). In fact, Appellant Barbara Gordon agreed under oath that no Group II money was lost and that it all went where it should have. (R. p. 403, lines 13-21). It is also undisputed that Group III money has *not* been distributed, but is being held in trust until a final determination in the present action is made. (R. p. 402, lines 7-24). Consequently, all of Appellants' alleged losses involve Group I money, which, in reality, are being held as part of the Group III funds. (R. p. 402, line 25-p. 403, line 4).

As testified to by Appellant Charles Gordon, Appellants' cause of action for fraud is based entirely on the filings in the probate court for the Estate of Clara Burch. (R. p. 965, lines 1-20; p. 966, lines 2-9; p. 966, line 20-p. 967, line 4; p. 969, lines 4-25; p. 970, lines 17-24; p. 971, lines 7-11). Those filings necessarily involve Group II money – the money that George Burch reported in the inventories for the Estate of Clara Burch.

If, as Barbara Gordon testified, all Group II money was correctly distributed to the heirs and beneficiaries of Clara Burch's estate, then the Appellants have lost nothing as a result of any representations made in the court filings. Consequently, Appellants have failed to prove any damage proximately resulting from any reliance upon representations made in the probate court. The trial court correctly granted Jacqueline Busbee's motion for directed verdict on the cause of action for fraud, and the Court of Appeals should affirm on this separate and independent ground.

E. Appellants' failed to present clear and convincing evidence of the probate court's detrimental reliance on any representation of Jacqueline Busbee, individually.

Appellants' cause of action for fraud includes an action for "fraud benefit" under section 62-1-106 of the South Carolina Probate Code. Derived almost verbatim from section 1-106 of the Uniform Probate Code, section 62-1-106 reads, in pertinent part:

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.

S.C. Code Ann. § 62-1-106 (Supp. 2009). Akin to relief from final judgment in instances of extrinsic fraud, section 62-1-106 is intended to provide a remedy outside the Probate Code to those injured by a fraud on the probate court where "the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court." Ebeling v. Voltz, 454 So.2d 783 (Fla. Dist. Ct. App. 1984) (quoting DeWitt v. Duce, 408 So.2d 216, 219 (Fla. 1981) and stating that "an attack to probate is not impermissible where fraud or other circumstances prevented contestants from having their day in court"). The commentators to section 1-106 of the Uniform Probate Code

more thoroughly explain the principles underlying the section and the situations the section is intended to address:

This [section 1-106] is an overriding provision that provides an exception to the procedures and limitations provided in the [Probate] Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period . . . has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Unif. Probate Code § 1-106, cmt.

From a plain reading of section 62-1-106, a claim for "fraud benefit" arises in three situations: 1) whenever fraud has been perpetrated in connection with any proceeding under the Probate Code; 2) whenever fraud has been perpetrated in any statement filed under the Probate Code; and 3) if fraud is used to avoid or circumvent the provisions or purposes of the Probate Code. In any of those situations, and before the remedies of section 62-1-106 can apply, one must first prove a cause of action for fraud.

Unlike common law fraud, in which a false and material representation must have been made to the plaintiff, the recipient of the representation under section 62-1-106 of the South Carolina Probate Code is the probate court itself. See Eoff v. Forrest, 789 P.2d 1262, 1267, n. 2 (N.M. 1990).

In Eoff, which is cited by Appellants' in support of their arguments at page 34 of their Initial Brief, the Supreme Court of New Mexico interpreted a probate code section

virtually identical to section 62-1-106 of the South Carolina Code. See N.M. State. Ann. § 45-1-106(A) (West 1989). According to the court, "the 'fraud' contemplated by Section 45-1-106(A) is ordinary, common-law fraud as distinct from some other, less demanding species of fraud, such as . . . securities fraud The 'Probate Code' fraud involved here comes closer to 'fraud on the court,' which, if anything, is even more exacting than common-law fraud." Eoff, 789 P.2d at 1266 (citations omitted). Thus, one of the questions faced by the Supreme Court of New Mexico in the appeal from an order granting summary judgment was whether a genuine issue of material fact existed that a fraud was perpetrated on the probate court.

In rendering its decision, the New Mexico Supreme Court relied heavily on an affidavit submitted by the probate court judge who granted the informal probate of the will in question. According to the court, "[the judge's] affidavit was sufficient, at least for purposes of the motion, to establish the fourth element of the heirs' cause of action: reliance by the 'other party' to his or her detriment." Eoff, 789 P.2d at 1267.

In the present action, there is absolutely no evidence in the record that the probate court relied upon any representations to its detriment. Unlike Eoff, in which an affidavit from the probate court was entered into evidence, Appellants here offered no evidence of the court's detrimental reliance. In other words, nowhere in the record does it indicate that the probate court changed its position to its detriment as a result of any representations made to it by Jacqueline Busbee, individually. In fact, and as discussed earlier, the probate court had not yet acted to close either the Estate of George Burch or the Estate of Clara Burch before Appellants filed their lawsuit against the Respondents. Once filed, the lawsuit effectively stayed the closing of the estates of George and Clara

Burch pending the outcome of the action. Ironically, Appellants' lawsuit prevented any possibility of detrimental reliance as contemplated in section 62-1-106.

F. Appellants failed to present clear and convincing evidence of any benefit by Jacqueline Busbee from any fraud.

Even if Appellants had offered evidence of the probate court's detrimental reliance, their remedy against Jacqueline Busbee would be limited to "the extent of any benefit received" by Ms. Busbee. Appellants submitted no evidence that Jacqueline Busbee benefitted from any reliance.

Appellant Barbara Gordon admitted under cross-examination that Jacqueline Busbee received no money from the Estate of Clara Burch:

Q: [To Barbara Gordon] Now, let's get some things out of the way, Mrs. Gordon. There is no evidence – you would agree that there is no evidence in this case that Mrs. Busbee got any of Clara's money?

A: No.

Q: You agree with that?

A: That's correct. (R. p. 404, lines 5–11).

* * *

Q: Okay. And you would agree also that there is no evidence that George Burch made any gifts to Jackie Busbee?

A: No. (R. p. 404, lines 16–19).

If Jacqueline Busbee has received no benefit whatsoever to date, as Barbara Gordon admitted, then the only benefit Appellants could argue – and have argued – that Jacqueline Busbee could possibly receive as a result of any alleged fraud on the probate court is an increased commission as the personal representative of the Estate of George Burch. In other words, if all Group III money remains in the Estate of George Burch for distribution to his heirs, and none of that money is ordered returned to the Estate of Clara

Burch, Jacqueline Busbee's commission could potentially be greater. This exposes the fallacy in Appellants' argument. If all Group III money remains in the Estate of George Burch, the following must occur: a final order in the present action determining that said funds should remain assets of the Estate of George Burch. Necessarily, that order must exonerate the Respondents from all alleged wrongdoing, including fraud. If the court decides there has been no fraud committed, then any benefits received by Jacqueline Busbee would be a result of something other than fraud. Appellants' cause of action for section 62-1-106 "fraud benefit" would, therefore, fail.

On the other hand, if a final order concludes that fraud has been committed in the administration of the Estate of Clara Burch by one or more of the Respondents, then Group III money will be returned to Clara's Estate from George's Estate. As a result, Jacqueline Busbee's commission as personal representative will be decreased or eliminated, and, therefore, Jacqueline Busbee will not have benefitted as a result of any fraud on the probate court. In that scenario, Appellants' cause of action for section 62-1-106 "fraud benefit" will likewise fail. In either event, the inability to prove a benefit to Jacqueline Busbee as a result of fraud on the probate court precludes recovery by Appellants. The trial court correctly directed a verdict in favor of Jacqueline Busbee on the cause of action for "fraud benefit," and the Court of Appeals should affirm on the separate and independent grounds discussed.

III. The trial court did not err in directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for conversion because the evidence, including Appellants' own testimony, established that Jacqueline Busbee never received any money belonging to the Estate of Clara Burch and that she had no knowledge of any transfers made from any accounts or certificates of Clara Burch.

“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.” Hawkins v. City of Greenville, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) (citing Crane v. Citicorp Nat’l Servs., Inc., 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (superseded by statute on other grounds)). Conversion is a wrongful act that emanates by either a wrongful taking or wrongful detention. See Kirby v. Horne Motor Co., 295 S.C. 7, 366 S.E.2d 259 (Ct. App. 1988). “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) (citing Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975); Castell v. Stephenson Fin. Co., 244 S.C. 45, 50-51, 135 S.E.2d 311, 313 (1964)). A plaintiff may prevail upon a claim for conversion by showing the unauthorized detention of property after demand. See Mackela v. Bentley, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005). The plaintiff must show either title or right to possession of the property at the time of conversion. See Oxford Fin. Cos. v. Burgess, 303 S.C. 534, 402 S.E.2d 480 (1991).

Appellants presented no evidence at trial that Jacqueline Busbee converted any real or personal property belonging to the Estate of Clara Burch. In fact, both Appellants admit that Jacqueline Busbee never received any money belonging to Clara Burch:

Q: [To Barbara Gordon] Now, let's get some things out of the way, Mrs. Gordon. There is no evidence – you would agree that there is no evidence in this case that Mrs. Busbee got any of Clara's money?

A: No.

Q: You agree with that?

A: That's correct. (R. p. 404, lines 5–11).

Appellant Charles Gordon likewise confirmed his wife's testimony:

Q: [To Charles Gordon] And you don't contend in this lawsuit, do you, Mr. Gordon, that Jackie Busbee received personally any of the money that was transferred by George from these accounts or these C.D.'s?

A: I have no way of knowing.

Q: But you don't contend that? You have no evidence of that?

A: No evidence.

Q: And you really don't believe that, do you?

A: You know, I don't know, but I have no evidence of it. (R. p. 949, line 20–p. 950, line 4).

Even Appellants' own expert, John Freeman, testified that Jacqueline Busbee did not personally receive any of the funds transferred by George Burch:

Q: [To Mr. John Freeman] Other than potential legal fees there is no evidence that Jackie received any money which George allegedly transferred from Clara's accounts prior to Clara's death?

A: Yea, I think that's true. (R. p. 838, lines 8–11).

Because Jacqueline Busbee, individually, did not receive any funds belonging to Clara Burch, for her to have converted any funds of Clara Burch is a legal impossibility. Consequently, the trial court correctly directed a verdict in favor of Jacqueline Busbee, individually, on the cause of action for conversion.

Despite their own testimony that Jacqueline Busbee, individually, never received any money belonging to Clara Burch, Appellants argue that Jacqueline Busbee should

still be liable for conversion because she a) filed inventories and appraisements in the Estate of Clara Burch that did not include a Wachovia certificate; b) exercised the right of ownership over the Wachovia certificate funds as personal representative of George Burch's estate; and c) stands to benefit from any conversion through the commission she could receive on the probate assets in George's estate. For the following reasons, Appellants' arguments are without merit.

First, the fact that a Wachovia certificate was not listed in the inventories and appraisements filed in the probate court for the Estate of Clara Burch does not give rise to a cause of action for conversion. Jacqueline Busbee did not provide the information contained in the inventories and appraisements, nor did she sign the documents attesting to their accuracy. (R. pp. 1458–1464; R. pp. 1559–1572; R. pp. 1721–1739; R. p. 965, lines 10–14; R. p. 983, lines 6–12; R. p. 984, lines 17–22; R. p. 985, lines 6–10). Further, Appellants admit that Jacqueline Busbee had no knowledge of improper transfers on the part of George Burch. (R. p. 949, lines 7–19; R. p. 960, lines 9–19; R. p. 404, lines 12–15). Without knowledge of the transfers or possession of the money Jacqueline Busbee could not have had the intent required for conversion. Moreover, a failure to report the Wachovia certificate on the inventories and appraisements does not amount to a “second” conversion. Appellants' own probate expert, Mr. James Hardin, agrees that there can be no “second” conversion:

Q: [To Mr. James Hardin] Okay. Your position in this case – it's true, is it not, that the Plaintiff's [sic] position and what you testified to here and your position on the stand is that the conversions – that George stold [sic] this money. True?

A: Yes.

Q: And that the conversion was complete when he made the transfers according to you?

A: Yes.

Q: That you can't convert money twice?

A: That's right.

Q: I mean, once it's converted, it is converted; correct?

A: Yes. (R. p.638, line 25–p. 639, line 12).

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 Burch², not Jacqueline Busbee. Mr. Jeremy Hall, a financial specialist from Wachovia Bank, testified at trial regarding the Wachovia certificate. (R. p. 735, lines 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, line 16–p. 738, line 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.

Second, Appellants assert that a "significant part of the assets of Clara Burch which were converted by George are listed on the Inventory of the Estate of George Burch." (Appellants' Initial Brief, p. 35). Because Jacqueline Busbee, as personal representative of the Estate of George Burch, has not returned the money to the Estate of Clara Burch, Appellants' argue that Jacqueline Busbee has converted money belonging to Clara Burch. As Appellants' own expert, James Hardin, testified to above, any such monies allegedly converted by George Burch cannot be converted twice. In addition, the

² The jury specifically rejected the Appellants' argument that George Burch converted his wife's funds. (R. p. 1252, line 22–p. 1253, line 6).

law of conversion in South Carolina provides that a plaintiff may prevail upon a claim for conversion by showing the unauthorized detention of property after demand. See Mackela v. Bentley, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005). It is undisputed that Appellants' first demand to Jacqueline Busbee occurred through the filing of their lawsuit. At that time, Jacqueline Busbee was the personal representative of the Estate of George Burch. In response to the demand contained in the lawsuit, Appellants admit that no assets of either George Burch's or Clara Burch's estates were lost:

Q: [To Appellant Barbara Gordon] All right. Now, between the date that George Burch died January 18, 2003 and the date that your husband was appointed successor personal representative of Clara's Estate on February 27, 2003, roughly five weeks, do you have any evidence that any assets that belonged to Clara's Estate turned up missing? Any money? Any furniture? Any cars? Any records? Anything that you can tell me that existed on January 18 that did not exist on February 27?

A: You mean whether anything new was missing?

Q: Yes, ma'am. I want you to take a snapshot of what you know was in Clara's Estate on January 18 and tell me what on that list was not around on February 27 – five weeks later?

A: I don't know of anything.

Q: Don't know of anything. You don't know of any piece of property or asset that turned up missing during that interim time period; correct?

A: I can't think of it offhand. (R. p. 409, line 21–p. 410, line 13).

* * *

Q: [To Appellant Barbara Gordon] All right. Thank you. Now. Between the date that Jackie Busbee was appointed as personal representative of George's Estate – and that was January 28 of '03 – until today, do you have any evidence that any assets in George's Estate have been lost, misappropriated, wasted, anything of that nature?

A: I don't know of anything.

Q: So, as best you know today Jackie Busbee has taken care of the assets in George's Estate that the law placed within her care?

A: I hope so.

Q: All right. You don't have any evidence to the contrary?

A: I don't have any evidence to the contrary. (R. p. 415, line 14–p. 416, line 2).

Appellants are silent on the well-settled principle that in order to prevail in a cause of action for conversion they must first show they have either title or right to possession of the property at the time of conversion. See Oxford Fin. Cos. v. Burgess, 303 S.C. 534, 402 S.E.2d 480 (1991). As there exists a legal contest over who has title or right to possession of the property in controversy, Ms. Busbee, as personal representative of George Burch's Estate, has rightly held the money in interest bearing accounts, rather than disbursing it, pending a final decision as to the rightful owner of the money. Should it ultimately be decided by the courts that the money should go to Clara Burch's heirs, then Ms. Busbee shall act accordingly. Should the decision be in favor of George Burch's heirs, Ms. Busbee will likewise follow the Court's directive. In either scenario, Ms. Busbee is not exercising ownership over the funds. She has, as personal representative, remained neutral in the controversy between Clara's beneficiaries and the Burch children and has not converted anything. The trial court correctly granted a directed verdict to Jacqueline Busbee on the cause of action for conversion.

Appellants also argue that because Jacqueline Busbee stands to benefit from any conversions by George Burch through a commission she could receive on the probate assets in George Burch's estate, the cause of action for conversion against her should not have been dismissed. See Appellants Initial Brief, p. 36. Appellants cite no law to support their position that a personal representative can be held liable for conversion because she might receive a commission based in part on allegedly converted funds. In

addition, Appellants' argument is based upon a circumstance that has not yet occurred. Jacqueline Busbee has not, up to and including the date of the filing of this Brief, received any commission from her role as personal representative of the Estate of George Burch because the Estate of George Burch has not yet been closed. Any commission she does receive, which must be court-approved, will be based upon the assets distributed from George Burch's estate. The value of those assets will be determined by the courts when a final decision is made regarding the merits of Appellants' claims. If the courts rule in favor of George Burch, then George Burch will have been exonerated, no conversion will have taken place, and Jacqueline Busbee's commission will not be based upon converted funds. On the other hand, if the courts rule in favor of Appellants, any money determined to have been converted by George Burch will be returned to the Estate of Clara Burch. In such a scenario, Jacqueline Busbee's commission, as a matter of law, will not be based upon any converted funds.

All evidence presented to the trial court, not the least of which came directly from the Appellants themselves, firmly establishes that Jacqueline Busbee, individually, received no money from the Estate of Clara Burch and had no knowledge of any money transferred by George Burch from accounts and certificates of Clara Burch. Without knowledge and possession, there can be no conversion. The trial court correctly directed a verdict in favor of Jacqueline Busbee, individually, on the cause of action for conversion. The Court of Appeals should affirm that decision.

IV. The trial court did not err in directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for civil conspiracy because the Appellants failed to offer any evidence of a joint assent of the minds of Jacqueline Busbee and another party for the prosecution of an unlawful enterprise for the purpose of injuring the Appellants; failed to offer any evidence of “special damages”; and failed to demonstrate any independent duties owed to them and breached by Jacqueline Busbee, individually.

The tort of civil conspiracy in South Carolina contains three elements: “(1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages.” City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 546, 677 S.E.2d 574, 579 (S.C. 2009) (citing Pye v. Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006) and Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000)). “It is essential that plaintiff prove all of these elements in order to recover.” Pye, 369 S.C. at 567, 633 S.E.2d at 511 (citing Lyon v. Sinclair Refining Co.; 189 S.C. 136, 200 S.E. 78 (1938)).

“[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987). Unlike criminal conspiracy, in which the agreement is the gravamen of the offense, the gravamen of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design. See Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). “The ‘essential consideration’ in civil conspiracy ‘is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff.’” Pye, 369 S.C. at 567, 633 S.E.2d at 511 (quoting Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986)). Because the essence of a civil conspiracy is the

damage resulting to the plaintiff, “the damages alleged must go beyond the damages alleged in other causes of action.” Pye v. Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (citing Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989)).

In a civil conspiracy cause of action involving an attorney, plaintiffs have the additional burden of proving that the attorney breached some independent duty to a third person or acted in his own personal interest outside the scope of his representation of the client. See Pye, 633 S.E.2d at 510 (citing Stiles v. Onorato, 318 S.C. 297, 300, 457, S.E.2d 601, 602 (1995)). See also Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986) (stating that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client).

A. Appellants presented no evidence of a joint assent of the minds of Jacqueline Busbee and another party for the prosecution of an unlawful enterprise for the purpose of injuring the Appellants.

There are two critical periods of time involved with Appellants’ allegations of civil conspiracy: the time period before and up to the day of George Burch’s death and the time period following George Burch’s death.

For the period prior to George Burch’s death, Appellants again attempt to use the Wachovia certificate and the filings of the inventories and appraisements to further their cause, arguing that the Wachovia certificate and the filings provide evidence from which the jury could have reasonably inferred a joint assent of the minds of Jacqueline Busbee and George Burch. (Appellants’ Initial Brief, p. 37). Appellants’ argument problematically requires the Court of Appeals to completely dismiss Appellants’ own testimony. Specifically, both Appellants, Charles and Barbara Gordon, testified that Jacqueline Busbee had no knowledge of George Burch’s transfers prior to George’s

death. (R. p. 949, lines 7–19; R. p. 960, lines 9–19; & R. p. 404, lines 12–15). Even Appellants’ own ethics expert, John Freeman, agreed that Jacqueline Busbee had no actual knowledge of improper transfers. (R. p. 844, lines 20–24).

Civil conspiracy requires evidence of the joint assent of the minds of two or more parties to the prosecution of an unlawful enterprise for the purpose of injuring the plaintiff. As established through Appellants’ own words, Jacqueline Busbee did not know of any unlawful enterprise or of any attempt to injure the Appellants. If she did not know that any unlawful enterprise to injure the Appellants was taking place, it is impossible that she could have jointly assented to that unknown enterprise with George Burch. As to all actions prior to the death of George Burch, the trial court correctly directed a verdict in favor of Jacqueline Busbee on the cause of action for civil conspiracy. The Court of Appeals should affirm that ruling.

For the period of time beginning at the death of George Burch, Appellants contend that Jacqueline Busbee became the “interim fiduciary”³ of the Estate of Clara

³ Appellants’ rely upon section 62-3-609 of the South Carolina Probate Code for their assertion that Jacqueline Busbee became the “interim fiduciary” or “statutory fiduciary” of the Estate of Clara Burch. Appellants cite no legal authority in support of their interpretation of the statute. Section 62-3-609 provides, in pertinent part: “The death of a personal representative . . . terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased . . . , if any, has the duty to protect the estate possessed and being administered by his decedent . . . at the time his appointment terminates, has the power to perform acts necessary for protection, and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.”

A plain reading of the statute reveals that no fiduciary relationship is created. Rather, the personal representative of the decedent becomes an interim caretaker of the estate being administered by the decedent with duties to protect the estate and to account for and deliver the estate assets to the successor personal representative.

George Burch died on January 18, 2003. (R. p. 2577). On January 28, 2003, Jacqueline Busbee was appointed Personal Representative of the Estate of George Burch. (R. pp. 1449–1453). Thirty (30) days later, on February 27, 2003, Appellant Charles Gordon was appointed successor personal representative of Clara’s estate. (R. p. 988, lines 10–15). When asked directly whether any of the assets in Clara Burch’s estate – Group II money – were lost or turned up missing between the date of George’s death and the appointment of Charles Gordon, Appellant Barbara Gordon candidly admitted, “I don’t know of

Burch, failed to “marshal and account for Clara’s assets” in that capacity, but instead “claim[ed] them as George’s assets to the benefit of Laurie and Dennis [Burch].” (Appellants’ Initial Brief, p. 37). In other words, Appellants contend that the failure of Jacqueline Busbee to take the assets of George’s estate that make up Appellants’ claims and to turn them over to Clara’s estate somehow constitutes evidence from which a jury could reasonably infer a conspiracy. What Appellants fail to mention in the appeal is that Jacqueline Busbee’s actions were mandated by and consistent with South Carolina law. By following the requirements placed upon her by the South Carolina Probate Code, a civil conspiracy is a legal impossibility.

As the duly appointed personal representative of George’s estate, section 62-3-709 of the Probate Code required Jacqueline Busbee to take possession or control of George’s property. In the event a dispute arises regarding the title to the property in the estate, the Probate Code provides that a personal representative “may maintain an action to recover possession of property or to determine the title thereto.” S.C. Code Ann. § 62-3-709 (Supp. 2009). In the present action, the Appellants filed suit before Jacqueline Busbee, as personal representative, could take any steps to investigate and act. The original inventory and appraisal for George’s estate was not filed until after the present action was commenced. (R. p. 410, line 23–p. 412, line 8).

As was the case in the time period preceding George Burch’s death, Appellants presented no evidence of any joint assent of the minds of Jacqueline Busbee and anyone

anything.” (R. p. 409, line 21–p. 410, line 13). With respect to the assets in George Burch’s estate – Group III money – Appellant Barbara Gordon was asked if she had any evidence that, between the time of George’s death and the time of trial of the present action in October 2007, any assets in George’s estate had been “lost, misappropriated, wasted, anything of that nature?” Her answer: “I don’t know of anything.” (R. p. 415, lines 14–20). By Appellant’s testimony, Jacqueline Busbee fulfilled her obligations as interim caretaker under section 62-3-109 of the Probate Code.

else for the prosecution of an unlawful activity for the purpose of injuring the Appellants. The evidence presented by Appellants was simply that Jacqueline Busbee protected the property and assets of the Estate of Clara Burch up and until the time Charles Gordon was appointed successor personal representative. Appellants likewise admit that Ms. Busbee protected the property and assets of the Estate of George Burch, including the assets to which Appellants direct their claims. The trial court correctly directed a verdict in favor of Jacqueline Busbee, individually, on the cause of action for civil conspiracy, which should be affirmed by the Court of Appeals on this separate and independent ground.

B. Appellants presented no evidence of “special damages” as a direct result of any conspiracy.

The gravamen of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design. See Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). Because the essence of a civil conspiracy is the damage resulting to the plaintiff, “the damages alleged must go beyond the damages alleged in other causes of action.” Pye v. Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (citing Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989)).

The Court need look no further than Appellants’ summary of alleged damages to determine that Appellants set forth no evidence of “special damages” as a result of a civil conspiracy. In order to prove damages, Appellants retained the expert services of an accountant, Agnes Asman. Ms. Asman was asked by the Appellants to determine what assets belonging to Clara Burch were transferred out of her name, the time of the transfer, and the amount. She was then asked to calculate the loss of income that resulted from the assets being transferred. (R. p. 746, line 18–p. 747, line 16). Ms. Asman’s damages

calculations are summarized in Plaintiffs' Trial Exhibit 11A. (R. p. 1359).

Other than Exhibit 11A, Appellants' offered no evidence of any additional damages during the trial. Thus, the damages represented in Exhibit 11A constitute Appellants' damages for all causes of action asserted in their Amended Complaint.

In reviewing the Amended Complaint, it becomes clear that Appellants' pleadings mirror their trial testimony – no specific special damages are asserted. The cause of action for civil conspiracy appears on page 18 of the Amended Complaint. In paragraph 78, Appellants assert that “Plaintiff [Appellants] has been caused to suffer special damages as set forth above.” (R. p. 114). In the preceding paragraph, Appellants realleged all prior allegations in the Amended Complaint, including all prior allegations concerning damages. (R. p. 114, ¶ 77). A careful review of the Amended Complaint reveals four separate paragraphs that arguably allege damages incurred by the Appellants. (R. pp. 100–101, ¶ 21; R. p. 101–102, ¶ 25; R. p. 102, ¶ 29; and R. p. 103, ¶ 32). These paragraphs are incorporated into all the legal causes of action asserted by the Appellants, including civil conspiracy, with no substantive differences in the various causes of action noted. (Compare R. p. 112, ¶¶ 58, 62 & 64; R. p. 113, ¶ 71; R. p. 114, ¶¶ 73, 78 & 79; and R. pp. 115 - 116, ¶¶ 83 & 87). With no substantive differences, Appellants are seeking the same damages in their conspiracy cause of action as they seek in all other causes of action. Even their prayer for relief fails to distinguish any “special damages” separate and distinct from the “actual and punitive damages” sought. (R. p. 117). Because South Carolina law makes it clear that in order to recover for civil conspiracy “the damages alleged must go beyond the damages alleged in other causes of action,” Pye, 633 S.E.2d at 511, the Court properly granted Jacqueline Busbee’s motion for

directed verdict, and that order should not be reversed on appeal based on this separate and independent ground.

C. Appellants failed to demonstrate any independent duties owed to them and breached by Jacqueline Busbee, individually.

At all times during which Jacqueline Busbee served as attorney to George Burch in his capacity as personal representative of the Estate of Clara Burch, Ms. Busbee's duties were governed by the South Carolina Probate Code. Section 62-1-109 of the Probate Code provides:

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

S.C. Code Ann. § 62-1-109 (Supp. 2009) (emphasis added).

Although Appellants allege Jacqueline Busbee acted as attorney for the Estate of Clara Burch, Appellants do not allege that they or any beneficiary of the Estate of Clara Burch entered into a written employment agreement with Ms. Busbee. In fact, Appellants admit that no written employment agreement has ever existed:

Q: [To Appellant Barbara Gordon] You nor your husband [Appellant Charles Gordon] have now or have ever had a written employment agreement with Mrs. Busbee; True?

A: Not a written agreement, no. (R. p. 395, lines 22-24).

Appellants' own expert, John Freeman, confirmed the lack of a written employment agreement with Ms. Busbee:

Q: [To Mr. John Freeman] Isn't it true that there is no written employment agreement between Jackie Busbee and the Plaintiffs [Appellants] in this

case?

A: I think there is no written employment agreement other than her representation in some correspondence that she represented the estate of which they are beneficiaries.

Q: But there is no written employment agreement?

A: No written formal retainer agreement naming the Plaintiffs [Appellants] as her clients. (R. p. 838, line 17–p. 839, line 1).

Under the plain reading of section 62-1-109, there are no “duties” owed by Jacqueline Busbee to “other persons interested in the estate” of Clara Burch.

The South Carolina Supreme Court has confirmed the plain reading of section 62-1-109 that Jacqueline Busbee owed no duties to the Appellants. In Douglass ex rel Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001), Christopher Boyce was killed in an automobile accident. His parents, after being appointed as personal representatives of Christopher’s estate, filed a wrongful death action, which they eventually settled. According to the documents filed in the probate court, Christopher’s parents were the sole beneficiaries of the wrongful death action.

After the wrongful death action was settled, Petitioner Douglas, a minor under the age of fourteen (14), brought an action against Christopher’s parents alleging they breached their fiduciary duties to him by failing to include him as a statutory beneficiary. Douglas claimed to be the biological son of Christopher.

Douglas eventually amended his complaint to assert, *inter alia*, causes of action against the attorneys who represented the personal representatives of Christopher’s estate in the wrongful death action. Douglas alleged that the attorneys *knew* that Douglas was the biological son of Christopher and, nonetheless, failed to list him as an heir of Christopher, depriving Douglas of his inheritance and wrongful death proceeds.

The trial court dismissed the claims against the attorneys pursuant to Gaar v. North Myrtle Beach Realty, Inc., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986), and Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995), holding that the attorneys were “immune from liability to third parties for injuries allegedly arising from the performance of their professional duties” Douglas, 344 S.C. at 9, 542 S.E.2d at 717. The Court of Appeals affirmed.

The Supreme Court affirmed both the trial court and the Court of Appeals in dismissing Douglas’ claims, finding that the attorneys for the personal representatives owed Douglas no duty as a matter of law. According to the Supreme Court:

As noted by both the trial judge and the Court of Appeals, an attorney is immune from liability to third persons arising from the attorney’s professional activities on behalf and with the knowledge of the client, absent an *independent* duty to the third party. Accordingly, in this case, the question is whether an attorney representing the personal representative in a wrongful death action has an independent duty to the statutory beneficiaries.

Douglas, 344 S.C. at 10, 542 S.E.2d at 717 (citing Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)) (emphasis in original). The Supreme Court answered the question in the negative. Because section 62-1-109 of the Probate Code expressly negates any duty to persons interested in “other fiduciary property,” which includes the proceeds of a wrongful death claim, the Supreme Court held that “under § 62-1-109 the Court of Appeals properly affirmed the dismissal of the causes of action against [the attorneys] because they owed [Douglas] no duty in connection with their representation of the . . . personal representatives of Christopher’s estate.” Douglas, 344 S.C. at 11, 542 S.E.2d at 718. The Supreme Court also noted that, as in the present action, Douglas had not alleged the attorneys were acting in their own personal interests, which is “another exception to the immunity rule.” See Douglas, 344 S.C. at 10, 542 S.E.2d at 717, n.5

(citations omitted).

Appellants argue the results of section 62-1-109 and the above-cited case law are altered in the present action by the fact that from time to time, Jacqueline Busbee would issue from her office letters or probate forms that indicated she was attorney for “the Estate of Clara Burch,” and at other times she would sign as attorney for “the personal representative.” Appellants’ argument fails for at least three reasons.

First, section 62-1-109 of the Probate Code disposes of Appellants’ argument because no written employment agreement exists between Ms. Busbee and any of the Burch heirs, including the Appellants. Absent such a written employment agreement, the statute expressly disclaims any duty in favor of those who would claim it, including the Appellants in this case.

Second, the Burch heirs are not “the Estate of Clara Burch.” Ms. Busbee never, even by accident, represented to anyone that she represented any of the Burch heirs. To the contrary, Ms. Busbee suggested to the Burch heirs that they should retain their own attorney to represent their interests. (R. p. 996, lines 11–17).

Third, no duty can be owed to the “estate” because an estate is not a legal entity under South Carolina law. The South Carolina Probate Code defines “estate” as “[t]he property of the decedent, trust, or other person whose affairs are subject to this code as originally constituted and as it exists from time to time during administration.” S.C. Code Ann. § 62-1-201(11) (Supp. 2009). In addition, “[e]states are not natural or artificial persons, and they lack legal capacity to sue or be sued, and it is well settled that all actions that survive a decedent, must be brought by or against the personal representative.” 31 Am. Jur. 2d Executors and Administrators § 1118. Further, the term

“estate,” when used in probate proceedings and statutes, is a comprehensive word describing, in the most general terms, the assets of the deceased. 31 Am. Jur. 2d Executors and Administrators § 4. Strictly speaking, an estate is not a live or corporate person but is merely a collection of the decedent’s assets to which no duty could be owed.

Finally, although Appellants’ probate law expert, James Hardin, through tortured reasoning testified that an attorney could have a duty to a decedent’s estate separate from the duty to the personal representative, (R. p. 558, line 3–p. 559, line 19), he also admitted that his file documents, obtained by subpoena, contained the following handwritten entry from his April 26, 2006 conversation with Appellants’ counsel:

Busbee’s duty both as fiduciary and lawyer for fiduciary
meaningless without a written K

(R. p. 2572, lines 1–4). Hardin acknowledges that “K” means “contract” such that the entry should read, “meaningless without a written contract,” that this reference concerned S.C. Code Ann. § 62-1-109, and that either he or Appellants’ counsel voiced this observation during their conference. (R. p. 614, line 25–p. 617, line 8).

Under section 62-1-109, Jacqueline Busbee could not owe an independent duty to Appellants or any other beneficiaries of the Estate of Clara Burch absent a written employment agreement. The record is abundantly clear that no such agreement has ever existed. Under Douglas, interpreting section 62-1-109, Jacqueline Busbee owed no independent duties to Appellants, and the Court of Appeals should affirm the trial court’s granting of a directed verdict as to Jacqueline Busbee, individually, on the cause of action for civil conspiracy on this separate and independent ground.

V. As an additional and sustaining ground, the trial court did not err in directing a verdict in favor of Jacqueline Busbee, individually, on the causes of action for aiding and abetting a breach of fiduciary duty, fraud and “fraud benefit” under S.C. Code Ann. § 62-1-106, conversion and civil conspiracy because Appellants failed to allege or prove that Jacqueline Busbee, individually, acted in her own personal interest outside the scope of her representation of George Burch, and failed to demonstrate any independent duties owed to the Appellants by Jacqueline Busbee.

A. The “immunity rule.”

As established in Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986), “an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” Gaar, 287 S.C. at 528, 339 S.E.2d at 889. Dubbed the “immunity rule” by the South Carolina Supreme Court, see Douglass ex rel Louthian v. Boyce, 344 S.C. 5, 10, 542 S.E.2d 715, 717, n.5 (2001), it has been cited with approval by numerous South Carolina state and federal courts. See, e.g., Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994) (affirming dismissal of claims of malicious prosecution against attorney due to lack of any evidence that attorney acted with a personal or malicious motive to cause harm to the plaintiff); Bertwell v. Allstate Ins. Co., 2008 WL 304735 (D.S.C. Jan. 31, 2008) (dismissing fraud claims and others against an attorney absent evidence of any independent duty owed to the plaintiff or any evidence that attorney acted for his own personal benefit outside the scope of his representation); Pye v. Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) (affirming order granting summary judgment to attorney in action for civil conspiracy); Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995) (finding that an attorney will not be held liable for civil conspiracy unless, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client); and

Douglass ex rel Louthian v. Boyce, supra (finding that because attorneys for the personal representative of an estate owed no duties to an alleged beneficiary of the estate, attorneys were immune from liability to the alleged beneficiary for conspiracy and intentional interference with inheritance rights).

In Gaar, attorneys John Clarke and Steven John represented North Myrtle Beach Realty Company. The attorneys brought suit on behalf of their client against John and Karen Gaar. The suit arose out of exclusive listing agreements between the Gaars and North Myrtle Beach Realty for the marketing of three condominiums. Following testimony, the trial court granted the Gaars' motion for involuntary nonsuit on the basis that North Myrtle Beach Realty had no cause of action against the Gaars. The Gaars then brought suit against attorneys Clarke and John for malicious prosecution.

In granting the attorneys' motion for summary judgment, the circuit court found that there existed no genuine issue of material fact that the attorneys had probable cause to pursue the breach of contract actions. On appeal, the Court of Appeals affirmed on a separate ground that a suit for malicious prosecution does not ordinarily lie against an attorney who filed suit on behalf of his client. While the Gaars urged the Court of Appeals to recognize such a cause of action against an attorney, the Court of Appeals refused, stating:

In our opinion, *the better rule* is that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. Accordingly, an attorney who acts in good faith with the authority of his client is not liable to a third party in an action for malicious prosecution. Such a suit is properly brought against the party to the original action, not the attorney representing him *In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities.*

Gaar, 287 S.C. at 528-29, 339 S.E.2d at 889 (citations omitted) (emphasis added). Citing the South Carolina Supreme Court, as well as courts from other jurisdictions, the Court of Appeals expounded on the immunity rule's underlying principles:

Attorneys must be free to act and advise their clients without constant fear of harassment from lawsuits. An attorney has an ethical obligation zealously to pursue any lawful claim of his client. If he does not properly represent and support his client's position, an attorney is subject to a suit for malpractice. To hold that an attorney who files pleadings in support of his client's position has acted overzealously, and is therefore liable to the other party in damages for malicious prosecution, would create a conflict of interest with the attorney's obligation to properly represent and support his client.

Gaar, 287 S.C. at 529-30, 339 S.E.2d at 889-90 (citations omitted).

B. Exceptions to the immunity rule.

The Supreme Court of South Carolina further explained the immunity rule in Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995), when it affirmed the dismissal of a defendant's third-party complaint against the plaintiff's attorney for civil conspiracy and initiation of a frivolous lawsuit. Citing Gaar, the Supreme Court recognized that an attorney, when acting on behalf of and with the knowledge of his client, will be immune from liability to third persons. See Stiles, 318 S.C. at 298, 457 S.E.2d at 602. However, the Supreme Court recognized that an attorney does not enjoy absolute immunity. An attorney can be subject to liability to third persons if he "breach[es] some independent duty to a third person" or acts "in his own personal interest, outside the scope of his representation of the client." Stiles, 318 S.C. at 300, 457 S.E.2d at 602. These two exceptions have been confirmed in subsequent opinions, including, *inter alia*, Douglass ex rel Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001) (after confirming that plaintiff did not allege that attorney acted for their own personal interests, "another exception to the immunity rule," the Supreme Court affirmed the dismissal, finding

attorneys owed no duties to the third party non-client).

Based on Gaar and its progeny, the question before the Court of Appeals is whether Jacqueline Busbee either acted in her own personal interest outside the scope of her representation of George Burch or breached an independent duty owed to the Appellants. As shown below, Appellants did not present evidence of either.

C. Appellants failed to meet their burden of proving the conduct of Jacqueline Busbee fell within the exceptions of the immunity rule.

No allegations in the Amended Complaint allege that Jacqueline Busbee acted in her own personal interest outside the scope of her representation of George Burch. (See, generally R. pp. 97–118). Neither do Appellants allege in what manner Jacqueline Busbee might have acted outside her role as George Burch’s attorney. To the contrary, Appellants attempt to circumvent the immunity rule on the premise that Ms. Busbee owed independent duties to the Appellants. Specifically, Appellants argue that Jacqueline Busbee not only represented George Burch in his capacity as personal representative of the Estate of Clara Burch, but that she simultaneously acted as the attorney for the “Estate of Clara Burch,” from which her independent duties to Appellants and other beneficiaries of Clara Burch’s estate allegedly sprung. (See, e.g., R. p. 97–98, ¶ 2) (stating “[Respondent] Busbee also formerly served as attorney for George E. Burch, Personal Representative of the Estate of CLARA and as attorney for CLARA’s Estate”).

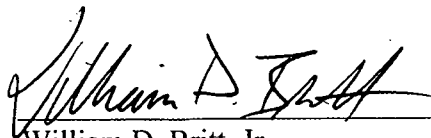
As a consequence of having failed to argue or present evidence that Ms. Busbee acted in her own personal interest outside the scope of her representation of George Burch, Appellants must prove that Ms. Busbee, individually, owed independent duties to the Appellants and the *beneficiaries* of the Estate of Clara Burch in order to defeat the protections of the immunity rule.

As discussed above in section IV(C), it is a legal impossibility for Jacqueline Busbee to have owed independent duties to the Appellants. Under section 62-1-109, Jacqueline Busbee could not owe an independent duty to Appellants or any other beneficiaries of the Estate of Clara Burch absent a written employment agreement. The record is clear that no such agreement has ever existed. Under Douglas, interpreting section 62-1-109, Jacqueline Busbee owed no independent duties to Appellants, and the Court of Appeals should affirm the trial court's granting of a directed verdict as to Jacqueline Busbee, individually, on the four causes of action for aiding and abetting a breach of fiduciary duty, fraud and fraud benefit, conversion and civil conspiracy.

CONCLUSION

For the reasons appearing above, 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, fraud and "fraud benefit," civil conspiracy and conversion. The trial court's rulings should be affirmed.

Respectfully submitted,



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October 5, 2009
Columbia, South Carolina

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

BRIEF OF RESPONDENTS
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Other Authorities

Hon. Jean Hoefer Toal et al., <u>Appellate Practice in South Carolina</u> 71 (2d ed. 2002) ..	44
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Ralph King Anderson, Jr., <u>South Carolina Requests to Charge - Civil</u> , 2002, §3-2	39
Ralph King Anderson, Jr., <u>South Carolina Requests to Charge - Civil</u> , 2002, §12-1	41
Ralph King Anderson, Jr., <u>South Carolina Requests to Charge - Civil</u> , 2002, §18-2	35

S. Alan Medlin, <u>The Law of Wills and Trusts, Vol. I, Estate Planning in South Carolina</u> (2002) §512.	49
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STATEMENT OF ISSUES ON APPEAL

Other

1. The Invited Error Doctrine is an additional sustaining ground that the Court can consider pursuant to Rule 220 (c), SCACR.(All Issues on Appeal).

Directed Verdicts

2. Was the trial court's denial of Appellants' motion at the close of all evidence for a directed verdict against the Estate of George Burch for money removed from Clara Burch's bank accounts a reversible error of law when Respondents had introduced at least a scintilla of evidence which showed that the subject transactions were not gifts in violation of Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985)? (Issue on Appeal I).
3. Was the trial court's denial of Appellants' motion at the close of all evidence for a directed verdict against the Estate of George Burch for money removed from Clara Burch's bank accounts a reversible error of law when Respondents had introduced at least a scintilla of evidence which showed that the amount of damages sought in and by the motion was contested and was the subject of conflicting evidence? (Issue on Appeal I).
4. Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as Personal Representative of the George Burch Estate, for aiding and abetting and for breach of fiduciary duty a reversible error of law a reversible error of law when the evidence showed that when Busbee first assumed the office of personal representative,

George was then dead, and additionally and alternatively, when there was no evidence presented that after Busbee was appointed personal representative of the Estate of George Burch that any assets under her management were lost or dissipated? (Issue on Appeal IIA).

5. Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, and in favor of Respondents Dennis and Laurie Burch, on the causes of action for common law fraud and for fraud benefit under S. C. Code Ann. §62-1-106 a reversible error of law when Appellants failed to present evidence of damages? (Issue on Appeal IIB).
6. Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, and in favor of Respondents Dennis and Laurie Burch, on the causes of action for common law fraud and for fraud benefit under S. C. Code Ann. §62-1-106 a reversible error of law when Appellants failed to present evidence of a representation, or the speaker's intent that the non-existent representation be acted on by the Appellants, or Appellants' reliance on the unproven representation, or the Appellants' right to rely on the truth of the unproven representation? (Issue on Appeal IIB)
7. Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, on the cause of action for conversion a reversible error when the evidence shows that whatever assets were titled in George's name when he died were identified on the Inventory and Appraisement; that the personal representative's possession of the property was required by law; and that the

Appellants failed to prove damages? (Issue on Appeal IIC).

8. Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, and in favor of Respondents Dennis and Laurie Burch on the cause of action for civil conspiracy a reversible error when Appellants failed to offer evidence on the required elements of the cause of action? (Issue on Appeal IID).

Jury Charges

9. Was the trial court's refusal to grant Appellants' request to charge no. 36 a reversible error when the request for that charge was untimely pursuant to Rule 51, SCRCP? (Issue on Appeal IIIA).
10. Was the trial court's charge on the burden of proof on the cause of action for conversion as to the Estate of George Burch a reversible error when the trial court gave the burden of proof charge requested by the Appellants, and Appellants were thereby estopped or waived the right to complain on appeal?(Issue on Appeal IIIB).
11. Was the trial court's charge on the burden of proof on the cause of action for conversion as to the Estate of George Burch a reversible error when the incorrect charge was prejudicial to the Respondents, the correct charge was given at the request of the Appellants, and therefore any error in this respect was harmless to the Appellants? (Issue on Appeal IIIB).

Equitable Relief

12. Was it reversible error for the trial court to refuse, post-trial, to grant Appellants' requested equitable relief when the outcome of the jury trial was that the Appellants are not and were not creditors of George's estate and therefore are strangers to

George's estate? (Issue on Appeal IV)

STANDARD AND SCOPE OF REVIEW

Directed Verdicts

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

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).

On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor. Jones v. General Electric Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998).

On appeal from an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in a light most favorable to the party against whom the directed verdict was granted. If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Whelan v. Welch, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991). This does not mean that the trial court should ignore facts unfavorable to the opposing party. Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (Ct. App. 1994). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor. Id. A failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991).

Jury Charges

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Id. It is the trial court's function to charge the jury on the applicable law as raised by the pleadings and

supported by the evidence. McBeth v. TNS Mills Inc., 318 S.C. 388, 458 S.E.2d 52 (Ct.App.1995); Ellison v. Parts Distributors Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct.App.1990). The circuit court must charge the current and correct law to the jury. McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995).

“When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial.” Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). “If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error.” Id. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately charges the law. Id. at 574.

However, the right to object or except to a jury charge may be lost by estoppel or waiver or invited error. 89 C.J.S. Trial §727 (2001). Consequently, a party cannot take exception to an instruction given at his own request. Id.

Denial of Equitable Relief

A case with legal and equitable issues presents a divided scope of review. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). When legal and equitable causes of action are maintained in one suit, each retains its own identity as legal or equitable. Future Group II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Townes Assocs., Ltd. v. City of Greenville, supra. In an action in equity tried by a jury, where the circuit court concurs in the jury’s findings of fact, the appellate court must affirm those findings if there is any evidence reasonably supporting

the jury's conclusions. Thigpen v. Thigpen, 217 S.C. 322, 60 S.E.2d 621 (1950).

STATEMENT OF THE CASE

This is a dispute between a wife's (hereinafter "Clara") probate estate and her husband's (hereinafter "George") probate estate over ownership of assets. More specifically, it is a dispute between the devisees named in Clara's last will and the devisees named in George's last will. The successor personal representative of Clara's estate, Charles Gordon, commenced the action on April 15, 2003, naming as defendants attorney Jacqueline Busbee, individually and as the personal representative of George's estate.¹ Also named as defendants were George's children, Laurie and Dennis Burch, who are also the only devisees named in George's last will. The action was commenced in the Aiken County Probate Court and was removed to the Aiken County Court of Common Pleas by Order of the Probate Judge dated April 28, 2003.² (R. Vol. I, p. 58-59).

During pretrial discovery, an Amended Complaint was filed on August 18, 2004 in which the Plaintiffs (Appellants herein), on behalf of Clara's estate, sought to establish a claim against George's estate for money George allegedly wrongfully withdrew from Clara's bank accounts. The claim was made pursuant to S.C. Code Ann. §62-3-804(2). A motion to dismiss the claim on grounds of procedural deficiencies was granted by the Circuit Court. On appeal to the Court of Appeals, the dismissal was reversed and the matter was remanded to the Circuit Court where the action continued.³ The claim against George and George's estate

¹ Appellant Barbara Gordon was later appointed as co-personal representative and was added to the caption of this case by Order dated June 14, 2007.

² S.C. Code Ann. §62-1-302(d).

³ Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

was grounded in allegations of conversion, fraud, civil conspiracy and breach of fiduciary duty during his tenure as personal representative of Clara's estate. (R. Vol. I, p. 97-118). Also alleged were causes of action against attorney Busbee, individually, stemming from her representation of George in matters preceding Clara's death and her representation of George with respect to his service as personal representative of Clara's estate. (Amended Complaint). The causes of action alleged against attorney Busbee, individually, were for simple and/or gross negligence (first cause of action), aiding and abetting George's alleged wrongdoing (second cause of action), breach of fiduciary duty (third cause of action), professional negligence (fourth cause of action), fraud (fifth cause of action), civil conspiracy (seventh cause of action), tortious interference with expected inheritance rights (eighth cause of action), and conversion (ninth cause of action). (R. Vol. I, p. 97-118).

The legal causes of action alleged against Busbee, in her capacity as personal representative of George's estate, were for simple and/or gross negligence (first cause of action), breach of fiduciary duty (third cause of action), fraud (fifth cause of action), civil conspiracy (seventh cause of action), tortious interference with expected inheritance rights (eighth cause of action), and conversion (ninth cause of action). (R. Vol. I, p. 97-118).

The causes of action alleged against Defendants Laurie and Dennis Burch, George's only children and devisees, were simple and/or gross negligence (first cause of action), fraud (fifth cause of action), civil conspiracy (seventh cause of action), tortious interference with expected inheritance rights (eighth cause of action), conversion (ninth cause of action), and fraudulent conveyance as against Defendant Laurie Burch (tenth cause of action). (R. Vol. I, p. 97-118).

In addition to alleging legal causes of action seeking damages, the Appellants also

alleged causes of action against Busbee, as personal representative of George's Estate, seeking equitable relief in the forms of accounting (sixth cause of action), constructive trust (eleventh cause of action) and removal of Busbee as personal representative of George's Estate (twelfth cause of action). (R. Vol. I, p. 97-118).

All defendants denied the allegations.

Trial commenced on October 1, 2007 and ended with a verdict on the legal issues on October 11, 2007. (R. Vol. IV, p. 2701-2702). At the beginning of the trial, the trial judge ruled that the causes of action seeking equitable remedies against Busbee, as personal representative, would be decided by the court following the jury's verdict. At the close of Appellants' case in chief, various directed verdict motions were made by the Respondents. The colloquy between judge and counsel appears in the Record. (R. Vol. II, p. 869, l. 18 to p. 897, l. 10). The trial judge ruled as follows:

- As to Dennis Burch, directed verdict granted on all causes of action. (R. Vol. II, p. 897, l. 11-14).
- As to Laurie Burch, directed verdict granted on all causes of action, subject to the possibility that she may be called on to repay \$170,000 to the estate of George Burch depending on the verdict with respect to the surviving causes of action. (R. Vol. II, p. 897, l. 14-21).
- As to Jackie Busbee, individually and as attorney, directed verdict granted as to aiding and abetting, fraud, conspiracy, conversion, and intentional interference with inheritance rights. (R. Vol. II, p. 898, l. 10-25). As to negligence and professional malpractice, the motion for directed verdict was denied. (R. Vol. II, p. 897, l. 22 to p. 898, l. 9).

- With respect to Jackie Busbee in her capacity as personal representative of the Estate of George Burch, directed verdict was granted as to all legal causes of action except conversion, for which the estate still had to defend George's actions prior to his death and the appointment of Busbee as personal representative (R. Vol. II, p. 899, l. 1-8).
- With respect to Appellants' claim for punitive damages, directed verdict was granted to the defendants, except as against the Estate of George Burch. (R. Vol. II, p. 899, l. 12-16; p. 906, l. 15-19; and Special Verdict Form at R. Vol. IV, p. 2701-2702).

The Court summarized the result as leaving the malpractice/negligence/breach of fiduciary duty causes of action against Busbee, individually; and leaving the causes of action for negligence, breach of fiduciary duty, fraud and conversion against the Estate of George Burch (not Busbee as PR) with punitive damages still in the case as to the Estate of George Burch. (R. Vol. II, p. 903, l. 12 to p. 904, l. 8).⁴

⁴ One of the disputes during trial was the issue of whether a probate "estate" is an entity capable of being represented by counsel separate and apart from the personal representative. Because Respondent Busbee as personal representative had a duty to remain impartial, George's devisees, Dennis and Laurie Burch, assumed the defense against Appellants' allegations on behalf of "the estate," and references to "the estate" were loosely made throughout the trial. The probate experts who testified differed on this subject. A recent opinion gives the impression that a probate estate is capable of being represented as a client, apart from the personal representative. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). On the other hand, much law, both statutory and case law, indicates that an estate, apart from its fiduciary, has no ability to act as a client and to be the beneficiary of attorney fiduciary duties. S.C. Code Ann. §62-1-109 (an attorney who is hired by a fiduciary owes duties to the fiduciary and not to persons interested in the estate, and by implication not to inanimate property); S.C. Code Ann. §62-1-201(11) (estate is defined as including the property of the decedent); In Re Estate of Wagner, 386 N.W.2d 448 (Neb. 1986) (there is no such position known as "attorney of an estate" and when an attorney is employed to render services in settling an estate, the attorney acts as attorney for the personal representative and not for the estate); In Re Estate of Cromwell, 522 S.W.2d 36 (Mo. App. 1975) (the personal estate of a decedent is not a legal entity); In Re Banjovic, 151 B.R. 402 (W.D. Tex. 1993) (a probate estate is the property, not the possessor or owner of the property; the estate is not a legal entity) This issue can be important when the question is to whom does the attorney owe professional duties.

At the close of all of the evidence, various motions were made and ruled upon as follows:

- Plaintiff's motion for directed verdict as to all transfers made by George from Clara's accounts after June 30, 2001 was denied. (R. Vol. II, p. 1149, l. 12 to p. 1153, l. 25). The particulars of this motion and a review of the evidence in the record pertaining to the motion are addressed hereinbelow.
- Defendant's motion for directed verdict as to punitive damages was revisited, and the Court refused to change its earlier decision on punitive damages, leaving punitive damages in the case only as to claims made against the estate of George Burch. (R. Vol. II, , p. 1154, l. 7 to p. 1156, l. 17).
- Busbee, individually, moved for directed verdict on the malpractice/breach of fiduciary duty claim. (R. Vol. II, p. 1157, l. 3 to p. 1160, l. 12). The motion was denied. (R. Vol. II, p. 1160, l. 24 to p. 1161, l. 3).
- The Estate of George Burch moved for directed verdict as to the fraud cause of action. (R. Vol. II, p. 1161, l. 4-21). The motion was denied. (R. Vol. II, p. 1161, l. 22-23).
- Busbee, as personal representative, moved for dismissal of the claim for removal of Busbee as personal representative. (R. Vol. II, p. 1161, l. 24 to p. 1162, l. 12). The Court reserved ruling on the motion until the equitable causes of action were to be considered by the Court following the jury's verdict on the legal causes of action. (R. Vol. II, p. 1162, l. 13-16).

The jury found in favor of the Respondents (Defendants below) on all causes of action

submitted to them for decision. (R. Vol. IV, p. 2701-2702 and R. Vol. II, p. 1252, l. 3 to 1253, l. 20). Following announcement of the verdict, the court allowed the Appellants ten days to submit post-trial motions. On October 18, 2007, Appellants served a "Motion for Judgment Notwithstanding the Verdict, In the Alternative for New Trial, and For Equitable Relief." (R. Vol. I, p. 140-151). By Order dated May 20, 2008, Appellants' post-trial motions were denied. (R. Vol. I, p. 6-45).

By written motion dated and served June 2, 2008, Appellants moved the court to reconsider its Order dated May 20, 2008 which denied Appellants' post-trial motions. (R. Vol. I, p. 197-200). By Order dated September 30, 2008, the motion for reconsideration was denied. (R. Vol. I, p. 1-5). Appellants appealed both the May 20, 2008 Order denying Appellants' post-trial motions and the September 30, 2008 order denying appellants' motion for reconsideration.

STATEMENT OF THE FACTS⁵

These Respondents do not concede the facts to be as represented in Appellants' brief. The facts as described by Appellants include much that was disputed at trial and which was the subject of competing evidence and which the jury found to be insufficient for a Plaintiffs' verdict. The relevant and persuasive facts, as set forth by the trial court in its May 20, 2008 Order denying Appellants' post-trial motions, and which are consistent with the jury's verdict, are:

The evidence at trial, fairly summarized and viewed in the light most favorable to the

⁵ References to evidence in the record are not intended to reflect all evidence with respect to the particular "fact." It is intended to satisfy the requirement that factual findings be supported by some evidence.

defendants (Respondents) and which obviously persuaded the jury to its verdict, established that George E. Burch and Clara G. Burch were married on July 30, 1984. (R. Vol. I, . p. 375, l. 5-8). At that time Clara was approximately 75 years of age (R. Vol. I, p. 375, l. 12-13), and George was approximately two months from his 70th birthday. (R. Vol. I, p. 405, l. 23 to p. 406, l. 3). At the time of Clara's death they had been married for 17 years.

Clara had no children. (R. Vol. I, p. 370, p. 16-17). George had two children from his prior marriage – Defendants Laurie Burch and Dennis Burch. (R. Vol. I, p. 375, l. 5-11; and Amended Complaint paragraph 12 at R. Vol. I, p. 99).

On January 22, 1985, Clara signed her Last Will and Testament. (Amended Complaint paragraph 15 at R. Vol. I, p.99-100). An attorney other than Jacqueline Busbee prepared Clara's Will, which names George as Clara's Personal Representative. (R. Vol. I, p. 696, l. 23-25.)

In October 1994, Clara began residing in a retirement home. (R. Vol. I, p. 378, l. 19-24).

In February, 1995, George asked Ms. Busbee to draft a power of attorney for Clara's signature, naming George attorney-in-fact, to assist him in taking care of his wife. (R. Vol. II, p. 977, l. 21 to 978, l. 2). Ms. Busbee drafted the power of attorney, which did not contain a gifting provision. (R. Vol. III, p. 1745-1747). Ms. Busbee then instructed George to have two witnesses sign the power of attorney and verify that Clara was then competent and knew what she was signing. (R. Vol. II, p. 978, l. 3-10). Clara signed the power of attorney on February 27, 1995. (R. Vol. III, p. 1745-1747). Two employees from the retirement home signed the power of attorney as witnesses. Ms. Busbee did not travel from Wagener to North Augusta in order to participate in the execution of the power of attorney.

(R. Vol. II, p. 978, l. 11-19).

Several times from 1995 through April 19, 2000, George transferred funds from accounts held in the joint names of Clara and George, and from accounts solely in Clara's name. The funds were transferred into accounts in joint names, Clara and George, and into accounts in George's name only. (R. Vol. III, p. 1335-1354 and 1359-1360).

At George's request, Jacqueline Busbee prepared a Last Will and Testament for George, which he signed on June 5, 1996. Under the terms of his Will, George named Ms. Busbee as his Personal Representative. On the same day he executed his Will, George signed a power of attorney naming Ms. Busbee as attorney-in-fact. Ms. Busbee never exercised the power of attorney given to her by George. (R. Vol. II, p. 979, l. 14 to 981, l. 7).

Clara died on April 19, 2000. (R. Vol. II, p. 982, l. 1-15).

On July 6, 2000, George was appointed as Personal Representative of the Estate of Clara Gordon Burch. George, as Personal Representative of Clara's estate, retained Ms. Busbee as his attorney in his capacity as personal representative. (R. Vol. II, p. 982, l. 1 to 983, l. 5).

Ms. Busbee advised George that it was his responsibility as Personal Representative of the Estate of Clara G. Burch to account for the assets of Clara. (R. Vol. II, p. 1020, l. 12-21). Furthermore, if there was a safe deposit box, Ms. Busbee instructed him to visit the box to determine if there were any assets in the box. (R. Vol. II, p. 998, l. 20 to 999, l. 5; and p. 1021, l. 13-22).

Ms. Busbee accepted as true George's report of Clara's assets and did not investigate her client's representations by personally going into the safe deposit box. (R. Vol. II, p. 1021, l. 18 to 1022, l. 7).

None of the inventories or interim accountings filed with the Aiken County Probate Court in the Estate of Clara Burch was signed by Ms. Busbee. They were signed by George as Personal Representative of the Estate of Clara Burch. (R. Vol. IV, p. 2543, 2548, 2560, 2566 and Vol. II, p. 962, l. 17-24).

Between April 18, 1996 and April 19, 2000, and between July 26, 2000 through September 12, 2002, George made loans to his daughter Laurie, some of which Laurie has repaid. (R. Vol. II, p. 1106, l. 14 to 1111, l. 15). The initial Inventory and Appraisement filed the George Burch Estate disclosed the existence of these transactions and expressed uncertainty as to whether the transactions were loans or gifts. (R. Vol. IV, p. 2577 and 2587, Schedule G). At trial, Laurie Burch testified that any balance due to her father was to be considered as an advance on her distribution from the estate. (R. Vol. II, p. 1111, l. 22 to 1112, l. 17).

George died on January 18, 2003. (R. Vol. IV, p. 2577 and 2587).

On January 22, 2003, Ms. Busbee and the Burch children went to Security Federal Bank to ascertain if George's original will was in the safe deposit box. (R. Vol. I, p. 300, l. 21 to 301, l. 4 and p. 316, l. 20 to 317, l. 18). Ms. Busbee and the others were not allowed to look through the contents of the box. The will was not in the box and nothing from the box was removed. (R. Vol. II, p. 986, l. 6 to 987, l. 20 and Vol. I, p. 321, l. 8 to 322, l. 5).

On January 28, 2003, Ms. Busbee was appointed Personal Representative of George's estate. Thirty (30) days later, on February 27, 2003, Plaintiff Charles Gordon was appointed successor personal representative of Clara's estate. (R. Vol. II, p. 988, l. 10-15).

On March 4, 2003, Security Federal employees inventoried the safe deposit box. A list of the contents was created by the bank's employees. (R. Vol. I, p. 317, l. 19 to 319, l.

20 and Vol. II, p. 989, l. 5 to 990, l. 14).

On March 30, 2003, at the request of Appellants' attorney Adele Pope, Ms. Busbee personally delivered to Adele Pope's office in Columbia her entire legal file with respect to the Estate of Clara Burch and all the contents of the safe deposit box at Security Federal, as well as the notarized list of the contents of the safe deposit box. (R. Vol. II, p. 990, l. 19 to 992, l. 21). At that time neither Dennis Burch nor Laurie Burch had examined the contents of the safe deposit box and did not know the contents were being delivered to attorney Adele Pope. (R. Vol. II, p. 1128, l. 2-25).

Again at the request of Adele Pope, from April 1, 2003 through April 12, 2003, Ms. Busbee requested financial records be copied from financial institutions on Clara's and George's accounts and had those records delivered to Ms. Pope's office. (R. Vol. II, p. 992, l. 22 to 996, l. 3).

On April 15, 2003, Plaintiff Charles Gordon, as successor Personal Representative represented by Adele Pope, filed suit against Ms. Busbee and the other named Defendants. (R. Vol. I, p. 60-70). Mr. Gordon's wife, Barbara, was later named as an additional Plaintiff. (R. Vol. I, p. 46-48).

During Ms. Busbee's representation of George as Personal Representative of Clara's estate she occasionally referred to herself in her written communications as Attorney for the Personal Representative of the Estate of Clara G. Burch and as Attorney for the Estate of Clara G. Burch. (R. Vol. II, p. 996, l. 18 to 997, l. 6).

Ms. Busbee received none of the funds transferred by George from Clara's accounts. (R. Vol. II, p. 949, l. 7-19 and p. 960, l. 9-19). There existed no written employment agreement between Ms. Busbee and the Appellants or any of the Burch heirs. (R. Vol. II, p.

996, l. 11-17).

No evidence was offered by the Appellants to explain or account for the transfers made by George other than that he was a "crook." Appellants' accountant expert admitted that she did not perform an audit on the various transactions in question nor was her analysis to be considered as a forensic accounting. (R. Vol. II, p. 766, l. 5 to 767, l. 23). Defendants showed several examples where certain accounts were claimed by Appellants to belong solely to Clara on the basis of 1099's, which were actually joint accounts or accounts solely in George's name when the signature cards and initial account applications were examined. (R. Vol. II, p. 771, l. 9 to 772, l. 9 and p. 802, l. 9 to 809, l. 3).

Appellants presented no evidence definitively showing that the money on deposit in the accounts at issue was Clara's money at the time it was deposited.

No assets of the Clara Burch estate were shown to have been lost or wasted during the period January 28, 2003 to February 27, 2003 when Busbee served as interim caretaker for the assets in Clara's estate. (R. Vol. I, p. 409, l. 16 to p. 410, l. 13).

No assets of the George Burch estate were shown to have been lost or wasted after January 28, 2003 when Busbee was serving as personal representative. (R. Vol. I, p. 415, l. 14 to 416, l. 2).

Other factual and procedural considerations relied upon by the trial court in deciding Appellant's post-trial motions were: it was a nine-day trial; according to information revealed during the qualification and seating of the jury, the jury was composed of very educated and intelligent jurors; it is unlikely that the trial court could again get a jury that is as intelligent and qualified as this jury; the jurors were allowed to take notes; Appellants introduced copious exhibits, most without objection; there were over 300 exhibits introduced

cumulatively; Appellants called numerous witnesses; the trial court did not recall that the Appellants were denied the opportunity to call a single witness; Appellants called three experts for opinion testimony; practically all of Appellants' timely requests to charge were given by the Court; there were charges requested by the Appellants after closing arguments had been made which were untimely pursuant to Rule 51 and which were not specifically considered independently of the charge as settled upon prior to closing argument; witnesses and issues were vigorously challenged during the trial by all parties; Appellants had the benefit of the rule allowing them two arguments to the jury during closing arguments; to lessen the chance for jury confusion, a special verdict form was used which led the jury through the causes of action in a logical and organized sequence calling the jury's attention to the separate theories and remedies advocated by the Appellants; Appellants had a very full and fair opportunity to make points with the jury on Appellants' theory of the case; the trial was in every sense of the concept a fundamentally fair trial. (R. Vol. I, p. 6-45).

ARGUMENT

Litigants are entitled to fair trials but not to perfect trials. Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

1. Invited Error Doctrine. (Additional Sustaining Ground; All Issues on Appeal).

Respondents argue that Appellants, by their "scorched-earth" theory of the case in which they chose to pursue character assassinations of George and of attorney Jackie Busbee, caused the court and jury to include in each and every cause of action the element or consideration of George having done what he was alleged to have done because he was a "crook," a thief, a criminal. (See summaries of Appellants' trial evidence below). If the court

and jury were not persuaded by the requisite standard of proof that George did what was alleged because he was motivated by a criminal intent, the Appellants invited a verdict for the defendants. The invited error doctrine was not mentioned or identified during the trial with respect to trial motions, but it was expressly utilized by the trial court in its May 20, 2008 Order Denying Appellants' Post-Trial motions. The use of the doctrine by the trial court and now by this court was and is permissible under Rule 220 (c), SCACR, (any trial court ruling, order, decision or judgment may be affirmed upon any ground appearing in the record.) As demonstrated by the May 20, 2008 Order Denying Post-Trial motions (R. Vol. I, p. 6-45), the Invited Error Doctrine serves to deny the Appellants any relief from the trial court via post-trial motions and any relief from this appellate court because the Appellants' trial theory, trial evidence, and the arguments to the trial court and to the jury inserted a matter into the trial that makes the jury's verdict unassailable on appeal. The Appellants made known to the trial court and to the jury that their case was based on the "George was a crook" theory.

- In his opening statement, Appellants' counsel described George Burch's conduct as follows: George "raided and destroyed" Clara's estate plan (R. Vol. I, . p. 215, l. 1-2).
- In the opening statement of Laurie and Dennis Burch's counsel, he said to the jury: "To believe the Plaintiffs in this case, there is only one version that they can submit to you. George Burch was a crook. Pure and simple. If they're going to win this case, they've got to prove to you George Burch was a crook." (R. Vol. I, p. 226, l. 11-20). **There was no objection to this portion of the opening statement.**
- Appellant Barbara Gordon testified: question, "... And then you say that George. . . and let's make no mistake about this. There is no point in sugarcoating it. Your contention in this case is that George stold [sic] that money?" Appellant's answer:

"Absolutely." Question: "You say George stold [sic] it?" Answer: "Absolutely." (R. Vol. I, , p. 397, l. 11-17).

- Appellant Barbara Gordon later testified as follows: question, "But you come into this courtroom saying that George is a crook. You've said as much. That's what you've alleged?" Answer, "Yea." (R. Vol. I, p. 431, l. 22-25.)
- Appellant's probate administration expert, attorney James C. Hardin, III, admitted on cross examination that the theory of the Appellant's case was "that George Burch was a crook." (R. Vol. I, . p. 693, l. 14-23.)
- Appellants' other expert, attorney John P. Freeman, who testified primarily on matters of attorney ethics, took every opportunity to toss verbal grenades around the courtroom to help the Appellants by denigrating George with the use of language designed to plant in the jurors' minds the image of George being a criminal. Freeman used the words "looting" and "robbed" to describe George's conduct (R. Vol. II, p. 837, l. 9-19); later he described George's conduct in terms of "massive theft" (R. Vol. II, p. 840, l. 18-25); when answering a question about why George delayed estate administration when a quick administration might have avoided detection, Freeman said "it is possible that somebody could have pulled off a crime without discovery" (R. Vol. II, p. 841, l. 10-14); when testifying about his opinion that Busbee should have made a noisy withdrawal from her representation of George, Freeman said that George was stealing money from Clara's estate and "that's theft . . . its indictable" (R. Vol. II, p. 841, l. 22 to p. 842, l. 10); and he testified that Busbee should not shut her eyes "and let a court be misled by a crook." (R. Vol. II, p. 843, l. 6-23).
- In his closing argument to the jury, the attorney for Respondents Laurie and Dennis

Burch continued the theme by reminding the jury of his opening statement in which he said that the evidence would show that George Burch was an honorable man, worthy of belief and worthy of trust, and who was “not a crook out to steal his wife’s money.” (R. Vol. II, p. 1184, l. 4-10.) **There was no objection to this portion of the closing statement.**

- Also in the closing argument of the attorney for Respondents Laurie and Dennis Burch, he argued that Appellants’ attorney sought to have the jury discount all of George Burch’s positive traits because those traits were inconsistent with his theory of the case. “He wants you to believe George Burch pure and simple is a crook.” (R. Vol. II, p. 1185, l. 20-25.) **There was no objection to this argument.**
- Later in his closing argument, the attorney for Respondents Laurie and Dennis Burch asked the jury the question, “Now, have they presented you anything to show George is a crook? The only thing they have presented is George transferred money, ergo he is a crook.” (R. Vol. II, p. 1198, l. 15-19). **There was no objection to this argument.**

The theory of the case pursued by a party at trial has consequences. When Appellants elected to try their case on the theory that George was a bad man who was acting with a criminal *mens rea*, for which they sought to hold defendants liable, such theory and practice should prevail throughout the case, and Respondents should not be denied the privilege of meeting the issue so made and presenting the case to the jury accordingly. See McDonald v. Plas, 401 S.W.2d 929 (Mo. App. 1966). And, subsequent to trial, the theory presented by a party at trial cannot be changed for the purpose of post-trial motions or appeals. Shelton v. LS & K, 648 S.E.2d 307 (S.C. App. 2007).

As the above trial excerpts show, Appellants quite intentionally invited the trial court and the jury to evaluate George's conduct in the context of George having had a nefarious or criminal motive with respect to the causes of action alleged by Appellants. In response to Appellants' theory of the case, Respondents presented much evidence of George and Clara's happy marriage, George's love for and devotion to Clara and to his church, and other facts and circumstances tending to show that George was not a crook, he was not a criminal, and that George had acted in good faith for reasonable purposes in transferring funds from and to the various bank accounts. (See argument 2 A below),

As addressed above, because the Appellants' evidence portrayed George's conduct with respect to the bank accounts as a product of a criminal motive, if it is reasonable to conclude that the jury's verdict was based on its disagreement with Appellant's theory of the case and on its finding that George was not a crook or a thief and that in all respects he was acting in good faith, the Appellants cannot now complain about a result they made possible by their own theory of the case which they invited the jury to consider. It is not beyond the pale of reason to envision the jury at the outset of deliberations posing the question to itself, "Was George a crook?" If not, game over; Plaintiffs failed to prove their case as presented.

The doctrine of invited error provides that a party may not set up or induce an action or invite error at trial and thereafter complain about it in post trial motions or appeals. The South Carolina Supreme Court has recognized the doctrine without much in the way of analysis. Santee Oil Co., Inc. v. Cox, 265 S.C. 270, 217 S.E.2d 789 (S.C. 1975) (a party "may not complain of invited error"). However, it is a well-recognized doctrine with much application in the reported cases of other jurisdictions. Sterling v. Gil Soucy Trucking, LTD,

552 S.E.2d 674 (N.C. App. 2001) (invited error is not grounds for a new trial); Travelers Casualty Co. v. Cincinnati Gas, 169 Ohio App. 3d 207 (2006)(under the invited error doctrine a party may not take advantage of an error that the party invited or induced the trial court to make); Vista Resorts v. Goodyear Tire & Rubber Co., 117 P.3d 60 (Colo. App. 2005) (a party's affirmative action during litigation triggers the invited error doctrine and usually bars appellate review of alleged error arising from such action); Moody v. State, 888 So.2d 532 (Ala. App. 2003), cert. den. Ex Parte Moody, 888 So.2d 605, cert den. 543 U.S. 964 (party may not allege error in trial court proceedings which was a natural consequence of his own actions); Pickett v. Stockard, 605 S.W.2d 196 (Mo. App. 1980) (invited error can arise when a case is tried upon one theory and another theory is argued on appeal); Bryan v. Bryan, 930 So.2d 693 (Fla. App. 3 Dist. 2006); Potter v. Houston, 847 N.E.2d 241 (Ind. App. 2006); Norgart v. Upjohn Co., 981 P.2d 79 (Cal. 1999); In re Breedlove, 979 P.2d 417 (Wash. 1999). The doctrine protects principles underlying judicial economy and integrity by allocating appropriate responsibility *for the inducement of some action at trial* later asserted to be error. Roberts v. Consolidation Coal Co., 539 S.E.2d 478 (W. Va. 2000). See also 5 C.J.S. Appeal and Error §874 (2007).

2. **Was the trial court's denial of Appellants' motion at the close of all evidence for a directed verdict against the Estate of George Burch for money removed from Clara Burch's bank accounts a reversible error of law when Respondents had introduced at least a scintilla of evidence which showed that the subject transactions were not gifts in violation of Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985)? (Issue on Appeal I).**

At the close of all evidence, Appellants moved for a directed verdict

"as to all transfers of the assets of Clara Burch by George Burch from and after June 30 of 2005 [sic] to include [list of bank accounts] . . . on the grounds that under Fender versus Fender any transfers under a power of attorney are not authorized, and, therefore, the property should be declared - those transfers should be declared to be void under a directed verdict. . ."

(R. Vol. II, p. 1149, l. 15 to 1150, l. 14).

This motion was made with respect to the Defendant Estate of George Burch. (R. Vol. II, p. 1150, l. 15-25). Appellants' Brief identifies twelve accounts totaling \$683,983. Appellants' argument on this issue is that the evidence introduced during the entire trial by all parties, and all reasonable inferences that can be drawn from that evidence, viewed in a light most favorable to George and to his Estate, did not amount to a trace or spark of evidence showing that George acted properly and in good faith.⁶ These Respondents disagreed and presented much evidence questioning the ownership of and contributions to the subject accounts.

A. Invited Error. It is important to recognize that by the time of the Appellants' directed verdict motion at the close of the Respondents' evidence, the "George was a crook" theory had been fully and repeatedly referenced in the testimony, without objection from Appellants. Evidence introduced to refute Appellants' "George was a crook" evidence included: George was retired from the Army and was a World War II veteran (R. Vol. II, p. 1068, l. 3-15); George and Clara were a happy couple (R. Vol. II, p. 1072, l. 14-23); they did everything together (R. Vol. II, p. 1073, l. 23 to 1074, l. 3); George was smitten with Clara (R. Vol. II, p. 1072, l. 4-23); George was an active member, deacon and Sunday School teacher at the Wagner First Baptist Church (R. Vol. II, p. 936, l. 4 to 937, l. 6 and p. 1083, l. 2-18); although George had arranged for very modest VA care for himself if such institutional care became necessary, he arranged for Clara to have the best, most expensive care option; (R. Vol. II, p. 1075, l. 11-23); he visited Clara daily in the nursing home (R. Vol. II, p. 1078, l. 20 to 1079, l. 10); he was frugal (R. Vol. II, p. 1084, l. 8-22 and p. 954, l. 23 to 955, l. 2). This certainly satisfied the scintilla standard.

B. Appellants' directed verdict motion was expressly limited to the law of Fender v.

⁶ Appellants' assert in their Brief that "There was not a scintilla of evidence produced by the Burch defendants to withstand a motion for judgment notwithstanding the verdict." (Argument I, Appellants' Brief).

Fender. The holding in Fender was very succinctly 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). Appellants have tried to describe the law of Fender as prohibiting “any transfer” without written authorization when Fender actually prohibits a particular type of transfer - a gift without written authorization in the power of attorney.

The question presented to the trial court by the Appellants’ directed verdict motion was whether there was a scintilla of evidence in the record supporting the defense that George was not a crook and that the challenged bank transactions were something other than gifts that violated the law of Fender v. Fender.

In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. Sanders and Nichols, Trial Handbook for South Carolina Lawyers §37:5 (2006). In Proctor v. Dept. of Health, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006), the Court of Appeals explained:

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 allegations of the complaint, the motions must be refused. This rule is especially strong in South Carolina where the “scintilla of evidence rule” is applied. (emphasis added).

“Scintilla” is defined as a spark or trace. Black’s Law Dictionary 1347 (7th ed. 1999). Therefore, if there was so much as a spark or trace of evidence supporting the non-moving parties’ defenses, viewing all inferences in the light most favorable to the non-moving parties, the directed verdict motion must be denied. The trial court denied the Appellants’ motion for directed verdict at the close of Respondents’ evidence on the basis that the Respondents

had introduced at least a scintilla, spark or trace of evidence explaining George's good faith handling of money from Clara's accounts.

Appellant's place substantial reliance on the trial judge's somewhat informal comments during the arguments on their directed verdict motion that the Burch Estate was "hanging by a thread" and that he "...should direct a verdict." Appellants' Brief does not set out the trial judge's remarks in their entirety; it omits that part of the judge's statement that expressly demonstrated that the trial judge knew and understood the standard by which he was to decide the motion and that he applied that standard. After hearing the argument of counsel for Laurie and Dennis Burch on the question of what evidence was presented to explain George's transfers, the trial judge said "You're hanging by a thread. That's all you're hanging by... Well, quite honestly, I should direct a verdict, **but I guess viewing the evidence in the light most favorable to you at this stage of the game I am going to let it go to the jury**, Mrs. Pope, but it is subject, obviously, to what they do and any subsequent motions down the road depending on what the jury does." (Emphasis added). (R. Vol. II, p. 1152, l.16 to p. 1153, l. 25).

These Respondents submit that the trial judge's comments were in the nature of repartee between Judge and lawyers and not indicative of an in-depth thoughtful exercise on the substance of the issues at hand. The entire exchange took place in a very compressed period of time at the conclusion of a long trial which was vigorously contested by all involved. Clearly, when the trial judge had the benefit of time to reflect on the entire record and had excerpts of the trial transcript available, the decision as to directed verdict/JNOV addressed in Appellant's post-trial motions, was confirmed. Even if given the significance desired by Appellants, Respondents submit that a "thread" is tantamount to a trace, a spark

or a scintilla of evidence, which is all that is necessary to overcome a directed verdict. Having found in favor of all Respondents on all causes of action, the jury evidently agreed that Respondents had proven sufficient facts in support of their positions.

C. Evidence satisfying the scintilla standard. 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 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's 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).

As addressed above, the Appellants' theory of the case linked George's conduct with respect to the bank accounts with a criminal motive, essentially adding the "crook" element to each cause of action. If it is reasonable to conclude that the jury's verdict was based on a finding that George was not a crook and that in all respects he was acting in good faith, the Appellants cannot now complain about a result they made possible by their own theory of the case which they placed before the jury and which they expressly invited the jury to act on.

General Verdict. When a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed. Gold Kist, Inc. v. C & S Nat'l Bank, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct.App. 1985). The application of the two-issue rule is separate and distinct from a prejudicial error inquiry, and operates to uphold a jury verdict that is sustained by the facts of the case. The rule is consistent with the established notion that the appellate courts in this State "exercise every reasonable

presumption in favor of the validity of a general verdict." Id. at 282, 333 S.E.2d at 73. If a scintilla of evidence was before the jury on any one of the above-described defenses, the general verdict for the Respondents must be affirmed. Appellants had the opportunity to submit special interrogatories to the jury in the special verdict form to determine the jury's verdict with respect to particular claims or defenses, but appellants did not do so.

3. **Was the trial court's denial of Appellants' motion at the close of all evidence for a directed verdict against the Estate of George Burch for money removed from Clara Burch's bank accounts a reversible error of law when Respondents had introduced at least a scintilla of evidence which showed that the amount of damages sought in and by the motion was contested and was the subject of conflicting evidence? (Issue on Appeal I).**

The Appellants argue that the funds George withdrew from Clara's accounts were converted by misuse of Clara's power of attorney and that every dollar withdrawn belonged to Clara. But, Appellants never offered evidence that all funds on deposit in the accounts at issue, at least the joint accounts, were Clara's assets. This is important because with respect to joint accounts, during the lifetimes of the joint owners, the funds on deposit are owned by the joint owners in proportion to the net contributions by each to the sums on deposit. S.C. Code Ann. §62-6-103.

With respect to Appellants' argument that the law of Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001) compelled a directed verdict in their favor, Respondents assert that this ground was not used in support of Appellant's motion for directed verdict at trial and, therefore, is not properly preserved for appellate review. Grounds which may be considered on appeal are limited to those which were urged before the trial court. Rosamond Enterprises, Inc. v. McGranahan, 278 S.C. 512, 299 S.E.2d 337 (1983). The Vaughn and Fender cases stand for different legal principles, and a Fender-based motion is not the same as a Vaughn-based motion.

Reserving this objection, Respondents assert that there was no proof offered on the respective contributions of the parties into the joint accounts. (R. Vol. II, p. 1062, l. 1 to 1063, l. 25). As stated, Appellant's accounting expert concedes that she was merely reviewing documents provided to her by Appellant's counsel and calculating totals based on balances with accrued interest. (R. Vol. II, p. 766, l. 3 to 776, l. 13). Nowhere was an effort made to quantify the net contributions of the parties into (or out of) the various accounts. This is a threshold required before the Vaughan case and S.C. Code Ann. §62-6-103(a) are applicable. Appellants urge the Court to conclude that George's "modest" income and Clara's assets from her previous three (3) marriages must lead to the conclusion that all of the funds were Clara's. (R. Vol. I, p. 461, l. 5-8). This position misses the target and disregards the evidence that over the course of their seventeen year marriage, George's gross income was approximately \$400,000.00, he lived modestly, and, but for the indulgence of a Cadillac, did not spend money unnecessarily. (R. Vol. I, p. 459, l. 1 to 460, l. 8). Additionally, the interest income shown on George and Clara's joint tax return for 1991 was more than double the amount on Clara's last individual return. (R. Vol. II, p. 1115, l. 2-25). George's W-2 income was greater than Clara's. (R. Vol. II, p. 1026, l. 1-25). Clearly, George brought assets into the marriage. (R. Vol. II, p. 1115, l. 1-25). Again, though, Appellants made no attempt to separately establish Clara's contribution to the joint accounts.

4. **Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as Personal Representative of the George Burch Estate, for aiding and abetting and for breach of fiduciary duty a reversible error of law when aiding and abetting was not alleged as against Busbee, as personal representative; the evidence showed that when Busbee first assumed the office of personal representative, George was then dead; and additionally and alternatively, when there was no evidence presented that after Busbee was appointed personal representative of the Estate of George Burch that any assets under her management were lost or dissipated? (Issue on appeal IIA).**

Pursuant to Rule 208(b)(6), SCACR, Busbee as personal representative, joins with and adopts by reference the portion of Respondent Busbee's, individually, brief addressing Issue on Appeal IIA.

A. Aiding and abetting. (1) Although Appellants' Issue on Appeal IIA purports to appeal the trial court's grant of a directed verdict in favor of Busbee, as personal representative of George's estate, the cause of action for aiding and abetting was directed solely to Busbee, individually. (Amended Complaint - Second Cause of Action at R. Vol. I, p. 112). The allegations of the second cause of action for aiding and abetting speak to conduct preceding George's death and Busbee's appointment as personal representative.

(2) Busbee, as personal representative, could not have aided and abetted George in the alleged wrongful conversion of Clara's funds because Busbee did not assume the office of personal representative until after George died. She, as personal representative, could not then aid and abet someone who was already dead. Busbee's alleged individual liability, if any, for aiding and abetting George is addressed in her separate Respondent's Brief.

B. Breach of fiduciary duty. With respect to the allegations of Busbee's breach of fiduciary duty as personal representative of George's estate, the evidence of breach of fiduciary duty (liability) was conflicting, but on the element of damages, the Appellants presented no evidence of loss or damage proximately caused by anything Busbee, as personal representative, did or failed to do.

Plaintiff Barbara Gordon's claim was that Busbee was responsible for maintaining the assets in Clara's estate during the period between George's death on January 18, 2003, and the date when Charles Gordon was appointed successor personal representative of Clara's Estate on February 27, 2003. When asked if she had any evidence that assets in Clara's estate

on January 18, 2003 were lost or otherwise missing on February 27, 2003, Mrs. Gordon candidly admitted that “I don’t know of anything.” (R. Vol. I, p. 409, l. 16 to p. 410, l. 13).

With respect to the assets of George’s Estate, some of which the appellants are claiming for Clara’ estate, Appellant Mrs. Gordon was asked if she had any evidence that between January 28, 2003, the date Busbee was appointed personal representative of George’s estate, and the time of trial in October 2007, any assets in George’s estate had been lost, misappropriated, wasted or anything of that nature. Her answer was, “I don’t know of anything.” (R. Vol. I, p. 415, l. 14 to 416, l. 2).

Appellants’ expert witnesses gave essentially the same testimony. Appellants called Attorney James C. Hardin, III as an expert witness on the duties of a personal representative in estate administration. (R. Vol. I, p. 500, l. 16-19). Although his testimony was critical of Busbee in her capacity as personal representative, Mr. Hardin agreed that if there is no evidence that property belonging to Clara’s estate was lost in the period of January 18, 2003 and February 27, 2003, the period between George’s death and the appointment of Charles Gordon as successor personal representative of Clara’s estate, then Busbee protected the property of Clara’s estate. (R. Vol. I, p. 673, l. 14 to p. 674, l. 18.)

Without evidence of injury or damages, a necessary element of the cause of action is missing and there can be no recovery. Gause v. Doe, 451 S.E.2d 408 (S.C. App. 1994) (injury to person or property is an element of a cause of action for negligence); Restatement (2d) Torts §874 (1979) (a plaintiff is entitled to tort damages for harm caused by breach of fiduciary duty owed to him) and a cause of action sounding in tort includes the element of injury, Troutman v. Facetglas, Inc., 316 S.E.2d 424 (S.C. App. 1984) (elements of a tort are duty, breach thereof, proximate causation and injury); Woodward v. Todd, 240 S.E.2d 641

(S.C. 1978) (one of the elements for a cause of action for fraud is injury); LaMotte v. Punchline of Columbia, Inc., 370 S.E.2d 711 (S.C. 1988) (injury causing special damage is an element of a cause of action for civil conspiracy). With respect to the cause of action for conversion, there was no evidence that Busbee, as PR, converted any property to her own use, as PR, or to the use of the George Burch estate. And, with respect to the cause of action for tortious interference with inheritance rights, there were two obvious grounds for the dismissal: that cause of action is not recognized in South Carolina, Douglass v. Boyce, 542 S.E.2d 715 (S.C. 2001), and, by the time of Busbee's appointment as PR, the execution of last wills and the activity in the subject bank accounts had already occurred.

5. **Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, and in favor of Respondents Dennis and Laurie Burch, on the causes of action for common law fraud and for fraud benefit under S. C. Code Ann. §62-1-106 a reversible error of law when Appellants failed to present evidence of damages? (Issue on Appeal IIB).**

Pursuant to Rule 208(b)(6), SCACR, these Respondents join with and adopt by reference the portion of Respondent Busbee's, individually, brief addressing Issue on Appeal IIB.

The only jurisdiction having adopted the Uniform Probate Code provision adopted in South Carolina as S.C. Code Ann. §62-1-106, and which has addressed the nature of the fraud contemplated by this statute, is New Mexico. In Eoff v. Forrest, 789 P.2d 1262 (N.M. 1990), the New Mexico Supreme Court concluded that "We believe that the 'fraud' contemplated by Section 45-1-106(A) is ordinary, common-law fraud as distinct from some other, less demanding species of fraud. . ." Law from other Uniform Probate Code jurisdictions should be given serious consideration in order to promote one of the purposes of the South Carolina Probate Code, namely, to make uniform the law among the various

jurisdictions. S.C. Code Ann. §62-1-102(b)(5).

Common law fraud in South Carolina requires proof of nine elements: (1) a representation, (2) the falsity of the representation, (3) the materiality of the representation, (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity, (5) the speaker's intent that the representation be acted on by the person hearing the representation, (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. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §18-2. Each element must be proven by clear, cogent and convincing evidence. The failure to prove any element of fraud is fatal to a recovery for fraud. Id.

Of course, even assuming, *arguendo*, that Appellants can show each and every substantive element of fraud by the required clear and convincing standard, which these Respondents assert was not done, there must be proof of damages which result. Throughout this brief are references to the fact that Appellants have not and cannot show that any asset is missing from either Clara's Estate or George's Estate. Specifically cited is testimony of Appellant Barbara Gordon. (R. Vol. I, p. 409, l. 16 to p. 410, l. 13 and p. 415, l. 14 to 416, l. 2).

6. **Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, and in favor of Respondents Dennis and Laurie Burch, on the causes of action for common law fraud and for fraud benefit under S. C. Code Ann. §62-1-106 a reversible error of law when Appellants failed to present evidence of a representation, or the speaker's intent that the non-existent representation be acted on by the Appellants, or Appellants' reliance on the unproven representation, or the Appellants' right to rely on the truth of the unproven representation? (Issue on Appeal IIB).**

Returning to the other eight elements of fraud, the Appellants cannot satisfy even the representation requirement. The record is void of any statements by either Laurie or Dennis

made to the Appellants which could satisfy this requirement. The only evidence of any representation by Jackie as PR, according to Appellants, is in the form of the various probate court filings she submitted. It is suggested that these fall far short of the type of representation which would form the basis for the other required elements. Going further, there was no evidence offered by Appellants, either directly or circumstantially, from which the jury could conclude that any such representation was made with a knowledge of its falsity or in reckless disregard for its truth or falsity. Nor was any attempt made to show any intent that any representation (if there, in fact, was one) be acted upon by the Appellants and that they had the right to rely upon its truth. The trial judge clearly recognized these deficiencies in granting directed verdicts in favor of Jackie as P.R., Laurie and Dennis on the statutory and common law fraud claims, even taking the evidence in the light most favorable to Appellants.

A. Directed Verdict as to Dennis Burch with respect to fraud.

By Appellants' admission during argument on the directed verdict motions, the only cause of action applicable to Dennis was the conversion. So, the Appellants were not seeking to prove fraud as against Dennis. (R. Vol. II, p. 888, l. 16 -21).

Additionally and alternatively, there was no evidence of a representation made by Dennis to the Appellants; no evidence of an intent on Dennis' part that a representation by him be relied on by the appellants; no evidence that Appellants had the right to rely on anything Dennis represented as fact. The record reflects that Dennis was only in Wagener, SC a total of thirty-six (36) hours for his father's funeral. He had never met Jackie Busbee before their visit and never saw her afterward. (R. Vol. I, p. 456, l. 16-21). He accompanied his sister and Jackie Busbee to the bank to see if a more recent will for his father could be found. He was allowed by Security Federal Bank to gain admission to the safety deposit box

on which his father was listed as a co-renter. Even though Appellant's repeatedly attempted to characterize this trip to the bank as nefarious and proof of a conspiracy among Jackie, Dennis and Laurie, it is irrefutable that the bank personnel, at that time, determined it appropriate to allow Dennis access as George's next of kin and, more importantly, nothing was removed from the box at that time. (R. Vol. I, p. 321, l. 8 to 322, l. 11 and p. 718, l. 3-10). The record reflects that neither Dennis, Laurie nor Jackie Busbee were even allowed to look into the box or touch its contents.

This was the extent of Dennis' involvement in this case and even Appellant's witness, Mr. Hardin, conceded that under these facts Dennis had not done anything wrong. (R. Vol. I, p. 715, l. 5 to 716, l. 16 and p. 718, l. 3-10). Dennis was unaware of any transfers by George, never received any loans from George, (R. Vol. I, p. 490, l. 3-7 and p. 495, l. 3-6) never received any assets from either Estate, and his name was not mentioned again after the scenario involving the safety deposit box. It is abundantly clear that directed verdict in Dennis' favor was appropriate and required.

B. Directed Verdict as to Laurie Burch with respect to fraud.

Appellants' brief does not identify evidence of a representation made by Laurie to the Appellants, or evidence that Laurie had the requisite intent that a representation made by her to the Appellants would be acted upon, or evidence that the Appellants would have had a right to rely on anything represented to them by Laurie. Appellants simply have made a laundry list of miscellaneous events, involving various persons at various times, and through a creative process of spinning a tale, have tried to convert the list into a theory of fraud. But according to the old saying that "the devil is in the details," the fraud theory lacks details, and the list of events does not satisfy the specific requirements for fraud.

When Appellants' attorney was asked to identify evidence in the record that would leave Laurie in the case (R. Vol. II, p. 890, l. 14-18), the response was that Laurie had received loans from George (R. Vol. II, p. 890, l. 19-22). When asked to link the loans to a particular cause of action, the Appellants did not do so but instead moved on the say that Laurie had destroyed records. (R. Vol. II, p. 890, l. 23 to 891, l. 7). When asked to identify evidence that the alleged destruction of records had proximately caused a loss to the Appellants, the attorney did not do so but instead moved on to raise the subject of the aiding and abetting, breach of fiduciary duties and conspiracy causes of action against Respondent Busbee. (R. Vol. II, p. 891, l. 8 to 22). This colloquy between the trial judge and Appellants' attorney demonstrates just what a mish-mash of a case the Appellants' presented. When asked by the Court to identify the particular evidence for fraud, the Appellants did the old two-step in an effort to deflect the court's questions, but in the final analysis, the absence of evidence was too obvious for the Court to ignore.

The tone and content of the trial judge's rulings on the directed verdicts clearly convey the message that he was confident and sure that the evidence to prove fraud was lacking. (R. Vol. II, p. 897, l. 11-21).

C. Directed Verdict as to Respondent Busbee, as personal representative, with respect to fraud.

Because the fraud cause of action is directed against Busbee, as personal representative, and the Burch respondents as devisees of George's estate, the alleged fraud must have occurred after George's death and after Busbee was appointed personal representative on January 28, 2003. Although Busbee, as personal representative, vehemently denied each and every element of the alleged fraud, there are elements more readily obvious

as not having supporting evidence in the record, thereby justifying the directed verdict.

And, after George's death, what representation was made by Busbee, as personal representative, that the Appellants relied on and had the right to rely on? None are identified in Appellants' Brief. Appellants claim knowledge on the part of Busbee as PR of various things, but there is no evidence of a representation made by Busbee as PR to the Appellants after January 28, 2003 which includes the other elements of fraud: knowledge of falsity, intent that appellants act on whatever the representation is, the appellants' ignorance of falsity and right to rely. It is mish-mash totally lacking in specific evidence to prove specific elements of the fraud cause of action.

7. **Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, on the cause of action for conversion a reversible error when the evidence shows that whatever assets were titled in George's name when he died were identified on the Inventory and Appraisement; that the personal representative's possession of the property was required by law; and that the Appellants failed to prove damages ? (Issue on Appeal IIC).**

Pursuant to Rule 208(b)(6), SCACR, Busbee as personal representative, joins with and adopts by reference the portion of Respondent Busbee's, individually, brief addressing Issue on Appeal IIC.

Conversion is the unauthorized assumption and exercise of the right of ownership or dominion over goods or personal property belonging to another, to the exclusion of the owner's rights. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §3-1. The elements of the tort of conversion are: (1) an interest by the plaintiff in the thing converted, (2) the defendant converted the property to his own use, and (3) the use was without the plaintiff's permission. Id., §3-2.

There was no evidence that Busbee, as personal representative of George's estate,

assumed and exercised rights of ownership over property in which the Appellants claim an interest. Appellants claim that Clara's assets were wrongly in the possession of George when he died and that after Busbee was appointed personal representative of George's estate, she failed to immediately concede the title issue and deliver the property to the personal representative of Clara's estate. Busbee, as personal representative, was sued in this case approximately two and one-half months after her appointment as personal representative. The normal claims period for presentment of claims against a probate estate is eight months. S.C. Code Ann. §62-3-801(a).

As the duly appointed personal representative of George's estate, Busbee was required by law to take possession or control of George's property. S.C. Code Ann. §62-3-709 (except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property); S.C. Code Ann. §62-3-711 (a personal representative has the same power over the title to property of the estate that an absolute owner would have). If a title dispute arises over property identified as estate property, the personal representative may look to the court for a resolution. S.C. Code Ann. §62-3-709 (the personal representative may maintain an action to recover possession of property or determine title thereto); S.C. Code Ann. §62-3-715(8) (the personal representative may satisfy and settle claims against the estate); §62-3-715(20) (the personal representative may prosecute or defend claims). Before Busbee, as personal representative, could investigate and act, the Appellants herein commenced their own action. The original inventory and appraisal was filed after this case was commenced. (R. Vol. I, p. 410, l. 23 to 412, l. 8).

Finally, there is no evidence that any property in George's estate has been lost or

dissipated. When asked if she had any evidence that assets in Clara's estate on January 18, 2003 (the date of George's death) were lost or otherwise missing on February 27, 2003 (when the successor personal representative of Clara's estate was appointed), Mrs. Gordon candidly admitted that "I don't know of anything." (R. Vol. I, p. 409, l. 16 to p. 410, l. 13). With respect to the assets of George's Estate, some of which the Appellants are claiming for Clara' estate, Appellant Mrs. Gordon was asked if she had any evidence that between January 28, 2003, the date Busbee was appointed personal representative of George's estate, and the time of trial in October 2007, any assets in George's estate had been lost, misappropriated, wasted or anything of that nature. Her answer was, "I don't know of anything." (R. Vol. I, p. 415, l. 14 to 416, l. 2).

8. **Was the trial court's granting of a directed verdict in favor of Jackie Busbee, as personal representative of George's estate, and in favor of Respondents Dennis and Laurie Burch on the cause of action for civil conspiracy a reversible error when Appellants failed to offer evidence on the required elements of the cause of action. (Issue on Appeal IID).**

Pursuant to Rule 208(b)(6), SCACR, Busbee as personal representative, joins with and adopts by reference the portion of Respondent Busbee's , individually, brief addressing Issue on Appeal IID. A civil conspiracy consists of three elements: (1) a combination of two or more persons; (2) joining for the purpose of injuring the plaintiff; and (3) which causes special damage to the plaintiff. Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §12-1.

The most obvious deficiency, which standing alone is sufficient to affirm the directed verdict, is the absence of damages. The allegation is that after George's death, when Busbee was acting as personal representative of George's estate, Busbee as personal representative and the Burch Respondents as devisees of George's estate, conspired to injure Appellants.

But, as has been asserted hereinabove with respect to other causes of action, the Appellants did not prove damages. Appellants admitted that no property identified as property in George's estate was known to be missing or dissipated after George's death. (R. Vol. I, p. 409, l. 16 to p. 410, l. 13 and p. 415, l. 14 to 416, l. 2). Not only is evidence of general actual damages lacking, so too any evidence of special damages which are required for a recovery for civil conspiracy. Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989) (damages for conspiracy must go beyond the damages alleged in other causes of action).

All of the so-called conspiratorial conduct identified by the Appellants can just as readily be viewed as innocent and lawful. Disconnected circumstances, any one of which or all of which are just as consistent with a lawful purpose as with an unlawful purpose, are insufficient to establish a conspiracy. Goble v. American Ry. Express Co., 124 S.C. 19, 115 S.E. 900 (1923).

There was no evidence offered by Appellants that any of the limited meetings between Laurie, Dennis and Jackie Busbee were for the purpose of injuring Appellants. The only meeting Dennis attended was to accompany his sister and Jackie to Security Federal Bank for the purpose of seeing if there was an updated will in the safety deposit box. As stated previously, Dennis was deemed by the personnel of Security Federal to have the authority to have access to the box as George's next of kin. There was no will present, and nothing was removed from the box. Neither Dennis, Laurie nor Jackie were allowed to inspect its contents or to ever look inside. Clearly, Dennis was not meeting for any purpose to injure Appellants. At that particular time, the same can be said for both Laurie and Jackie.

The record shows that Laurie met with Jackie at one other time to obtain copies of

documents which she (Jackie) had delivered to Appellant's attorney, Mrs. Pope. As this occurred after the documents had already been produced to Appellants, no injury to the Appellants could have occurred from this meeting.

The record does not contain any mention of meetings between George, Dennis and/or Laurie or George and Jackie which would satisfy the requirement to constitute civil conspiracy. It is submitted that any and all actions taken by them singularly or in concert with one another were for the purpose of the legal administration of the two estates involved, all of which was legitimate and appropriate. There was no evidence which could support the civil conspiracy allegations being submitted to the jury as to Jackie as P.R., Laurie and Dennis.

9. Was the trial court's refusal to grant Appellants' request to charge no. 36 a reversible error when the request for that charge was untimely pursuant to Rule 51, SCRCP? (Issue on appeal IIIA).

Appellant's Request to Charge No. 36 was included in a group of supplemental requests submitted to the Court on the morning of October 11, 2007. All parties had previously been given the opportunity to submit their various requests, and the trial court held a charge conference in chambers to advise of the substance of the charge. With that knowledge, closing arguments were concluded at the end of the day on October 10, 2007. (R. Vol. II, p. 1213, l. 22 to 1215, l. 24). At the commencement of Court the next morning, Appellant's counsel stated that they were submitting additional requests. (R. Vol. II, p. 1215, l. 22 to 1216, l. 3). Mr. Powell, Busbee's attorney, objected under Rule 51, SCRCP, on the ground that the supplemental requests to charge were untimely. Rule 51 provides that the charge is to be set before closing arguments. The Court denied consideration of the supplemental requests on that basis. (R. Vol. II, 1216, l. 3-22). The Court did, however,

make them a part of the record as Court's Exhibit No. 3. (R. Vol. II, p. 1216, l. 19-22).

The failure to timely request a specific charge will constitute a waiver of any right to complain on appeal about the failure to give the charge. Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 71 (2d ed. 2002). Additionally, to have allowed additional charges after closing argument would have been extremely prejudicial.

10. Was the trial court's charge on the burden of proof on the cause of action for conversion as to the Estate of George Burch reversible error when the trial court gave the burden of proof charge requested by the Appellants and Appellants were thereby estopped or waived the right to complain on appeal? (Issue on Appeal IIIB).

Appellants complain that the trial judge first charged the jury that because of the confidential relationship between George and Clara, the burden of proof was on George or his estate to prove the bona fides of the bank transactions at issue⁷, but that later in the charge the trial judge instructed the jury that the Plaintiffs bore the burden of proof for the elements of conversion.⁸ However, what the Appellants contend was the incorrect 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). Appellants' request no. 23 reads in part: "To prevail in a conversion action, the plaintiff must prove either" Appellants' request no. 25 reads in part: "To recover in an action for conversion, the plaintiff must prove. . . ." What the Appellants now take exception to is the result of their own requested charges.

The right to object or except to a jury charge may be lost by estoppel or waiver. 89

⁷ Appellants contend this was the correct charge. (R. Vol. II, p. 1247, l. 10 to 1248, l. 13).

⁸ Appellants contend this was an incorrect charge. (R. Vol. II, p. 1247, l. 10 to 1248, l. 13).

C.J.S. Trial §727 (2001). Consequently, a party cannot take exception to an instruction given at his own request. Id. In Moody v. Dykes, 496 S.E.2d 907 (Ga. 1998), the Georgia Supreme Court applied the principle that even if a defect in the charge amounts to a substantial error blatantly apparent and prejudicial, relief from the appellate court is not available when the giving of an instruction, or the failure to give an instruction, is induced during trial by counsel for the complaining party or specifically acquiesced in by counsel. In other words, there is no plain error exception. In AG Systems, Inc. v. United Decorative Plastics, 55 F.3d 970 (4th Cir. 1995), the appellant-plaintiff appealed on the ground that the trial judge charged the jury in error that the Plaintiff had the burden of proof by a preponderance of evidence. The appellant argued on appeal that the burden was a lesser standard pursuant to statute. The court wrote “Not only did AG Systems fail to object to this instruction, it invited error when it proposed the preponderance-of-the-evidence instruction.” The court expressly declined to adopt a plain error exception to the invited error doctrine.

Here the Appellants complain about inconsistent or contradictory charges on burden of proof when the very inconsistency complained of was caused by the burden of proof charge expressly requested by the Appellants. For the trial court to have revisited that charge under the circumstances then existing, especially considering that the situation was of the Appellants own doing, undue emphasis or prominence would have been given to the Appellants’ requested charge. It is proper to refuse instructions which unduly emphasize particular theories, facts or burden of proof by making them unduly prominent to the benefit of one party, even if the instructions may be correct as legal propositions. 89 C.J.S. Trial §616 (2001). The doctrines of invited error/estoppel/waiver precluded relief at trial and now preclude relief on appeal.

11. **Was the trial court's charge on the burden of proof on the cause of action for conversion as to the Estate of George Burch reversible error when the incorrect charge was prejudicial to the Respondents, the correct charge was given at the request of the Appellants, and therefore any error in this respect was harmless to the Appellants? (Issue on Appeal IIIB).**

Early in the charge to the jury, the trial judge instructed that because of the confidential relationship between George and Clara, George's estate had the burden to prove that all of George's transfers to himself or to third parties, from Clara's accounts using the power of attorney, were valid. (R. Vol. II, p. 1218, l. 25 to 1220, l. 21). Later in the charge, when instructing on the law of conversion, the trial judge charged the jury that the Plaintiff had the burden of proof on the elements of conversion. (R. Vol. II, p. 1234, l. 5 to 1235, l. 22). Respondents did not object to the part of the charge purporting to shift the burden of proof to the Respondent estate on the cause of action for conversion.

The trial court's first charge purporting to place the burden of proof on the estate to prove the bona fides of the challenged transfers was incorrect, and the Appellants' argument in support of that charge is incorrect. It is sometimes loosely said that the burden of proof shifts in this circumstance, but in truth, the burden of proof never shifts away from the Plaintiff. In Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005) it was explained that a presumption of invalidity arises when transactions are tainted by the involvement of a confidential relationship between the parties. Once the confidential relationship is shown, the transaction is presumed invalid, and the burden then shifts to the other party to affirmatively show the bona fides of the transaction. In this situation, the burden of going forward with the evidence, but not the burden of persuasion, shifts to the proponent. The contestants of the transactions still retain the ultimate burden of proof to invalidate the transactions. Id., citing Restatement (Third) of Property: Wills and Other

Donative Transfers §8.3 cmt. F (2003). See also, Rule 301, SCRE, which provides that presumptions imposes on the party against whom it is directed the burden of going forward with the evidence, but does not shift the burden of proof.

The result was that the Appellants received the benefit of a correct charge that they actually requested, and received the benefit of an erroneous charge, without objection, 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).

12. **Was it reversible error for the trial court to refuse, post-trial, to grant Appellants' requested equitable relief against Jackie Busbee, as personal representative, when the outcome of the jury trial was that the Appellants are not and were not creditors of George's estate and were strangers to George's estate? (Issue on Appeal IV).**

The four forms of equitable relief requested against Busbee, as PR, are (1) accounting, (2) constructive trust, (3) Statute of Elizabeth, and (4) removal of Busbee as PR for cause. The availability of equitable relief in favor of the Appellants against Busbee, as PR, depends on Plaintiffs' being interested parties in the George Burch Estate with standing to demand such relief from the personal representative. The evidence at trial established that Appellants are not heirs, devisees, children, surviving spouse or beneficiaries of the decedent George Burch. Appellants' only interest in or against the George Burch Estate, which would qualify Appellants as "interested persons" in the estate and would give them standing to prosecute this case, is their status as claimants or creditors of the estate. S. C. Code Ann. §62-1-201(20). "Interested person" is broadly defined and basically includes any person with an

interest in or against the estate. Id. By its verdict, the jury found as fact that Appellants were not and are not creditors of the George Burch Estate. Consequently, they have no interest in the estate. Unless the verdict is set aside and the judgment reversed, there are two significant aftereffects to the trial. First, Appellants are no longer interested persons in the George Burch estate and are now strangers to the estate. Absent interested person status, they have no right or standing to make demands or complaints of any sort against the Personal Representative, including the equitable causes of action at issue. See Matter of Estate of Dilley, 919 P.2. 458 (Ok. App. 1996) (a stranger to the estate may not participate in proceedings to compel an accounting); Washoe Broadcasting v. Neuhoﬀ, 726 P.2d 338 (Nev. 1986) (a stranger to the estate has no standing to petition for the sale of an estate asset); Estate of Voelker, 396 N.E.2d 398 (Ind. App. 1979) (a stranger to the estate cannot waive the attorney client privilege).

Until the Appellants establish, if they can and do, that they are creditors of George's estate, they have no standing or status to make demands of the personal representative.

Accounting. Busbee, as PR, will eventually be required to provide an accounting. The Probate Code requires that an accounting be filed when the estate is being closed, §62-3-100, and, of course, whenever the Court may otherwise require an accounting prior to the closing of the estate. But, a stranger to the estate may not participate in proceedings to compel an accounting. Matter of Estate of Dilley, 919 P.2. 458 (Ok. App. 1996).

Dennis and Laurie, on the other hand, have no duty to account to any party, as they occupied no fiduciary position regarding the allegations in question.

Nature of a Constructive Trust. Law professor Alan Medlin has described a constructive trust as follows:

A constructive trust serves as an equitable remedy that requires a person holding title to property to convey that property to someone more deserving to hold the title. Thus, a constructive trust is a remedy for unjust enrichment. Because a constructive trust serves as an equitable remedy, it arises from the operation of law rather than from the express intent of a settlor. The inequitable circumstances justifying the imposition of a constructive trust include such wrongdoing as fraud, breach of a fiduciary duty, breach of a confidential relationship, or undue influence. When a court imposes a constructive trust, the less-deserving property holder must convey the property to the more-deserving property holder.

S. Alan Medlin, The Law of Wills and Trusts, Vol. I, Estate Planning in South Carolina (2002) §512.

A constructive trust results from fraud, bad faith, abuse of confidence or violation of fiduciary duty. Smith v. South Carolina Retirement System, 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999). Fraud is usually an element essential to the establishment of a constructive trust, but it need not be actual fraud. Id. It is said that the fraud or other misconduct is a factor critical to the imposition of a constructive trust. Jonas v. Jonas, A06A1413 (Ga. App. 2006).

Standard of Proof. The proof to establish a constructive trust must be clear and convincing. All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741 (1942). Clear and convincing evidence has been defined as evidence which is clear, definite, unequivocal and satisfactory, or such, as has been said, as to lead to but one conclusion, or as to leave no reasonable doubt as to the existence of the fact in issue. Singleton v. Mullins Lumber Co., 234 S.C. 330, 108 S.E.2d 414 (1959). More recently, the South Carolina Court of Appeals cited with approval the following definition as applied in Florida courts:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of

such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Anonymous (M-156-90) v. State Bd. of Medical Examiners, 323 S.C. 260, 473 S.E.2d 870 (Ct. App. 1996). Clear and convincing evidence is required in civil cases where the wisdom of experience has demonstrated the need for greater certainty. 32A C.J.S. Evidence §1306. It is usually applied where there is a special danger of deception. Id.

Plaintiffs seek the imposition of a constructive trust on the assets of the George Burch Estate on the theory that George Burch's estate possesses assets which he obtained from Clara and/or her estate by fraud, conversion, breach of fiduciary duty or other nefarious means. The jury found that there was no such fraud or bad faith on the part of George Burch and that Appellants had failed to prove their "claim" against George's estate.

In a like manner, the jury's verdict has the result of absolving Dennis and Laurie from the application of a constructive trust as to any asset received or to be received from George's estate.

Statute of Elizabeth. S.C. Code Ann. §27-23-10 (2007) is intended to protect parties defrauded in connection with a conveyance of property. Lebovitz v. Mudd, 358 S.E.2d 698 (S.C. 1987). The statute, and case law authorities addressing the operation of the statute, provide that transfers of property may be set aside under two conditions: (1) where the transfer is made by the grantor with the actual intent of defrauding persons of their actions, suits, debts, accounts, damages, etc., and when the grantor's fraudulent intent is imputable to the grantee(s) even though there is a valuable consideration; and (2) where a transfer is made without actual intent to defraud but without valuable consideration. Albertson v. Robinson, 638 S.E.2d 81 (S.C. App. 2006). Although the second test under the Statute of

Elizabeth is frequently described as having only two elements: 1-no actual intent to defraud and, 2- no valuable consideration, there is another very important element:

Where a conveyance is made without an actual intent to defraud but without consideration, it is said that the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors . . . this means a sufficient amount of property not merely at the time of the transfer, *but an amount from which in the final analysis the creditors are able to collect their indebtedness in full.* (emphasis added.)

Gardner v. Kirven, 191 S.E. 814 (S.C. 1937); Albertson v. Robinson, supra

By its verdict, the jury found that George did not wrongfully take possession of the assets at issue so that the setting aside of those transfers by authority of the Statute of Elizabeth is unavailable to the Plaintiffs as a remedy.

Again, the verdict has the effect of removing Laurie from any imposition of equitable relief on the theory of fraudulent transfer of property.

Involuntary Removal of Busbee, as personal representative. General Law Governing Removal. Probate Courts have the power at common law to revoke letters of administration for waste, misappropriation of assets, or for complete unfitness for the trust. Ex Parte Small, 69 S.C. 43, 48 S.E. 40 (1904). This power is now codified in S. C. Code Ann. §62-3-611 which provides for removal of a Personal Representative for cause. Removal of a Personal Representative for cause is within the sound discretion of the Court, Matter of Estate of Humphrey, 367 N.W.2d 873 (Mich. App. 1985), said discretion to always be guided by the best interests of the estate.

Also to be taken into account is the principle of law that not all technical violations of duty require removal of a Personal Representative. Removal should not be ordered for minor irregularities or mistakes, where no fraud or wilful misconduct exists. Witherspoon v. Watts, 18 S.C. 396 (1883). S. C. Code Ann. §62-3-611 (1987) governs the involuntary removal

of a Personal Representative for cause. Subsection (b) provides that cause for removal exists when removal would be in the best interests of the estate. The statute also states that removal is proper under other circumstances that are not relevant to this case.

Removal of a Personal Representative is a harsh and drastic action which should be sparingly exercised by the court, upon a clear showing of serious misconduct or only when there is shown a clear necessity to preserve estate property. Estate of Murphy, 336 So.2d 697 (Fl. App. 1976); Hartt v. Hartt, 295 P.2d 985 (Wyo. 1956); In Re Bailey's Estate, 159 A. 549 (Pa. 1932); Estate of Feeney, 139 Cal. App. 3d 812 (1983); Matter of Farber, 98 A.D.2d 720 (N.Y. 1983); Jones v. Palmer, 2 S.E.2d 850 (N.C. 1939); Matter of Robbin, 747 P.2d 869 (Mont. 1987). In a proceeding for the removal of a testamentary fiduciary, the grounds for removal should be proved by clear, strong and cogent evidence. Willson v. Cable, 15 S.E.2d 56 (Va. 1941).

This deference accorded to the Personal Representative is especially strong where the Personal Representative has been expressly named by the testator in his will, because the deliberate choice of a Personal Representative by the testator is not to be lightly set aside. Jennings v. Murdock, 553 P.2d 846 (Kan. 1976). The right to administer an estate is a "valuable right," Talbert v. Reeves, 127 A.2d 533 (Md. 1956), which should only be taken from the testator's chosen person for compelling reasons. In re Estate of Georgiana, 458 A.2d 989 (Pa. Super. 1983) affirmed 475 A.2d 744 (Pa. 1984). The person appointed by the testator is someone in whom the testator has expressed much confidence and who was expressly named by the testator after mature deliberation. It is the purpose and policy of the South Carolina Probate Code to "make effective the intent of a decedent in the distribution of his property," S. C. Code Ann. §62-1-102(b)(2) (1987), and this would necessarily include

allowing the person appointed by the testator to administer the estate. It has been said that “A judge treads on sacred ground . . . when he overrides the testator’s directions regarding the appointment of the person in whom the decedent placed his trust to administer his estate according to the powers given in the Will.” Pontrello v. Estate of Kepler, 528 So.2d 441 (Fla. App. 1988).

South Carolina law is clearly consistent with the foregoing principles. In Smith v. Heyward, 115 S.C. 145, 104 S.E. 473 (1920), the South Carolina Supreme Court stated:

The courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated. No doubt, the courts have the power to do it in a proper case. But for obvious reasons it is a power which should be exercised with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud. . . . The rule certainly is that the administration will not be taken from an executor without strong reasons, because. . . it is for the testator, not the court, to say in whom the trust for administration of his effects shall be reposed.

In this case the Court determined that Plaintiffs’ evidence failed to prove that Busbee, as PR, had breached fiduciary duties as PR of the George Burch Estate, or engaged in other misconduct or maladministration with respect to the estate, because the legal causes of action against Busbee, as PR, were dismissed by the Court at the close of Plaintiffs’ case. Busbee, as PR, remained impartial during the trial, and there was absolutely no evidence that any of the property identified as estate property (titled in George’s name on the date of his death) has been lost by Busbee, as PR, during the period of her service as PR. Additionally, the jury found that Busbee, individually, had not breached her attorney fiduciary duties to anyone else associated with this case.

CONCLUSION

The Appellants received a fair trial. For the reasons appearing above, all rulings and the judgment of the trial court being challenged on appeal should be affirmed.



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October 7, 2009

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.

APPELLANTS' FINAL REPLY BRIEF

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I. THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION FOR DIRECTED VERDICT AS TO THE ESTATE OF GEORGE BURCH, AND DENIAL OF JUDGMENT NOTWITHSTANDING THE VERDICT, WAS REVERSIBLE ERROR BECAUSE GEORGE'S TRANSFERS OF CLARA BURCH'S ASSETS MADE AFTER JUNE 30, 1995 ARE INVALID.

Appellants moved for directed verdict in their favor against the Estate of George Burch as to all of the transfers of Clara Burch's assets that George made after June 30, 1995, which is the date after which it is undisputed that Clara Burch was totally mentally incapacitated. (R. pp. 1149–1151). The plaintiffs' motion sought a directed verdict in the amount of \$683,983.

The evidence is without contradiction that George Burch converted Clara's funds to his own use while Clara was incompetent and during those times when he was her attorney-in-fact and that he converted funds of her estate when he served as PR. His actions in making unauthorized transfers of Clara's monies amounted to the unauthorized assumption and exercise of the right of ownership of money belonging to Clara's estate. Defendant Estate of George Burch is, therefore, liable for conversion for the money taken, with interest. Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981). It is also liable for George's breaches of his fiduciary duty as attorney-in-fact and as personal representative.

In the case of Fender v. Fender, 285 S.C. 260 , 329 S.E.2d 430 (1985), the Supreme Court unequivocally adopted the rule that bars "a gift by an attorney-in-fact to himself or a third party absent clear intent to the contrary evidenced in writing." Id., at 431 (emphasis added). The Supreme Court, in affirming summary judgment for the plaintiff, held that transfers by an attorney-in-fact with alleged oral authorization for the transfers are invalid as a matter of law.

The brief of the Burch respondents does not dispute the rule in Fender, but argues that the transfers George made to himself (R. pp. 1335-1354, 1359) were not “gifts.” Both legal analysis and common sense¹ show this argument to be without merit. In Fender the defendant used a power of attorney to transfer 37 acres of real estate, a car, and two bank accounts to himself. The Supreme Court noted that a person cannot use his authority as agent for another for his personal benefit “in a substantially gratuitous transfer,” notwithstanding alleged oral authorization. Id. at 431. Fender’s transfers were gifts, as were George Burch’s, and they were found to be wrongful. In the instant case, the trial court overlooked or misapprehended Fender when it erroneously denied appellants’ motion for directed verdict (and later the motion for judgment notwithstanding the verdict) as to the Estate of George Burch. The Estate of George Burch failed to produce any writing to show the gifts were authorized, and the lower court erred in overlooking this fundamental fact.

The standard of review for a motion for directed verdict is that the appellate court, in considering the evidence in a light favorable to the non-moving party, should reverse the denial of the motion if there is no evidence to support the ruling or if the decision was controlled by an error of law. Clark v. S.C. Dept. of Public Safety, 362 SC, 377, 608 S.E. 2d 573 (2005). The appellants should prevail for both reasons. In the instant case, the respondent Estate of George Burch had the burden of establishing that the transfers were lawful. It failed in that burden, as pointed out in appellant’s initial brief.²

¹ “Gift” is defined as “a voluntary transfer...made gratuitously...without consideration.” Black’s Law Dictionary, 4th Ed., p. 817.

² It should be noted that the heirs of George Burch, Laurie and Dennis Burch, knew nothing about George’s transfers, and were incapable of providing any support to the respondents “theory” that there was an “agreement.”

The Estate of George Burch did not present written evidence to meet its burden of proving that the subject transfers by George to himself were authorized, as they were made during the time that Clara Burch was mentally incompetent (by use of a power of attorney) and from her estate when he was a fiduciary. After the permanent onset of her mental incapacity by 1995, the only way Clara could have authorized George to transfer money from herself was by a valid power of attorney which authorized gifts or from her estate through her will. She did neither.

Further, the expert for respondent Busbee point-blank agreed with appellants. Attorney Steve Johnson admitted that the incompetent Clara Burch was a “vulnerable adult”³ under South Carolina law. (R. p. 1048). Mr. Johnson also agreed that an improper or unauthorized use of a power of attorney to transfer the funds of a vulnerable adult to oneself would constitute exploitation of that vulnerable adult. (R. pp. 1049-1050). He testified as follows:

“Q: Do you agree that a transfer to oneself under a POA...[which] does not authorize gifts, when a principal is incompetent and cannot consent, is improper?

A: It’s improper. (R. p. 1050)

Q: We’re going to get back to whether the power of attorney was valid. But assuming for the moment that it was valid and the lights went out on Mrs. Clara Burch on July of 1995, was any transfer after that date by George Burch to himself or to someone else from her funds valid?

A: It would not have been authorized by the terms of the power of attorney.” (R. p. 1051).

Johnson agreed that if transfers were made by the attorney in fact when Clara was incompetent, they would be “owed back to Clara’s Estate.” (R. p. 1051). The trial court committed an error of law in ignoring this principle and in failing to apprehend that there

³ See The Omnibus Adult Protection Act, S.C. Code §43-35-10(11) for the definition of “vulnerable adult” (a person impaired because of ...”organic brain damage,” “aging,” “mental dysfunction,” or by virtue of being a resident of a nursing home).

was no evidence produced by respondent Estate of George Burch to support its burden of proving that the transfers were valid.

**A. George Burch's Estate Produced No Evidence that
the Subject Transfers Were Proper and Valid.**

The Burch respondents argue in their brief that there was a "scintilla" of evidence that showed the transfers by George were not gifts. (Brief of Respondents Busbee as PR and Burches, pp. 23-29). The respondents have made four (4) arguments about this "scintilla" of evidence and each will be addressed and refuted herein below.

- (1) Respondents' expert Johnson testified in response to a hypothetical question that "if" the transfers were in consummation of an agreement then the use of a power of attorney would not necessarily invalidate them, even in the absence of gifting authority, because they would not be gifts but contractual agreements. (R. p. 1042). Johnson cited no evidence of an agreement in his testimony, and respondents failed to submit evidence of an agreement. Busbee was in contact with George Burch regularly as his attorney from 1995 until his death in January 2003 and she knew of no such agreement. Respondents have offered only conjecture and speculation. They ignore the holding of Fender that a written authorization is required.
- (2) Respondents, with a straight face, argue that "George's attitude about taxes" (i.e., he was taking Clara's funds for himself to reduce estate taxes) was justification for the transfers. No evidence or authority is cited to support this argument, and none exists. Since Clara's Will excluded George as a beneficiary of her funds, George's attitude and opinions about taxes do not relate to Clara's money; are not relevant; and are not evidence of an "agreement."
- (3) Respondents argue that George did not file an elective share claim against Clara's estate and, therefore, his unilateral transfers to himself, even if illegal, were justified. There is no authority for this argument. There is no evidence that Clara, incompetent for five years before her death, "agreed to" the transfers or even that George knew what an elective share was until Busbee advised him of it after Clara's death (R. p. 1013). Further, having failed to timely seek an elective share, George was entitled to nothing. It is reasonable to assume that George did not file for an elective share, after Busbee advised him of his right because the proceeding would have invited close scrutiny of his illegal transfers, since notice to Clara's beneficiaries was required. See S.C. Code §62-2-205(b).

- (4) The respondents argue that the improper transfers by George were legitimized by the fact that he paid for Clara's medical care from "joint funds." This is incorrect. It is uncontradicted that, while Clara's medical care was paid out of a joint account, the account was Clara's before she added George's name and Clara was the sole source of the funds in that account.⁴ (R. p. 786).

The respondents argued in the lower court that the transfers by George to himself in the last ten days of Clara's life, totaling over \$231,000, were, in essence, paying himself back for medical expenses. This argument has no merit and ignores the fact that Clara's medical care was paid from her own funds. Respondents offer no explanation for the \$56,000 (including interest) of post-death transfers (R. pp. 1359, 1752-1755). Do respondents contend there was an "agreement" for George to take Clara's money after her death that belonged in her estate?

In Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E. 869 (2001), the Supreme Court addressed S.C. Code §62-6-103(a) which relates to the issue of ownership rights of contributing and non-contributing parties with regard to joint survivorship accounts. S.C. Code §62-6-103(a) provides:

"A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contribution by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (emphasis added).

There, the Supreme Court held that, even though funds remaining on deposit at the time of the death of one of the parties to the account belong to the surviving party as against the estate, the non-contributing joint account holder could not withdraw funds prior to the

⁴ The joint account was Account No. ...320 at Security Federal Bank. All of Clara's monthly retirement income was deposited into this account. (R. pp. 784-785). George's retirement income was never deposited into this account; it was placed into a separate account of his. (R. p. 785). Thus, she was the sole contributor to the account and George presented no evidence otherwise. According to expert Agnes Asman, CPA, Clara received total income of \$247,617 from 1994 through April 2000, all of which was deposited into Security Federal Acct. ...320 while she was in the nursing home. (R. p. 2282). Clara's total medical and nursing home expenses during this time period were \$238,446. (R. p. 806).

death of the contributing account holder.⁵ Since he was not named in Clara's will, nor was he the contributor to any of her bank accounts, George Burch was not entitled to the vast majority of Clara's funds either under her will or as a surviving party to a joint account.

The Supreme Court in the Vaughn case concluded that the non-contributing party was not entitled to a presumption of survivorship as to funds withdrawn prior to the decedent's death. Id., at p. 870. The Court in Vaughn applied the plain meaning rule and held that the funds removed by Bernhardt (the non-contributing party) belonged to the decedent. In the instant case, there was no evidence to show that Clara intended for her funds to go to George, as they were for her nursing home and medical care.

In fact, Clara's will clearly left George Burch, her fourth husband, no bank accounts or cash assets. When the evidence yields only one inference, a directed verdict is proper, and our Supreme Court has ruled that a trial court will be reversed when there is not evidence to support the ruling. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999) (affirming the Court of Appeals in reversing the trial court's failure to direct a verdict).

The evidence shows that there was no agreement or authorization by Clara for these transfers. The power of attorney did not authorize it. Her will did not provide for George. A PR may not transfer estate funds to himself. Respondents produced no written document and there was not a scintilla of evidence produced by the Burch defendants to withstand a motion for judgment notwithstanding the verdict. The lower

⁵ The respondents' brief argues that appellants did not argue the Vaughn case when making the directed verdict motion. This is incorrect and it ignores the fact that appellants introduced numerous exhibits, the testimony of Security Federal banker Sharon Swift, the testimony of Wachovia banker Jeremy Hall, and the testimony of CPA Asman for the purpose of tracing the assets of Clara Burch in accordance with Vaughn.

court erred in denying the motion. This Court should reverse that ruling and direct that judgment be entered in favor of the plaintiffs against the Estate of George Burch for \$683,983, plus interest from September 30, 2007.

B. George Burch's Estate Produced No Evidence Disputing the Amount of Damages Sought by the Motion for Directed Verdict.

The Burch respondents argue in their brief (pp. 29-31) that there was a scintilla of evidence sufficient to survive appellant's motion for directed verdict on the amount of damages sought. They erroneously argue that the amount of damages from George's improper transfers was disputed. Respondents produced no accounting expert, no lay witness, or other evidence to refute the damages. Appellants' expert Agnes Asman traced every account and certificate of deposit that Clara owned from 1994 to the time of her death in April 2000, and even to the death of George in April 2003. (R. pp. 746-747). She testified without contradiction to a reasonable degree of accounting certainty (R. p. 761) that the accounts transferred by George to himself belonged to Clara and were those listed on Plaintiffs' Ex. 11A.⁶ (R. pp. 753, 763, 1359). As of the day before trial, the amount of these transfers, plus prejudgment interest, was \$683,983. Ms. Asman also refuted the respondents' argument that George paid Clara's medical nursing home expenses by showing that Clara was the sole source of the funds in Account No. ...491 at Security Federal Bank. (R. p. 786).

Respondents argue that appellants did not establish that Clara was the source of the funds in the accounts on Plaintiffs' Exhibit 11A (R. p. 1359) (Brief of Respondents, pp. 30-31). This is incorrect as set forth above. Respondents argue that there was "no

⁶ Those transfers included some transfers before July 1995. Later, after all of the evidence, appellants' motion for directed verdict included only transfers of Clara's assets by George after July 1995, because the uncontradicted evidence was that Clara was mentally incapacitated from that date until her death in April 2000.

proof of the respective contributions of the parties into the joint accounts,” citing only a transcript reference to the October 2003 deposition of Charles Gordon on cross-examination by respondents’ counsel. (R. pp. 1062-1063). First, Mr. Gordon had no background in accounting and was not offered as a witness at trial. Counsel for respondents asked him at the deposition to “speculate.”⁷ (R. p. 1062, ll.20-21). Secondly, his deposition testimony four years prior to trial does not, and cannot be considered to, refute the numerous exhibits, tax returns and supporting documentation, and the clear, conclusive and uncontradicted testimony of banker Sharon Swift and of CPA Asman that Clara was the sole source of the funds in the accounts and certificates on the plaintiffs’ damage exhibit. (R. p. 1359). Asman traced each of Clara’s accounts listed on that exhibit to George. (R. pp. 753-761, 2428-2542). Even though the financial records were old by the time of the trial, Asman used tax returns, financial statements, bank statements, cancelled checks, certificates of deposit, and back-up documents going back to 1994 (R. pp. 747-748) and she was satisfied that her conclusions were based on sufficient data⁸.

⁷ Gordon in his 2003 deposition said he was “not aware of any” evidence that Clara would not want him to benefit from some of her assets. (R. p. 1063).

⁸ Asman prepared a chart summarizing her findings. (R. p. 1359). The chart showed that Clara owned 15 accounts and certificates in 1994. Using back-up documents, Ms. Asman determined that Clara was the sole source of the funds in all of these accounts and that between 1994 and 2001 they were transferred by George to himself or to accounts in his name only. The undisputed damages from George’s illegal transfers after Clara’s undisputed incompetence in July 1995 were traced as follows:

- Atlanta Postal/Carolina First: bank account closed by George on 8/24/95 (R. pp. 753, 1359, 2158, 2428). **\$41,720**
- Bank of America: mutual bond which was cashed by George on 1/19/2000 (R. pp. 755, 1359, 2431-2441)..... **\$24,760**
- Bank of Barnwell: certificate of deposit closed by George on 9/23/99. (R. pp. 755, 1359, 2437- 2438)..... **\$81,429**
- Community Bank: bank accounts closed and put into a certificate of deposit in George’s name at Security Federal on 4/17/00. (R. pp. 756, 1359, 2445-2450) **\$90,734**
- Palmetto Federal Regions Bank: account and certificate of deposit, which were closed and paid to George on 4/13/01. (R. pp.757, 1359, 2452-2456, 2153-2156)..... **\$13,658**
- Security Federal Bank: seven accounts and certificates of deposit closed in April 2000 and placed

Even if respondents were correct on this point, which is denied, the lower court should have granted a new trial on damages only as to any accounts which were “disputed” and entered directed verdict as to those that were undisputed. Thus, this Court should reverse the lower court and grant judgment for the plaintiffs for the full amount. In the alternative, this Court should grant judgment for plaintiffs against the Estate of George Burch in the “undisputed” accounts and remand any “disputed” accounts for a new trial on damages.

C. The “Invited Error Doctrine” Does Not Apply.

The brief of the Burch Respondents alleges that the lower court properly relied on the “invited error” doctrine in support of denying appellants’ post-trial motions. The doctrine does not apply in this case. Even if applicable, it is irrelevant to the issue of the judge’s blatant error in denying appellants’ motion for directed verdict discussed herein. Respondents’ argue that appellants’ case was based entirely and exclusively on the theory that “George was a crook.” This is absolutely incorrect. Neither in opening statement or in closing argument did plaintiffs’ counsel ever refer to George as a “crook,” “thief,” or a “criminal.” None of the witnesses called by plaintiffs referred to George Burch as a “crook,” except Professor John Freeman.⁹ The appellants’ requested no jury charge on George being a criminal, nor did the Court give any charge on the subject.

in certificates of deposit in George’s name in April 2000 and April 2002. (R. pp. 757-759, 1359, 2458-2492, 1334-1354, 2153-2156).....	\$299,470
◦ Wachovia: certificate of deposit placed in a certificate in George’s name on 9/21/00. (R. pp. 753-760, 1752-1755, 1144-1148, 1359).....	\$52,030
◦ Wachovia: certificate of deposit placed in a certificate in George’s name on 1/1/1996. (R. pp. 760-761, 1359, 2494-2502).....	\$60,152
◦ American Enterprise Investment Services, Inc.: check dated 1/31/02 payable to George as PR Cashed by George and never placed in Clara’s estate. (R. pp. 1123, 1391, 1359).	\$ 20,029
Total.....	\$683,983

⁹ None of the other witnesses of the plaintiffs referred to George Burch as a crook or a criminal. The respondents, not only in their opening statements and closing arguments to the jury, but by cross-

The “George is a crook” theory was propounded by the respondents in opening statement when they said that for plaintiffs to win the case they would have to “prove to you that George was a crook.” (R. p. 226).

The trial court relied on this doctrine in its order denying post-trial motions. It committed error in doing so. First, raising the doctrine by respondents is a straw man argument.¹⁰ It was created by respondents. Secondly, it does not apply to this case. Our Supreme Court has mentioned this doctrine only once. In the case of Santee Oil Co., Inc. v. Cox, 217 S.E. 2d 789 (1975), a minority shareholder brought an action on multiple theories of damages, and the lower court relied on only one. On appeal the appellant complained of the one selected. He “invited” the error and could not complain on appeal.

There are no such facts in the instant case and no error has been “invited.” George abused his fiduciary duties and improperly transferred funds of his wife to himself, while he had her power of attorney (with no gifting authority) and while he was her personal representative. The actions of George, according to plaintiffs’ theory, amounted to conversion, negligence, and breach of fiduciary duty. At no time did plaintiffs attribute criminal intent as a theory of their case. The jury was not asked to, and did not, render a verdict on this theory. The theory of George being a “crook” as

examination, constantly referred to plaintiffs’ position as being that George was a “crook.” For example, Barbara Gordon did not testify that George was a crook on direct examination, but was asked if she thought he was when on cross-examination. (R. p. 397, ll. 16-17). Likewise, expert Hardin did not testify that George was a crook on direct, but was asked if he thought he was on cross examination. (R. p. 693).

Appellants’ counsel in closing argument did not refer one time to George being a crook. Nevertheless, respondents’ counsel launched into their diatribe in closing argument that the only way for plaintiffs’ to prevail was for the jury to conclude that “George was a crook.” (R. p. 1198). Plaintiffs’ counsel in rebuttal argument addressed it head on: “You don’t have to find that George was a crook... we don’t know whether he was mistaken or delusional. It doesn’t matter. He took the money. He transferred it.” (R. p. 1206).

¹⁰ A “straw man argument” is “an informed fallacy based on misrepresentation of an opponent’s position... to create the illusion of having refuted a proposition by substituting a superficially similar proposition (“the straw man”) and refuting it, without ever having actually refuted the original position.”

Wikipedia

being fundamental to recovery has been advanced only by the respondents. The lower court erred in relying on the invited error doctrine as being applicable in this case.

II. THE TRIAL COURT ERRED IN CHARGING THE INCORRECT BURDEN OF PROOF ON THE CAUSE OF ACTION FOR CONVERSION

In instructing the jury on the cause of action for conversion against the Estate of George Burch the trial court charged the jury that "...the plaintiff has to prove all of that by the greater weight or preponderance of the evidence." (R. p. 1235). After the conclusion of the judge's charge, Plaintiffs' counsel objected to that charge for the reason that the burden of proof for conversion under the facts of this case is with the defendant. Appellants' counsel argued that because there was no written authorization for the transfers the burden of proof was on the Estate of George Burch to prove that the transfers were valid. Appellants' counsel carefully pointed out to the Court that:

"Once we show that there was a taking of the property, the burden shifts to them to show that it was not invalid." (R. p. 1248).

This point of law was fundamental to the appellants' case because the transfers that George made to himself from Clara's assets were at times when she was incompetent and, after her death. The pre-death transfers were made under a power of attorney which did not authorize gifts. A PR cannot transfer estate assets to himself if he is not a devisee. The judge denied the request to charge. (R. p. 1250).

The charge the judge made to which appellants objected constituted a misstatement of law under the court's holding in Fender v. Fender, 285 S.C. 260, 329 SE 2d. 430 (1985). See also S.C. Codes §62-6-103(a) and §62-3-713; and Vaughn v. Bernhardt, 345 S.C. 196, 547 SE 2d. 869 (2001).

The brief of the Burch respondents, pages 44-45, argues that appellants have waived the right to except to the judge's charge because appellants had specifically asked that this charge be given. This is incorrect. Respondents' brief argues that plaintiffs' Requests to Charge Nos. 23 and 25 amount to an estoppel or waiver of the right to object. This is incorrect. Plaintiffs' Requests to Charge Nos. 23 and 25 refer to the plaintiffs' burden of proving that there was a conversion – i.e., the plaintiffs in this and all conversion cases must prove the right to possession of the property at the time of the conversion. This is a correct statement of law. It is not contrary to the objection made to the judge's charge. The point to which appellants objected is that, since the conversion in this case involved the use of a power of attorney and the incompetence of the principal, once a conversion has been established under the facts of this case, the defendant has the burden of proving that the transfer was valid – i.e., that there was authorization for these transfers under Fender v. Fender, supra.

When appellants made the motion for directed verdict against the Estate of George Burch for these transfers it was understood, acknowledged, and agreed by all counsel that the Estate of George Burch had the burden of proving the validity of the transfers. A review of the arguments before the Court on this directed verdict motion at the conclusion of the evidence makes this obvious. Appellants' counsel asserted that the grounds of the motion were that the George Burch Estate had "failed to meet its burden" to show the validity of the transfers. (R. p. 1150). Respondents did not object and in fact agreed by responding that "we feel that the burden has been met." (R. p. 1153).

It is true that earlier in its charge, the trial court did correctly charge that the Estate of George Burch had the burden of proof (R. p. 1220), but this does not "cleanse"

the later error. See Beckham v. Sun News, 289 S.C. 28, 344 S.E. 2d 603 (1986). The instruction given by the Court was not merely confusing but in direct conflict with the applicable law. Under the law of South Carolina, giving conflicting instructions as to a material issue is reversible error because it is impossible for the Court to determine which instructions the jury follows and which it ignores.

An incorrect charge on the burden of proof is fundamental to the outcome of the case. In Beckham v. Sun News, 289 S.C. 28, 344 S.E. 2d 603, 604 (1986), the trial court initially charged the correct burden of proof as to the falsity of a libelous statement, but later charged the jury the defendant had the burden of proving the truth of the statement. The Supreme Court held that such a conflict was fundamentally confusing to the jury, requiring reversal. See also Cole v. SCE&G, 355 S.C. 183, 584 S.E. 2d. 405 (Ct. App. 2002), where the Court found reversible error when the trial court failed to instruct the jury that the burden of proving an affirmative defense was on the defendant.

In erroneously charging the burden of proof on conversion, the trial court committed fundamental error that requires reversal. This Court should reverse and order a new trial on this ground.

III. THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICTS TO RESPONDENTS AT THE CONCLUSION OF PLAINTIFFS' CASE.

A. There Was Sufficient Evidence to go to the Jury on the Cause of Action for Aiding and Abetting as to Respondent Busbee, Individually and as PR.

There was sufficient evidence on the aiding and abetting cause of action to go to the jury. There was both factual evidence and expert testimony by appellants to establish the three elements of this cause of action. In the case of Vortex Sports and

Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E. 2d 444 (Ct. App. 2008), the Court of Appeals ruled that a defendant is liable for aiding and abetting for the wrongdoing of another if the following elements are established: (1) a breach of fiduciary duty is owed the plaintiff; (2) defendants knowing participation in the breach; and, (3) damages. The respondents' brief overlooks that there was evidence of all three elements sufficient to go to the jury.

Respondents begin by asserting that appellants did not preserve this issue for appeal. This is incorrect. Appellants appealed the Court's denial of directed verdict against the Estate of George Burch on causes of action for conversion and breach of fiduciary duty. The actions of George Burch, which were the subject of plaintiffs' motion for directed verdict, constitute causes of action for conversion and/or breach of fiduciary duty. The brief of respondent Busbee, individually, asserts that appellants failed to appeal the jury verdict for the Estate of George Burch on the cause of action for breach of fiduciary duty. (Brief of Respondent, p. 14). This is incorrect. See plaintiffs' memorandum in support of post-trial motions dated October 9, 2007. Also, on page 20 of Brief of Appellants, it is specifically noted that the Estate of George Burch did not present evidence to "meet its burden of proving that the subject transfers by George to himself were authorized, as they were made...when he was a fiduciary." (emphasis added). The issue of George's breaching his fiduciary duty was preserved by the post-trial motion and memorandum, as well as in the appellants' brief.

Respondent Busbee aided and abetted George in breaching his fiduciary duty, by failing to list Clara's Wachovia certificate of deposit with a date of death balance of over \$32,400 (R. pp. 1752-1755) on Clara's estate inventory and, instead, assisting George, as

personal representative of Clara's estate, in placing this asset under George's control. This asset, although owned by Clara at her death was transferred by George to a certificate of deposit in his name on September 21, 2000, is now listed as an asset on George's estate Inventory and claimed by Busbee as George's PR. (R. p. 1644).

Busbee's filing on February 6, 2003, after George's death, a supplemental inventory in Clara's estate (R. p. 1458) which did not include all of Clara's assets,¹¹ but which was signed by George before he died, was substantial assistance to George's breach of fiduciary duties, as well as a breach of her fiduciary duties under S.C. Code §62-3-609. Appellant's expert Hardin discussed the unique fiduciary obligations that Busbee had to Clara's Estate when George died, and her breaches of her duties to protect, account and deliver Clara's assets. (R. pp. 665-668).

At the trial, it was specifically argued to the judge that the directed verdict motion was based on respondent Estate of George Burch having failed to meet its burden to show that the "pre-death transfers under the power attorney..." are valid. (R. p. 1150). All of the actions of George Burch which are actionable are taken by him as a fiduciary, either through a power of attorney or as PR of his wife's estate. The directed verdict motion went to all of the causes of action against George Burch, but specifically and emphatically, the causes of action of conversion and breach of fiduciary duty.

The respondents' argument that this issue has been waived is erroneous. The record reflects that appellants asserted their right to judgment notwithstanding the verdict

¹¹ The Supplemental Inventory did not list any of Clara's assets that George converted to his own use through the power of attorney while he was fiduciary (attorney-in-fact). While Busbee did not sign the Inventory, as respondents argue, she filed it with the court after George died. This is an endorsement of what George signed.

and/or a new trial on the cause of action for breach of fiduciary duty against the Estate of George Burch.

Respondent Busbee also asserts that there was not sufficient evidence for the jury to conclude that Jackie Busbee knowingly participated in any breach of duty. The factual evidence and the expert testimony establish there was such evidence. Professor John Freeman testified as an expert on behalf of appellants. He had previously testified as an expert in the area of aiding and abetting in the Vortex case. He testified as to the standard of care for a lawyer with regard to aiding and abetting as follows:

“A: ...he either knowingly or recklessly assists someone else who is doing something wrong and you become a participant. You’re not maybe the main wrongdoer. Somebody else is...such as George.....

Q: In the course of your investigation in this case have you found evidence of such conduct?

A: Yes.” (R. p. 834).

Professor Freeman went on to explain that the examples of aiding and abetting that he found by respondent Busbee were the representations in George’s estate by Busbee as his personal representative that he owned assets that belonged to Clara. (R. pp. 834, 1638, 1644). Professor Freeman characterized this representation, which was actually the filing of a false inventory that listed an asset that belonged to Clara, but Busbee as PR listed it as asset belonging to George’s estate. Mr. Freeman characterized Busbee’s conduct as “an active effort on behalf of Mrs. Busbee to further George’s claim and to further his wrongdoing.” He said that this was “active assistance in the face of knowledge of impropriety.”

Jim Hardin, a distinguished probate expert, also testified for appellants. He testified that it was a breach of the standard of care for Busbee not to have looked at the bank statements for the last month of Clara’s life. (R. p. 510). His opinion that if she had

looked at those bank statements she would have clearly seen over \$210,000 had been transferred by George out of Clara's name to himself in the last ten (10) days of her life. (R. pp. 510-511). Further, Mr. Hardin testified that Busbee had acknowledged in a filing in the probate court in June 2000 that she would get access to Clara's safe deposit box (R. p. 1299), but she never did. Had she done so, she would have discovered the assets converted by George. Thus, she had sufficient knowledge of wrongful acts. The primary affirmative act that clearly makes Busbee an aider and abettor in George Burch's wrongdoing is the Wachovia certificate of deposit in the amount of \$32,000, which was owned by Clara, was in Busbee's file after Clara's death, but which ended up being listed by Busbee as personal representative on the inventory of the Estate of George Burch. (R. pp. 1638-1644).

The lower court ignored and/or disregarded the plaintiffs' exhibits and the expert testimony of Freeman and Hardin in granting directed verdict and denying a new trial as to this cause of action for aiding and abetting. This Court should reverse this ruling and grant a new trial.

B. There Was Sufficient Evidence to go to the Jury on the Cause of Action for Fraud/Fraud Benefit Under §62-1-106 as to Respondents George Burch, Laurie Burch and Busbee, Individually and as PR.

There was sufficient evidence presented that the jury could have found respondents liable for fraud/fraud benefit under S.C. Code §62-1-106. This statute provides a cause of action for any person who is injured by fraud which is perpetrated in connection with a "proceeding" or in "any statement filed under this [Probate] Code." The trial court erroneously granted directed verdict as to all respondents on this cause of action.

Respondents argue that under the common law fraud analysis, the respondents did not make any representation, if they did they were not false, and the appellants did not rely on them to their detriment. (Busbee brief, pp. 25-31). This argument is incorrect. The facts recited in Initial Brief of Appellant show that the “fraud benefit” statute provides a mechanism for recovery for those persons, particularly estate beneficiaries such as the plaintiffs in the instant case, who are injured by fraud perpetrated upon the Court in a Probate proceeding. The cause of action is not synonymous with common law fraud. A common law fraud cause of action does not survive the death of the perpetrator. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E. 2d 94 (Ct. App. 2002). But under S.C. Code §62-1-106 the fruits of the fraudulent conduct may be in the hands of innocent persons, from whom recovery is possible, and the cause of action does survive, as it is part of the Probate Code.

A cause of action under S.C. Code §62-1-106 exists where a personal representative perpetrates a fraud on the court (“in connection with any proceeding”), files a false “statement under the Probate Code,” or uses fraud to “circumvent the provision or purposes of the Probate Code.” See Eoff v. Forrest, 789 P. 2d 1262 (N.M. 1990). In that case an affidavit was filed and the Supreme Court of New Mexico found that the probate court had relied on it. In the instant case, as set out in explicit detail in Appellants’ Initial Brief, pp. 30-33, the findings of Busbee as personal representative of George’s Estate contained assets in George’s Estate which belonged to Clara’s Estate to which she also was a fiduciary under §62-3-609. The jury could have concluded that such filing was false and a “fraud on the court.”

The reported cases in South Carolina on §61-1-106 are few and none directly on point. None have addressed “fraud upon the court.” The Alabama Supreme Court considered an identical statute, Ala. Code §43-8-5, in Christian v. Murray, 915 So. 2d 23 (2005). The Court discussed, as distinct from common-law fraud, that the statute contemplates a kind of fraud known as “fraud upon the court:”

“...fraud upon the court [is] that species of fraud that defiles or attempts to defile the court itself or that is a fraud perpetrated by an officer of the court and it does not include fraud among the parties...” citing Black’s Law Dictionary, 686 (8th Ed., 2004). (emphasis added). Id. at p. 26.

It is clear that knowingly filing false documents, such as George and Busbee did in the instant case, would constitute “fraud upon the court.”

The false and misleading filings and representations to the Court by George and Busbee constitute a fraud upon the Court under §62-1-106 which “attempts to defile the Court itself or which is perpetrated by officers of the court so that the judicial system cannot perform in the usual manner.” Eoff v. Forrest, 789 P. 2d at 1266.

Clara’s Estate and its beneficiaries have been injured by the fraud and respondents Busbee, Estate of George Burch, and Laurie and Dennis Burch have all benefitted. This Court should grant a new trial on this cause of action.

**C. There Was Sufficient Evidence to go to the Jury
on the Other Causes of Action.**

In the Initial Brief of Appellants it was argued fully why the lower court erred in granting directed verdict on the causes of action for conversion (as to respondent Busbee, individually and as PR) and for civil conspiracy (as to Busbee and Burch respondents). Those arguments are incorporated herein.

1. Conversion

Busbee's brief argues that there was no evidence that Busbee "received" any money of Clara's to "convert." (Busbee brief, pp. 36-37). As set forth in this brief, at a minimum, Busbee's file contained information from Wachovia about Clara's certificate. (R. pp. 1752-1755). Busbee's file reflects that she assisted George Burch in converting this certificate on September 21, 2000, months after Clara's death. Also, after George Burch died on January 18, 2003, Busbee (PR of his estate) became interim PR of Clara's estate, pursuant to S.C. Code §62-3-609. Busbee was interim PR of Clara's Estate until Charles Gordon's appointment as PR a month later. As such, Busbee had a fiduciary duty to marshal, protect, and deliver the assets of Clara. She failed to secure the Wachovia certificates and assisted George in converting it. She still "holds" this asset as PR of George's Estate.

2. Civil Conspiracy

Respondent Busbee argues that there was no "joint assent" of Busbee and George Burch, and thus this element of the cause of action has not been established. This is incorrect. There was strong circumstantial evidence from which the joint assent of the minds of George, the primary wrongdoer, and his attorney, fiduciary and attorney-in-fact Busbee could be found. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E. 2d 150, (Ct. App. 1987). According to attorney Busbee's file on the Estate of Clara Burch, Wachovia faxed to her on April 13, 2001, the date of death balance on Certificate No. 117232 owned by "Clara G. Carter Burch." (R. pp. 1753, 260-262). At that time it is inferred that Busbee had absolute knowledge that Clara was the sole owner of this

certificate of deposit. In fact, Busbee handwrote on the Wachovia fax: "Clara Burch Estate." (R. p. 1752).

Notwithstanding this knowledge, Busbee filed three (3) inventories in Clara's Estate that omitted this Wachovia certificate, including one after George died. (R. pp. 1752-1755, 1721-1739). To compound matters, and to complete the circle of assent, Busbee, as PR for George's Estate, on May 29, 2003, filed an Inventory claiming the Wachovia funds as owned by George! (R. pp. 1638-1644). Busbee refuses to return this asset to Clara's estate. She now joins the other respondents in claiming that Clara's estate has no right to the return of her funds and that Clara's Estate is a "stranger" to her own assets. (Brief of Respondents, p. 47).

The respondents cannot refute that there is a reasonable inference that there was joint assent between George Burch and Busbee, his fiduciary and Clara's fiduciary, who had multiple conflicts of interest.¹²

The respondents also argue that there is no evidence of "special damage" as a result of this conspiracy. The loss of the \$32,400 Wachovia certificate, as well as the loss of \$689,000 after Clara became mentally incompetent in July 1995, is indeed "special damage."

The lower court erred in granting respondents' motion for directed verdict on the causes of action for conversion and civil conspiracy and in denying appellants' motion for new trial.

¹² Respondents argue that George Burch and Busbee did not combine for the purpose of injury to the plaintiffs (Busbee brief, pp. 42-44). Obviously the effect of the combination of George and Busbee damaged Clara's Estate. See exhibits (R. p. 1359) and testimony of Sharon Swift and expert Asman.

D. Respondent Busbee Is Not Protected by the “Immunity Rule.”

Respondent Busbee argues for the first time in her brief that, as an additional sustaining ground, she is “immune” from liability to third person. She seeks, out of desperation, to ask this Court to rescue her from her “flagrant” and egregious conflicts of interest. This defense has been waived and, even if applicable, does not apply to the facts of this case.

1. The Defense of the Immunity Rule Was Waived.

The immunity rule defense is an affirmative defense which, if applicable, should have been pled in respondent’s Answer, but was not, nor was it presented in the lower court at all. See Rule 8(b) SCRPC (any matter constituting an avoidance must be set forth affirmatively as a defense). Respondent Busbee’s failure to plead it in her answer is a waiver. McCreery v. Covenant Presbyterian Church, 303 S.C. 271, 400 S.E.2d 130 (1990). Also, if she did not waive it by her failure to assert it in her Answer, Busbee’s failure to raise it at trial constitutes a waiver of this defense.

2. The Immunity Rule Does Not Apply in this Case.

Even if not waived, Busbee’s conduct in this case is not protected by this so-called “immunity rule.” This rule was referred to in some detail in Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 229 S.E. 2d 887 (Ct. App. 1986). In that case the general rule was recognized that a lawyer has no duty to third persons whom he or she does not represent and the lawyer is thus “immune” from liability to them. As a general proposition it acknowledges the rule of negligence law that a tortfeasor, including a lawyer, to be liable to someone, must breach a duty to that person. Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E. 2d 612 (1996).

However, in the instant case, respondent Busbee did owe duties to Clara's Estate in accordance with the trial exhibits and expert testimony. She held herself out as "attorney for the Estate of Clara Burch." (R. pp. 524, 1397-1403). She was also interim fiduciary for Clara's Estate under S.C. Code §62-3-609. According to probate expert Jim Hardin, Busbee breached duties to plaintiffs as attorney and as fiduciary. (R. pp. 533-542). As Hardin pointed out, Busbee was fiduciary to both Clara's Estate and then George's Estate. As fiduciary for Clara's Estate, she had a duty to make a claim against George's Estate for which she was also a fiduciary. (R. p. 539). The duty of a lawyer is one of "undivided loyalty" to the estate he represents (R. p. 540).

Respondent Busbee's indifference to these flagrant conflicts of interest does not allow her to ask this Court to "immunize" her acts as fiduciary. The "immunity rule" defense, not having been timely raise, has been waived by Respondents. Further, as described above, it does not apply.

IV. THE TRIAL COURT ERRED IN DENYING EQUITABLE RELIEF TO THE APPELLANTS.

The appellants rely on their prior arguments in their initial brief and focus now on the assertions made by respondents, who contend that the jury verdict in their favor precluded the trial court from considering and/or granting equitable relief. This is not an absolute rule.

The lower court had a duty, independent of the jury to make rulings on the equitable causes of action, particularly the cause of action for constructive trust. A constructive trust is a remedy for unjust enrichment. This doctrine requires a person holding title to property to convey that property to someone who deserves to hold the title.

A constructive trust arises from bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. Lollis v. Lollis, 291 S.C. 525, 354 S.E. 2d 559 (1987). Under Lollis, in an action to declare a constructive trust, being in equity, this Court may find the facts in accordance with its own view of the evidence. Notwithstanding the lower court order to the contrary, a review of this record will allow, in fact compel, this Court to conclude that the respondents George Burch Estate, it's PR Busbee, and its beneficiaries Laurie and Dennis Burch, have obtained over \$689,000 of funds which does not belong to the respondents and which they cannot in good conscience retain or withhold from the appellants who are beneficially entitled to same. The respondents acquired the funds through breach of trust and/or the violation of fiduciary duties. SSI Medical Services Inc. v. Cox, 301 S.C. 493, 392 S.E. 2d 789 (1990).

Appellants invite this Court's attention to the testimony of respondent Busbee's expert Steve Johnson, who said that if the funds of Clara were transferred to George by use of power of attorney, "there was a constructive trust imposed upon the funds." (R. p. 1051) (emphasis added) and that if Clara was incompetent when they were made they would be "owed back to Clara's estate" under constructive trust. (R. pp. 1051-1052).

This lower court's denial of post-trial motions should be reversed and, this Court, sitting as an equity court, should grant all equitable relief requested. In the alternative, this Court should be reverse and reward the issue of equitable relief with proper instructions to grant relief to appellants.

CONCLUSION

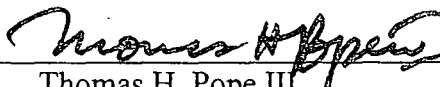
For the reasons stated in this Final Reply Brief and in the Final Brief of Appellant, the lower court committed reversible error in denying plaintiffs' directed verdict motions against the Estate of George Burch; in granting directed verdicts to respondents' on the causes of action of aiding and abetting, fraud/fraud benefits, breach of fiduciary duty, conversion and civil conspiracy; in refusing requests to charge; and in denying equitable relief to appellants.

This Honorable Court should reverse the lower court's rulings and direct that:

- (a) judgment be entered in favor of appellants against the Estate of George Burch for \$683,983, plus interest since September 30, 2007;
- (b) a new trial be granted on the causes of action against the respondents for aiding and abetting, fraud/fraud benefits, conversion, and civil conspiracy;
- (c) a new trial be granted because of an erroneous charge to the jury on the burden of proof; and,
- (d) equitable relief should be granted to the plaintiffs on constructive trust, removal of Busbee as PR, the Statute of Elizabeth, and an accounting.

Respectfully submitted,

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October 7, 2009

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

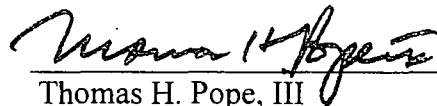
Charles E. Gordon and Barbara Gordon, as Personal
Representatives of the Estate of Clara Gordon Burch.....Appellants,

v.

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

CERTIFICATE OF COUNSEL

I, Thomas H. Pope III, Esquire, do hereby certify that Appellants' Final Reply Brief
complies with Rule 211(b).



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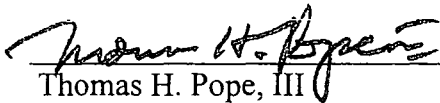
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CERTIFICATE OF COMPLIANCE

I, Thomas H. Pope III, Esquire, do hereby certify that Appellants' Final Reply Brief
complies with Supreme Court Order of August 13, 2007.



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