

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

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S.C. Supreme Court

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

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

v.

Petitioners/
Respondents,

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

Respondents/
Petitioners.

APPENDIX

Thomas H. Pope III
Pope & Hudgens, P.A.
PO Box 190
1508 College Street
Newberry, SC 29108
P: 803-276-2532; F: 803-276-8684
thpope@popeandhudgens.com
*Attorneys for Petitioners Charles E.
Gordon and Barbara Gordon, as PRs of
the Estate of Clara Gordon Burch*

OTHER COUNSEL OF RECORD:

Warren C. Powell, Jr.

Bruner, Powell, Wall & Mullins, LLC

PO Box 61110

Columbia, SC 29260

P: 803-252-7693; F: 803-254-5719

wpowell@brunerpowell.com

Attorneys for Respondent Jacqueline F. Busbee, Individually

B. Michael Brackett

Moses Koon & Brackett, PC

PO Box 100261

Columbia, SC 29202

P: 803-461-2312; F: 803-461-2309

mbrackett@mkb-law.com

*Attorneys for Respondent Jacqueline F. Busbee, as
Personal Representative of the Estate of George E. Burch*

Carlos W. Gibbons, Jr.

Ashley & Gibbons, PA

712 Calhoun Street, Suite B

Columbia, SC 29201

P: 803-771-4488; F: 803-736-7334

cgibbons@aglawsc.com

*Attorneys for Respondents Dennis E. Burch
and Laurie E. Burch*

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

In the Matter of: The Estate of
Clara Gordon Burch

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

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

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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

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

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

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

FACTS

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

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

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

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

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

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

for the execution of these transfers.

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

II. Grant of Directed Verdict

A. Aiding and Abetting a Breach of Fiduciary Duty

(Busbee – Individually and as PR)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Conversion (Busbee – Individually and as PR)

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

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

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

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

D. Civil Conspiracy

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

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

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

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

III. Jury Charges

A. Joint Bank Accounts

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

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

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

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

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

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

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

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

B. Conversion

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

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

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

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

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

In order to prove conversion, the plaintiff must (1) prove by the preponderance or greater weight of the evidence first that the plaintiff owned or had a right to possess a certain piece of personal property.

In other words, they must prove either title to or a right to possess the personal property. That would include, money, bank accounts at the time of conversion. Ordinarily, an immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the plaintiff to maintain his action.

Next, the plaintiff must (2) show by the preponderance or greater weight of the evidence that the defendant gained control and possession of the property or prevented the plaintiff from using the property. The wrongful detention of another person's property may give rise to an action for conversion, and, finally, the plaintiff must show (3) by the preponderance or greater weight of the evidence that the defendant did this without the plaintiff's permission. If the plaintiff expressly or impliedly agreed to or approved the defendant's taking, use, retention, or disposition of the property, the plaintiff cannot recover for conversion of the property. . . .

If you find that a conversion did take place, you should return a verdict for the plaintiff for the value of the property taken with interest. Of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence.

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

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

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

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

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

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

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

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

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

IV. Equitable Relief

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

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

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

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

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

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

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

CONCLUSION

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

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

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

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

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

v.

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

PETITION FOR REHEARING

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

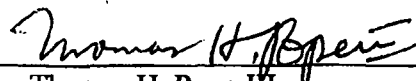
Attached to this Petition is a Memorandum in Support of Petition for Rehearing which identifies and analyzes the points which the appellants contend The Opinion has overlooked or misapprehended. This Petition incorporates herein the appellants’ analysis and arguments in the attached Memorandum.

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

- (a) reversing the lower court's denial of appellants' motion for directed verdict as to Wachovia CD #117232 in the amount of \$33,309.87, plus interest from September 21, 2000, for breach of fiduciary duty, and remanding this matter to the lower court for assessment of prejudgment interest;
- (b) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and as PR, on the cause of action for aiding and abetting breach of fiduciary duty and remanding this cause of action for new trial;
- (c) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and PR, Respondent Laurie Burch and Respondent Dennis Burch, on the cause of action for fraud/fraud benefit under S.C. Code §62-1-106 and remanding this cause of action for a new trial; and,
- (d) reversing the refusal of the lower court to give the proper jury instructions as to the burden of proof and burden of persuasion on the cause of action for conversion where transfers are made by use of a POA where the principal is incompetent and/or by a personal representative for his own benefit.

Respectfully submitted,

POPE AND HUDGENS, P.A.

BY: 
Thomas H. Pope III
PO Box 190 - 1508 College Street
Newberry, SC 29108
thpope@popeandhudgens.com
P: 803-276-2532; F: 803-276-8684

Adele J. Pope
1228 Walnut Street
Newberry, SC 29108

Attorneys for Appellants Charles E. Gordon and
Barbara Gordon as PRs of Estate of Clara
Gordon Burch

September 13, 2011

App. p.000018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

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

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

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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

INTRODUCTION

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

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

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

ARGUMENTS

I.

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

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

2000¹ were invalid. The Opinion correctly concluded that the lower court erred in failing to grant appellants' motion for a directed verdict under Fender, but failed to include the Wachovia certificate of deposit #117232 that was owned by Clara at her death in April 2000, becoming an asset of her estate, but which was transferred by George, as personal representative, into a certificate of deposit in his own name on September 21, 2000.

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

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

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

owned by Clara and was an asset in her estate.

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

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

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

II.

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

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

participation in the breach.” The Opinion overlooks or misapprehends the significance of the Wachovia certificate of deposit that was transferred from Clara’s estate to George after her death. (Plaintiffs’ Exhibit 89, R., pp. 1752-1754). The record shows that on April 13, 2001, Defendant Busbee received a fax, in response to her inquiry, from Wachovia bank reflecting that CD #117232³ in the name of “Clara G. Carter Burch” had been closed on September 21, 2000, over six months after Clara’s death, at the “personal representative’s request.” Busbee was attorney for the personal representative, George Burch, at the time of the transfer. These funds were placed in certificates of deposit in George’s name. (Plaintiffs’ Exhibit 89A, R., p. 1755).

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

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

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

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

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

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

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

Witness: It was not an I.R.A. account."

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

“Clara Burch Estate.” (R., p. 1752).

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

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

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

III.

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

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

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

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

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

IV.

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

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

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

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

Plaintiffs' counsel went on to say that

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

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

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

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

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

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

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

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

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

CONCLUSION

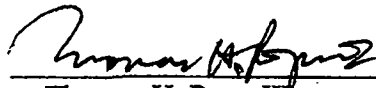
For the reasons set forth in this Memorandum, the appellants request that this Honorable Court grant this Petition for Rehearing and issue its Opinion:

- (a) amending the Opinion to include Wachovia CD #117232, (with a balance of \$33,309.87 on September 21, 2000, plus interest) as an asset of Clara's estate which George transferred to himself improperly under his authority as personal representative, as part of the appellants' directed verdict motion which this Court reversed and remanded;
- (b) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and as PR, on the cause of action for aiding and abetting breach of fiduciary duty and remanding this cause of action for new trial;
- (c) reversing the lower court's granting directed verdict in favor of Respondent Busbee, individually and PR, Respondent Laurie Burch and Respondent Dennis Burch, on the cause of action for fraud/fraud benefit under S.C. Code §62-1-106 and remanding this cause of action for a new trial; and,

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

Respectfully submitted,

POPE AND HUDGENS, P.A.

BY: 
Thomas H. Pope II
PO Box 190 - 1508 College Street
Newberry, SC 29108
thpope@popeandhudgens.com
P: 803-276-2532; F: 803-276-8684

Adele J. Pope
1228 Walnut Street
Newberry, SC 29108

Attorneys for Appellants Charles E.
Gordon and Barbara Gordon as PRs of
the Estate of Clara Gordon Burch

September 13, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880, Filed August 31, 2011

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

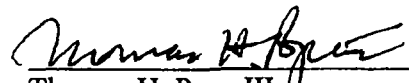
PROOF OF SERVICE

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

Carlos W. Gibbons, Jr., Esquire
Ashley & Gibbons, PA
712 Calhoun Street, Suite B
Columbia, SC 29201
Attorneys for Respondents Dennis E. Burch
and Laurie E. Burch

William D. Britt, Jr., Esquire
Warren C. Powell, Jr., Esquire
Bruner, Powell, Robbins, Wall
and Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110
Attorneys for Respondent
Jacqueline F. Busbee, Individually

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
PO Box 100261
Columbia, SC 29202
Attorneys for Respondent Jacqueline F. Busbee, as
Personal Representative of the Estate of George E. Burch


Thomas H. Pope III

September 13, 2011

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

In the Matter of:

The Estate of Clara Gordon Burch

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

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

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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

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

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

FACTS

App. p.000033

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

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

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

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

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

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

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

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

II. Grant of Directed Verdict

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Conversion (Busbee – Individually and as PR)

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

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

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

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

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

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

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

III. Jury Charges

A. Joint Bank Accounts

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

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

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

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

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

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

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

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

B. Conversion

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

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

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

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

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

In order to prove conversion, the plaintiff must (1) prove by the preponderance or greater weight of the evidence first that the plaintiff owned or had a right to possess a certain piece of personal property.

In other words, they must prove either title to or a right to possess the personal property. That would include, money, bank accounts at the time of conversion. Ordinarily, an immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the plaintiff to maintain his action.

Next, the plaintiff must (2) show by the preponderance or greater weight of the evidence that the defendant gained control and possession of the property or prevented the plaintiff from using the property. The wrongful detention of another person's property may give rise to an action for conversion, and, finally, the plaintiff must show (3) by the preponderance or greater weight of the evidence that the defendant did this without the plaintiff's permission. If the plaintiff expressly or impliedly agreed to or approved the defendant's taking, use, retention, or disposition of the property, the plaintiff cannot recover for conversion of the property. . . .

If you find that a conversion did take place, you should return a verdict for the plaintiff for the value of the property taken with interest. Of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence.

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

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

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

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

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

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

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

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

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

IV. Equitable Relief

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

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

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

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

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

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

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

CONCLUSION

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

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

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

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

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

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

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

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

The South Carolina Court of Appeals

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

v.

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

In the Matter of:

The Estate of Clara Gordon Burch

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

ORDER GRANTING PETITIONS FOR REHEARING

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

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

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

John Cannon C.J.
Paul W. Thomas
U. K. J.

Columbia, South Carolina

cc: Adele Jeffords Pope, Esquire
Thomas H. Pope, Esquire
B. Michael Brackett, Esquire
Carlos W. Gibbons, Jr., Esquire
Warren C. Powell, Jr., Esquire
William D. Britt, Jr., Esquire

FILED
4 January 2012