THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Presiding Judge

Opinion No. 4842 (S.C. Ct. App. filed June 15, 2011)

In the Matter of the Estate of Charles Galen Rider, a/k/a C.G. Rider

Carolyn S. Rider,.....Petitioner,

v.

Estate of Charles Galen Rider, Thomas M. Grady, Personal Representative,.....Respondent,

and

Deborah Rider McClure, Ginger C. Rider, Christian M., and Austin M.,.....Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENTS DEBORAH RIDER MCCLURE, GINGER C. RIDER, CHRISTIAN M., AND AUSTIN M.

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STATEMENT OF THE CASE

This was an action to determine whether certain financial assets should be included in a probate estate. On June 30, 2006, the Personal Representative of the Estate of Charles Rider filed a petition with the Probate Court in Beaufort County requesting an order that either: (a) all assets transferred to an agency account for Carolyn Rider, decedent's second wife, pursuant to a letter signed on June 17, 2005, were completed transfers as of the date of the letter; or (b) assets transferred after Charles Rider's death, on July 8, 2005, were incomplete transfers and, therefore, part of the probate estate. App., Vol. I, pp. 38-43.

On August 14, 2006, Deborah Rider McClure and Ginger C. Rider, daughters of Charles Rider; and Christian M. and Austin M., grandsons of Charles Rider (hereinafter referred to as "Respondents McClure"), filed a response to the petition in which they denied: (1) the June 17, 2005 letter was an entitlement order pursuant to Section 36-8-102(8) of the South Carolina Code; (2) the financial assets were effectively transferred to Carolyn Rider as of the date of the letter; and (3) the transfers were completed *inter vivos* gifts as of the date of the letter. App., Vol. I, pp. 66-68.

On September 11, 2006, Carolyn Rider filed an answer to the petition in which she admitted that Wachovia made the following four transfers *on the book entry dates set forth by Wachovia*: (1) On June 21, 2005, Wachovia transferred $733,228.00 dollars worth of securities to her account; (2) on July 8, 2005, Wachovia transferred $39,672.00 dollars worth of securities to her account; (3) on July 11, 2005, Wachovia transferred $935,032.64 worth of securities to her account; and (4) on October 20 2005, Wachovia transferred $304,182.46 worth of securities to her account. App., Vol. I, p. 58.

On July 10, 2007, the parties filed a Stipulation of Facts. App., Vol. I, pp. 71-73. On that same date, a trial on the petition was held before the Honorable Kenneth E. Fulp, Jr., Associate Judge of the Beaufort County Probate Court. On October 12, 2007, the Court entered an order of judgment in which the Court held the following: (1) The June 17, 2005 letter was an entitlement order pursuant to Article 8 of the Uniform Commercial Code; (2) the securities transfers required delivery for completion; (3) Wachovia's authority to act as an agent for Charles Rider terminated upon notification of his death on July 8, 2005; (4) the first three transfers were effective because Wachovia testified at trial that it generally takes several days to transfer securities from one account to another; (5) the October 20, 2005 transfer was part of the probate estate because Wachovia did not take the necessary steps to effectuate that transfer prior to the death of Charles Rider; and (6) the law of principal and agency supplements the provisions of Article 8. App., Vol. I, pp. 19-30.

On October 19, 2007, Carolyn Rider appealed the Order of Judgment to the Beaufort County Court of Common Pleas. App., Vol. I, pp. 119-20. On November 11, 2007, Carolyn Rider filed her grounds for appeal, which were: (1) the entitlement order was effective on the day it was made; (2) the Probate Court erred in applying the law of agency; (3) the Probate Court erred in not applying the "prior acts" provisions of the Agency Agreement to the actions of the principal; and (4) the Probate Court's order frustrated the intent of Charles Rider. App., Vol. I, pp. 121-22. On November 17, 2008, the Court of Common Pleas entered its Appellate Order in which it affirmed the holding of the Probate Court. App., Vol. I, pp. 32-37.

On December 17, 2008, Carolyn Rider appealed the Appellate Order of the Circuit Court to the South Carolina Court of Appeals. App., Vol. I, pp. 124. The case was heard before the Court of Appeals on May 5, 2011, and the Court filed its opinion on June 15, 2011. The Court of

Appeals held: (1) whether Wachovia had the authority to transfer assets from Charles Rider's agency account depended upon its authority pursuant to the Agency Agreement, which ended when Wachovia was advised of his death; (2) because Wachovia did not make the fourth (and third) transfer(s) before his death, the fourth transfer is part of the probate estate; and (3) Carolyn Rider failed to preserve the issue of whether the fourth transfer, unlike the first three transfers, was a completed *inter vivos* gift. App., Vol. I, pp. 607-19.

STATEMENT OF FACTS

On September 27, 1993, Charles Rider entered into an Investment Agency Agreement (the "Agency Agreement") with First Union National Bank of North Carolina, a predecessor of Wachovia Bank, N.A. App., Vol. I, pp. 246-47, 71; Vol. II, p. 608. Wells Fargo & Company acquired Wachovia on December 31, 2008 and is, therefore, the banking and investment entity involved in this appeal for any dates on or after December 31, 2008.[1]

Under the terms of the Agency Agreement, Charles Rider authorized First Union and, by succession, Wachovia, to do the following on his behalf:

> [O]pen and maintain an Agency Account (Discretionary) for me, and . . . hold therein, as my Agent, all cash, stocks, bonds, securities and other property time to time deposited with or collected by you for such account, subject to the following instructions and such other instructions as may from time to time be furnished in writing by me or my attorney-in-fact.

App., Vol. I, pp. 246-47; Vol. II, p. 608. The instructions set forth in the Agency Agreement included the following:

> 1. You are to provide investment review and management of the Account, taking such action as you, in your discretion, deem best with respect to the investment and reinvestment of the property held herein as though you were the owner of such property. Your authority extends, though is not limited to the sale and purchase of securities, the sale of [sic] exercise of warrants, subscription rights and other rights of similar nature. . . .

[1] See https://www.wellsfargo.com/wachovia (accessed on Sept. 15, 2011). The Trust Agreement also lists Wachovia as the successor [now acting] trustee. App., Vol. I, pp. 406-08.

App., Vol. I, pp. 246, 21; Vol. II, p. 608. The Agency Agreement provided for its termination upon death of the principal:

> This agreement may be terminated by either party by giving thirty (30) days notice in writing to the other party or by my death, provided that termination by reason of my death shall be effective only upon receipt of actual knowledge thereof by one of your responsible officials and shall not affect the validity of any prior actions. . . .

App., Vol. I, pp. 247, 23; Vol. II, pp. 608-09.

Less than three weeks before his death from colon cancer, Charles Rider signed a letter (the "Letter"), dated June 17, 2005, giving Wachovia authority to transfer unspecified securities and cash to a "new agency account" to be opened for his then-wife, Carolyn Rider. App., Vol. I, p. 78; Vol. II, p. 609. Despite the fact that Charles Rider was, during his lifetime, a sophisticated businessman who owned a racing team and amassed a net worth of over $15 million, the documents involved in this transfer of over $2 million (or roughly 12.5 percent of his net estate) are rudimentary, if not perfunctory, and fail in these particulars: (1) The Letter does not state what assets are to be transferred; (2) the Letter does not state the amount or value of the assets to be transferred; (3) the Letter does not state when the assets are to be transferred; (4) the Letter does not provide a date by which any transfers should occur take place; (5) the Letter references assets listed on a "following page"; (6) the page attached to the Letter lists assets totaling $2,000,000.00; (7) the page attached to the Letter was neither signed nor initialed by Charles Rider; (8) the page attached to the Letter has a market values date that is several days before the date of the Letter; and (9) the page attached is not otherwise dated. App., Vol. I, pp. 78-79.

With respect to delivery of the Letter, it further fails in these respects: (1) There is no evidence in the record to indicate how the letter was delivered to Wachovia; (2) there is no evidence in the record to indicate when the Letter was delivered to Wachovia; (3) there is no

evidence in the record to indicate when Carolyn Rider was apprised of the Letter; (4) there is no evidence in the record to indicate when Carolyn Rider was apprised of the transfers; and (5) there is no evidence in the record as to when the transfers occurred other than the book entry dates provided by Wachovia.

During the three weeks (exactly 21 days) between the date of the June 17, 2005 Letter and the day Charles Rider died, on July 8, 2005 (App. Vol. I, pp. 22, 289), Wachovia made the following transfers of financial assets from Charles Rider's agency account to an agency account for Carolyn Rider:

1. On June 21, 2005, Wachovia transferred shares of various stocks with a value of $733,228.00 (the "First Transfer") from Charles Rider's agency account to Carolyn Rider's account as indicated by book entries to Carolyn Rider's account, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73; Vol. II, p. 609.

2. On July 8, 2005, Wachovia transferred shares of stocks with a value of $39,672.00 (the "Second Transfer"), from Charles Rider's agency account to Carolyn Rider's account, as indicated by book entries to Carolyn Rider's account, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73; Vol. II, p. 609.

Carolyn Rider does not contest the fact that these transfers occurred as of the dates of these bank entries. App., Vol. I, pp. 80-82, 59, 71-73. Indeed, in her Answer to the Petition for Declaratory Judgment filed with the Probate Court, Carolyn Rider admits the transactions occurred on the dates of the book entries:

> The Respondent, Carolyn S. Rider, admits . . . [o]n June 21, 2005, Wachovia transferred . . . ($733,228.00) . . . worth of securities to Carolyn Rider; that on July 8, 2005, Wachovia transferred . . . ($39,672.00) . . . worth of securities to Carolyn Rider; that on July 8, 2005, Wachovia transferred . . . ($935,032.64) . . . worth of securities to Carolyn Rider; and, that on October 20, 2005, Wachovia transferred . . . ($304,182.64) . . . worth of securities to Carolyn Rider.

App., Vol. I, p. 59, 50-52, 71-73.

Charles Rider's daughter, Deborah Rider McClure, kept Wachovia apprised of her father's condition. App., Vol. I, pp. 188-90. On the day her father died, she informed Leila Evans,

Charles Rider's relationship manager at Wachovia, by telephone, of Charles Rider's passing. App., Vol. I, pp. 188-90. The relationship manager is the customer's primary contact with Wachovia. App., Vol. I, pp 183-84. By Sunday, July 10, 2005, Leila Evans informed Lynn DiLella, an officer of Wachovia's Wealth Management Group which managed Charles Rider's investment account, of Charles Rider's death. App., Vol. I, p. 163; Vol. II, p. 609. The next day —three days after Charles Rider passed, and over three weeks after the date of the Letter— Wachovia made the following transfers of financial assets from Charles Rider's agency account to a securities account for Carolyn Rider:

3. On July 11, 2005, Wachovia transferred various units of bonds (Evergreen International; Evergreen Adjustable; Evergreen North Carolina Municipal; and Evergreen Emerging Markets) with a value of $935,032.64 (the "Third Transfer") from Charles Rider's agency account to Carolyn Rider's account, as indicated by book entries to Carolyn Rider's account, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73. Wachovia held the Evergreen Mutual fund—it was an internal company. App., Vol. I, pp. 182-83; Vol. II, p. 609.

Over four months after the June 17, 2005 Letter—and over 100 days after Charles Rider died—Wachovia made the following transfers of financial assets from Charles Rider's agency account to a securities account for Carolyn Rider:

4. On October 20, 2005, Wachovia transferred various units of municipal bonds with a value of $304,182.46 (the "Fourth Transfer") from Charles Rider's agency account to Carolyn Rider's account, as indicated by a book entry by Wachovia to a securities account for Carolyn Rider, as admitted by Carolyn Rider. App., Vol. I, pp. 80-82, 59, 71-73; Vol. II, p. 609.

ARGUMENT

This case does not present a novel issue of law or any other issue on which this Court should grant a writ of certiorari on the issues presented by Carolyn Rider. Rather, this is a petition for review of a case in which three lower courts have ruled—both on common law and statutory bases—that Wachovia did not have the authority pursuant to the Agency Agreement to transfer the Fourth Transfer from Mr. Rider's agency account to a securities account for Carolyn Riders over three months after Mr. Rider's death. Rather than causing "widespread commercial, systemic uncertainty in financial and estate planning/estate administration," this Court's denial of certiorari will leave the UCC intact and interpreted as the drafters intended.

I. THE SUPREME COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT THE FOURTH TRANSFER IS PART OF THE PROBATE ESTATE.

Carolyn Rider asks this Court to turn a blind eye to the facts of this case, and the applicable provisions of the UCC and agency law, with her assertion that the South Carolina Court of Appeals "fail[ed] to recognize commercial realities associated with timing, mechanics and multiple entities involved in the asset transfer/entitlement order process." This Court should reject Carolyn Rider's assertions and deny the petition for certiorari on these two bases: (A) The Court of Appeals correctly held that the Fourth Transfer is part of the probate estate because Wachovia's authority to transfer assets pursuant to the Agency Agreement terminated upon the death of Charles Rider, and the Fourth Transfer was made over three months after Mr. Rider died; and (B) the Court of Appeals correctly held that the Fourth Transfer is part of the probate estate because Carolyn Rider did not acquire a securities entitlement to any of the assets until Wachovia indicated by book entries that the assets were credited to her securities account, and

Wachovia did not indicate by book entries that the Fourth Transfer was credited to Carolyn Rider's securities account until over three months after Mr. Rider died.

A. Because Wachovia's Authority to Transfer Assets Pursuant to the Agency Agreement Terminated Upon Charles Rider's Death, the Fourth Transfer is Part of the Probate Estate.

Wachovia's authority to transfer assets pursuant to the Agency Agreement terminated upon Charles Rider's death. App., Vol. I, pp. 76-77. Wachovia received notice of Charles Rider's death on the day he died. App., Vol. I, pp. 163, 188-90. The Court of Appeals correctly held that any financial assets not transferred as of that date are part of the probate estate.

1. Wachovia Was Charles Rider's Agent and Had the Authority to Act on His Behalf Until July 8, 2005.

An agency is a fiduciary relationship whereby one party, the agent, acts on behalf of another party, the principal, subject to the principal's control. 3 Am. Jur. 2d Agency § 1; Restatement (Third) of Agency § 1.01. Here, Wachovia acted as an agent for Charles Rider pursuant to the terms of the Agency Agreement. App., Vol. I, pp. 76-77. Pursuant to the Agency Agreement, Wachovia had the authority, among other related things, to provide investment review and management of an investment account; purchase and sell securities, warrants, subscription and other rights in accordance with Charles Rider's investment objective; and register stock certificates and other registered securities in its name as his agent. App., Vol. I, pp. 76-77.

The death of a principal terminates an agent's authority once the agent has notice of the principal's death. Restatement (Third) of Agency § 3.07(2); *see also, Parker v. First Citizens Bank & Trust Co.*, 229 N.C. 527, 50 S.E.2d 304 (1948); *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814, 817 (1948). "The reason for this rule is that the authorized acts of the agent are in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is

regarded as an execution of the principal's continuing will." *Id.*

This principle was affirmed by the terms of the Agency Agreement, which reads:

> This agreement may be terminated by either party giving thirty (30) days notice in writing to the other party or by [Charles Rider's] death, provided that termination by reason of [Charles Rider's] death shall be effective only upon receipt of actual knowledge thereof by one of [Wachovia's] responsible officials . . . .

App., Vol. I, pp. 76-77. Mr. Rider's daughter, Deborah Rider McClure, notified his relationship manager at Wachovia of his death on the day he died. App., Vol. I, pp. 188-90. The relationship manager was the customer's primary contact with Wachovia. App., Vol. I, p. 183-84. By Sunday, July 10, 2005, Leila Evans informed Lynn DiLella, an officer of Wachovia's "Wealth Management Group," that managed Charles Rider's investment account, of Charles Rider's death. App. Vol. I, p. 163. Accordingly, under the law and terms of the Agency Agreement and the facts of this case, Wachovia had the authority to manage Charles Rider's agency account as his agent until July 8, 2005, when Wachovia was notified of Charles Rider's death.

2. Because There is No Evidence in the Record to Support a Finding that the Financial Assets Transferred After Charles Rider's Death Were in the Process of Being Transferred Before his Death, the Court of Appeals Correctly Held that the Fourth Transfer is Part of the Probate Estate.

Carolyn Rider asserts that Wachovia began the process of transferring the financial assets of the Third and Fourth Transfers before Charles Rider's death, but neither she nor Wachovia offered any evidence at trial to support that contention. Carolyn Rider did not testify at the trial. The two representatives from Wachovia who testified at trial, did not testify with any specificity or as to when the transfer process began as to any of the financial assets. App., Vol. I, pp. 164-68, 182-83. The representatives from Wachovia only spoke in general terms as to how long the process may take as to various types of assets. App., Vol. I, pp. 164-68, 182-83. Lynn DiLella, who managed the wealth management relationship with Charles Rider at Wachovia, testified that

"[s]tock assets can be transferred relatively quickly if [they] have the certificate in good form in [their] vault in New York. . . . That can be done within a day, or three days, excuse me. If a trade is made, it settles within three days." App., Vol. I, pp. 165-66. "Mutual funds take a lot longer. . . . I have found it can take a week . . . ." App., Vol. I, pp. 165-66. Jonathan Rhomey, who was the successor to the employee in the trust department at Wachovia when the financial assets were transferred, testified that stocks transfer "very quickly"; mutual funds could take ten days to a few weeks. Maybe longer."[2] App., Vol. I, pp. 181-83; App., Vol. II, p. 610. He also admitted that he was surprised to learn the transfers took this long—it was unusual. App., Vol. I, pp. 185-86; Vol. II, p. 610

Neither Carolyn Rider nor Wachovia produced any documents showing when the transfer process began as to any of the financial assets. App., Vol. II, p. 618. Importantly, Wachovia testified that such documents exist. App., Vol. I, pp. 182-83. Wachovia testified that when a letter, such as Charles Rider's, was received by Wachovia's trust department, Wachovia used a specific form that gives instructions to various departments, depending upon what securities are being transferred. App., Vol. I, pp. 182-83, 175. Neither Carolyn Rider nor Wachovia produced this initial form nor any other or subsequent forms or documentation showing when the transfer process began or was underway as to the transfer of any of the financial assets. App., Vol. II, p. 618. Equally important, Wachovia maintained its silence when asked if the Third Transfer was started at least a couple of days prior to that date. App., Vol. I, p. 173. Admissions may be implied from mere silence. *Guignard Brick Works v. Allen University*, 155 S.C. 507, 152 S.E. 707, 708 (1930). Only when questioned in broader terms did Wachovia assent to questioning as to when transfers were initiated. App., Vol. I, pp. 171-75.

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[2] Mr. Rhomey also testified that Wachovia internally held the fund from which the Third Transfer was made—further undermining any claim that the transfer took over three weeks to settle. App., Vol. I, pp. 182-83.

Therefore, the Court of Appeals correctly found that there is no evidence in the record to support a finding that the Fourth (and Third) Transfer began before Mr. Rider passed. App., Vol. II, p. 618. Accordingly, this Court should deny certiorari on this issue.

3. The Court of Appeals Correctly Held that Agency Law Supplements, Rather Than Displaces, the Applicable Provisions of the UCC.

Relying on South Carolina common law and Section 1-103 of the UCC, Carolyn Rider asserts that the Uniform Commercial Code should displace the Agency Agreement. The Court of Appeals correctly held that agency law, and the agency agreement, supplement the applicable provisions of the UCC (App., Vol. II, p. 615), and this Court should deny certiorari on this issue.

Section 103 of Article 1 of the UCC states that the law relative to principal and agency "shall supplement" the provisions of the UCC unless common law provisions are displaced by particular provisions of the UCC. S.C. Code Ann. § 36-1-103 (1976 & Supp. 2010). The Official Comment to Section 509 of Article 8 makes it clear that the common law of principal and agency supplement the provisions of Article 8 and govern the relationship between an intermediary and its customers:

> This Article is not a comprehensive statement of the law governing the relationship between . . . securities intermediaries and their customers. Most of the law governing that relationship is the common law of contract and agency, supplemented or supplanted by regulatory law. This Article deals only with the most basic commercial/property law principles governing the relationship. Although Sections 8-504 through 8-508 specify certain duties of securities intermediaries to entitlement holders, the point of these sections is to identify what it means to have a security entitlement, not to specify the details of performance of these duties.

S.C. Code Ann. § 36-8-509 cmt. (1976 & Supp. 2010).

The Agency Agreement, and law of principal and agent, supplement Article 8 in this case by providing that the Agency Agreement terminated upon notification of Charles Rider's death, and that Wachovia ceased to have authority to act on Charles Rider's behalf after his death.

App., Vol. I, pp. 76-77; Vol. II, p. 615. Only if Article 8 is misconstrued, as Carolyn Rider urges, do its provisions conflict with the Agency Agreement, the law relative to principal and agent, and the actions of the parties and Wachovia in this case.

Because there is no evidence in the record to support a finding that the assets transferred after Charles Rider's death were in the process of being transferred before his death, and Wachovia did not have the authority to transfer them after his death, the Court of Appeals correctly held that the assets of the Fourth Transfer, which was transferred to Carolyn Rider's account on October 20, 2005, are part of the probate estate. Accordingly, this Court should deny the petition for certiorari on this issue.

B. The Court of Appeals Correctly Held that the Fourth Transfer is Part of the Probate Estate Because Carolyn Rider Did Not Acquire a Securities Entitlement To Any of the Assets Until Wachovia Indicated by Book Entry That the Assets Were Credited to Her Securities Account, and Wachovia Did Not Indicate By Book Entry That the Fourth Transfer Was Credited to Carolyn Rider's Securities Account Until Over Three Months After Mr. Rider Died.

Carolyn Rider asserts that she became an entitlement holder of the Fourth Transfer as of the date of the Letter. However, Carolyn Rider does not appeal or dispute the Court of Appeals and other lower court rulings that she became the entitlement holder of the first two transfers as of the book entry dates. App., Vol. I, pp. 59, 71-73; App., Vol. II, p. 536. Accordingly, it is the law of the case that the book entry dates determine when she became an entitlement holder as to all of the transfers, and she is precluded from asserting otherwise. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544 (1970) ("Under long-standing principles of law, an unappealed ruling is the law of the case."). This Court should deny certiorari on this issue.

Further, in her Answer to the Petition for Declaratory Judgment filed with the Probate Court, Carolyn Rider admits the transactions occurred on the dates of the book entries:

> The Respondent, Carolyn S. Rider, admits . . . [o]n June 21, 2005, Wachovia transferred . . . ($733,228.00) . . . worth of securities to Carolyn Rider; that on July 8, 2005, Wachovia transferred . . . ($39,672.00) . . . worth of securities to Carolyn Rider; that on July 8, 2005, Wachovia transferred . . . ($935,032.64) . . . worth of securities to Carolyn Rider; and, that on October 20, 2005, Wachovia transferred . . . ($304,182.64) . . . worth of securities to Carolyn Rider.

App., Vol. I, pp. 59, 51-53. Accordingly, this Court should deny certiorari on this issue.

Furthermore, as discussed below, the Court of Appeals correctly held that, in applying the applicable sections of Article 8 of the UCC to the facts of this case, Carolyn Rider did not become an entitlement holder until the dates that Wachovia indicated by book entry that her securities account was credited with the transfers. App. Vol. II, pp. 613-18. Because Wachovia did not make the Fourth Transfer to Carolyn Rider's securities account until over three months after Mr. Rider died, Wachovia did not have the authority to transfer the assets of the Fourth Transfer. Accordingly, the Court of Appeals correctly held the Fourth Transfer is part of the probate estate, and this Court should deny certiorari on this issue.

1. Wachovia Chose the Method By Which Carolyn Rider Acquired a Securities Entitlement to the Fourth Transfer.

Pursuant to Article 8 of the UCC, a "securities intermediary" includes a bank "that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity." S.C. Code Ann. § 36-8-102(4) (1976 & Supp. 2010); App. Vol. II, pp. 613-18. A "financial asset" is a security. S.C. Code Ann. § 36-8-102(9) (1976 & Supp. 2010); App., Vol. II, pp. 613-18. There is no dispute that the transfers involved in this case are securities—stocks and bonds (with the Fourth Transfer being municipal bonds). A "'securities entitlement' means the rights and property interest of an entitlement holder with respect to a financial asset . . . ." S.C. Code Ann. § 36-8-102(17) (1976 & Supp. 2010); App., Vol. II, pp. 13-18. An "'entitlement holder' means a person identified in the records of a securities intermediary as the person having

a security entitlement against the securities intermediary." S.C. Code Ann. § 36-8-102(7) (1976 & Supp. 2010); App., Vol. II, pp. 613-18.

Section 501(b) of Article 8 provides three methods under which a person acquires a securities entitlement from a securities intermediary. S.C. Code Ann. § 36-8-501(b) (1976 & Supp. 2010); App., Vol. II, pp. 613-18. One of the methods set forth in Section 8-501(b) is as follows: "***a person acquires a security entitlement if a securities intermediary . . . indicates by book entry that a financial asset has been credited to the person's securities account.***" S.C. Code Ann. 36-8-501(b)(1) (1976 & Supp. 2010) (emphasis added); App., Vol. II, pp. 613-18. The only evidence introduced at trial as to when Wachovia acknowledged that Carolyn Rider acquired a security entitlement to any of the financial assets was by the book entry dates that the stocks and bonds were credited to her securities account. App., Vol. I, pp. 51-53; Vol. II, p. 618. Again, Carolyn Rider does not dispute the fact that she acquired a security entitlement on the book entry dates as to the financial assets credited to her securities account on the dates of the first two transfers, and she admits that the book entry dates are the dates the transfers were made as to all four transfers. App., Vol. I, pp. 59, 71-73; App., Vol. II, p. 536.

2. Sections 506 and 507 of Article 8 Set Forth a Securities Intermediary's Duties to Comply with an Entitlement Order and Are Inapplicable in the Instant Case.

Carolyn Rider attempts to avoid the straightforward application of the applicable provisions of Article 8 by asserting that she became an entitlement holder as of the date of the Letter. She bases this argument on an assertion that Sections 506 and 507 of the UCC govern when an individual becomes an entitlement holder. Carolyn Rider misleads the Court with this argument, and the Court should deny certiorari on this issue.

Sections 506 and 507 set forth duties of a securities intermediary to comply with entitlement orders. S.C. Code Ann. §§ 36-8-506, 36-8-507 (1976 & Supp. 2010). They provide that a securities intermediary satisfies its duties if it acts pursuant to an agreement or, in the absence of an agreement, if it "exercises due care in accordance with reasonable commercial standards." S.C. Code Ann. § 36-8-506 (1976 & Supp. 2010). The Official Comment to Section 509 makes this abundantly clear:

> Although Sections 8-504 through 8-508 specify certain duties of securities intermediaries to entitlement holders, the point of these sections is to identify what it means to have a security entitlement, *not to specify the details of performance of these duties.*

S.C. Code Ann. § 36-8-509 cmt. (1976 & Supp. 2010) (emphasis added). Whether Wachovia/Wells Fargo exercised due care in accordance with reasonable commercial standards or acted pursuant to agreement is not before this Court. Because Carolyn Rider misconstrues these provisions of Article 8, and misleads the Court with this argument, this Court should deny certiorari on this issue.

In sum, because the Court of Appeals correctly held that Wachovia's authority to transfer assets pursuant to the Agency Agreement terminated upon the death of Charles Rider; the Fourth Transfer was made over three months after Mr. Rider died; Carolyn Rider did not acquire a securities entitlement to any of the assets until Wachovia indicated by book entry that the assets were credited to her securities account; and Wachovia did not indicate by book entry that the Fourth Transfer was credited to Carolyn Rider's securities account until over three months after Mr. Rider died, this Court should deny certiorari on this issue.

II. THE SUPREME COURT SHOULD DENY CERTIORARI ON THE BASES THAT CAROLYN RIDER DID NOT PRESERVE THE SECOND ISSUE FOR APPEAL; CAROLYN RIDER'S ARGUMENT OBSCURES THE FACT THAT WACHOVIA CHOSE THE METHOD BY WHICH CAROLYN RIDER ACQUIRED A SECURITIES ENTITLEMENT TO THE FINANCIAL ASSETS; CAROLYN RIDER'S ARGUMENT ALSO OBSCURES WACHOVIA'S ROLE IN THE TRANSFERS; BANKS AND THEIR CUSTOMERS HOLD SECURITIES, INCLUDING MUNICIPAL BONDS, INDIRECTLY—ALLOWING FOR THEIR RAPID TRANSFER; AND ESTATE PLANNING AND ADMINISTRATION WILL NOT BE DISRUPTED BY THE COURT OF APPEALS RULING.

Carolyn Rider asserts that the Court of Appeals opinion "will cause widespread commercial, systemic uncertainty" unless Section 501(b)(3) is read and applied to the particular facts of this case such that Carolyn Rider is held to be an entitlement holder as to the Fourth Transfer as of the date that Wachovia received the Letter from Charles Rider. This Court should deny certiorari on this issue and reject this argument on four bases: (A) Carolyn Rider did not preserve this issue for appeal; (B) Carolyn Rider's argument obscures the fact that Wachovia chose the method by which Carolyn Rider acquired a securities entitlement to the financial assets; (C) Carolyn Rider's argument also obscures Wachovia's role in the transfers; and, (D) estate planning and administration will not be disrupted by the Court of Appeals ruling.

A. Carolyn Rider Did Not Preserve this Issue for Appeal.

This Court holds, and the Appellate Court Rules state, that an issue not raised in the initial arguments to the Court of Appeals, and ruled upon by the Court of Appeals, is not preserved for appeal. Rule 242(d), SCACR; Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* (2nd ed. 2002) 77; *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000). Carolyn Rider raised this second issue for the first time in the petition for rehearing and petition for writ of certiorari. The Court of Appeals rejected the petition for rehearing. App., Vol. II, pp. 635-36. Carolyn Rider asserts throughout all of the lower court proceedings, documents, and in her petition for writ of certiorari that the UCC

comprehensively addresses the subject matter of this appeal; however, with this argument, she rejects its application to the facts of this case. App., Vol. 1, pp. 296-303. Further, Rule 242 requires that argument on a question presented for appeal include citation to authority—thereby giving respondents and opportunity to respond. Rule 242, SCACR. Carolyn Rider's second issue is conclusory with scant, if any, authority and only one reference to the record. Accordingly, because Carolyn Rider did not preserve this issue for appeal, and did not comply with the requirements of Rule 242 in presenting argument on the issue, this Court should deny certiorari on this issue.

B. Carolyn Rider's Argument Obscures the Fact that Wachovia Chose the Method Pursuant to Section 501 of Article 8 By Which Carolyn Rider Acquired a Securities Entitlement to the Financial Assets.

Carolyn Rider asserts that the Court of Appeals opinion limits the method by which a person can acquire a security entitlement to a financial asset to that of the book entry method for "written" orders. There is no basis for this argument. To the contrary, the Court of Appeals found that the only evidence in *this* case as to the method by which Wachovia, as the securities intermediary, indicated that Carolyn Rider had a security entitlement to the Fourth Transfer and the three other transfers was by the book entry method.[3] App., Vol. II, p. 618. Wachovia, rather than the Court of Appeals, chose the book entry method to indicate when Carolyn Rider acquired a security entitlement to the financial assets. Accordingly, the Court should deny certiorari on this issue.

C. Carolyn Rider's Argument Also Obscures Wachovia's/Wells Fargo's Role in the Transfers.

Carolyn Rider's argument also obscures then-Wachovia's duties and role in the transfers. Financial markets worldwide would come to a screeching halt if it took four months to transfer

[3] Section 501 of Article 8 sets forth the methods by which a person acquires a security entitlement from a securities intermediary, including the book-entry method. S.C. Code Ann. § 25-8-501 (1976 & Supp. 2010).

and/or settle shares in stocks or bonds. Indeed, "[o]ne of the main reasons for holding securities through securities intermediaries is to enable rapid transfer in settlement of trades." S.C. Code Ann. § 36-8-507 cmt. 1 (1976 & Supp. 2010).

To that end, Section 504 of Article 8 mandates that a "securities intermediary shall *promptly* obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset." S.C. Code Ann. § 36-8-504 (1976 & Supp. 2010) (emphasis added). Therefore, Wachovia had a duty to maintain shares of the First, Second, Third, and Fourth Transfers on behalf of Mr. Rider, which they then could have promptly transferred to another securities account. *However*, Wachovia did not make the Fourth Transfer until four months after the date of the Letter and over 100 days after Mr. Rider died—when they were without the legal authority to do so. Accordingly, this Court should reject certiorari on this issue.

D. Banks and Their Customers Hold Securities, Including Municipal Bonds, Indirectly—Allowing for Their Rapid Transfer.

Carolyn Rider's argument also ignores how securities are held. The Depository Trust Company (DTC) "holds" the "vast majority" of publicly held securities: "Approximately 600 banks and their brokers have accounts with the Depository Trust Company for their own holdings and for the holdings of those whom they act as securities intermediaries." Russell A. Hakes, *UCC Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 LOYOLA LAW REV. 664, 685 (2002).

The Fourth Transfer—municipal bonds—"can *only* be held indirectly because they are issued in book-entry form." *Id.* (emphasis added.) That is, the only holder of municipal bonds is a clearing corporation, and the single interest is divided among all those having a security entitlement on the books of the clearing corporation. *Id.* This indirect holding allows for the

"rapid transfer in settlement of trades." S.C. Code Ann. § 36-8-507 cmt. 1 (1976 & Supp. 2010). Accordingly, as the Court of Appeals found, the assertion that the Fourth Transfer took months to transfer has no basis in reality—in addition to having no factual basis in this case. Therefore, this Court should reject certiorari on this issue.

E. Estate Planning and Administration Will Not Be Disrupted by the Court of Appeals Ruling.

Finally, the petitioner claims that the Court of Appeals opinion will disrupt estate planning and administration. There is nothing in the record from which to glean the intent of Charles Rider in choosing to transfer $2 Million in stock and bonds from his Wachovia account to an account for Carolyn Rider at the same bank, other than the perfunctory Letter and the statement by Wachovia that it was part of his estate planning. App., Vol. I, p. 156; App., Vol. II, p. 418. Other estate-planning alternatives include: (1) funding and executing a trust or trust amendment directing that the assets be delivered to a beneficiary by the successor trustee upon the grantor's death;[4] (2) executing a will or will codicil making a testamentary gift to the donee;[5] (3) granting the spouse a durable or limited power of attorney to transact business involving the grantor's assets;[6] and/or (4) placing property, including accounts, into joint tenancy with full survivorship rights to the spouse.[7] Because other alternatives are available to effect the transfer of financial assets; and, most importantly, there is no factual or legal basis to support a finding that it takes four months to transfer financial assets from one account to another—especially between spouses at the same bank—Carolyn Rider's assertion that the Court of Appeals opinion will affect estate planning and administration is without merit, and this Court should deny certiorari on this issue.

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[4] S.C. Code Ann. § 62-7-602(a) (1976 and 2010 Supp.).
[5] S.C. Code Ann. § 62-2-901 (1976 and 2010 Supp.).
[6] S.C. Code Ann. § 62-5-501 (1976 and 2010 Supp.).
[7] Vaughn v. Bernhardt, 339 S.C. 125, 528 S.E.2d 82 (Ct. App. 2000).

In sum, because Carolyn Rider did not preserve this issue for appeal; and the claim that the Court of Appeals opinion will create "widespread commercial, systemic uncertainty" has no factual or legal basis or bearing on this case, estate planning, or the UCC, this Court should deny the petition for writ of certiorari on this issue.

III. THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI ON THE BASES THAT CAROLYN RIDER DID NOT PRESERVE THE ISSUE FOR APPEAL OF WHETHER THE FOURTH TRANSFER WAS A COMPLETED *INTER VIVOS* GIFT; AND THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT THE FOURTH TRANSFER WAS AN *INTER VIVOS* GIFT, MUCH LESS A COMPLETED *INTER VIVOS* GIFT.

The Court of Appeals held that Carolyn Rider failed to preserve the issue for appeal because she made a different argument to the Circuit Court than she made to the Court of Appeals. App., Vol. II, pp. 618-19. This Court should deny her petition for writ of certiorari on these two bases: (A) Carolyn Rider did not preserve the issue for appeal as to whether the fourth transfer was a completed *inter vivos* gift; (B) even assuming, *arguendo*, Carolyn Rider could have asserted this issue on appeal, her claim would have failed because there is no evidence in the record that the Fourth Transfer was a completed *inter vivos* gift.

A. Carolyn Rider Did Not Preserve for Appeal the Issue of Whether the Fourth Transfer Was a Completed *Inter Vivos* Gift.

This Court holds that an issue is not preserved when the appealing party argues a different ground at trial than the party argues on appeal. *Taylor v. Medenica*, 324 S.C. 200, 216, 479 S.E.2d 35, 43 (1996). The Court of Appeals held that Carolyn Rider failed to preserve the issue of whether the Fourth Transfer was a completed *inter vivos* gift on this basis. App., Vol. II, pp. 618-19. Carolyn Rider not only argued a different ground at trial and on appeal to the Court of Appeals, but she argued in the appeal to the Circuit Court that if this case was not decided under

the UCC, the transfers made after Mr. Rider passed, if characterized as gifts, would be incomplete and the assets would be part of the estate:

> Under basic tenets of property law with respect to *inter vivos* gifts, it is held that an *inter vivos* gift is not valid under delivery is completed. . . . [A]ssuming, arguendo, that this case were to be decided not under the UCC but instead under the common law of South Carolina which as previously noted would be contrary to clear South Carolina law, then initially it would seem that the transfers made after the Decedent's death would be invalid because Wachovia would have lacked the authority to make the gifts. If the gifts were void for lack of authority, then they would be incomplete gifts, includible in the Decedent's estate and would be distributable under the terms of his revocable trust.

App., Vol. I, pp. 305, 418. Further, Carolyn Rider does not argue on appeal that any of the other three transfers were *inter vivos* gifts. Accordingly, this Court should deny her petition for writ of certiorari on this issue because Carolyn Rider did not preserve the issue for appeal.

B. Assuming, *arguendo*, Carolyn Rider Could Assert this Claim on Appeal, Her Claim Fails Because There is No Evidence in the Record that the Fourth Transfer Was a Completed *Inter Vivos* Gift.

Even assuming, *arguendo*, that Carolyn Rider could assert on appeal that the October 20, 2005 transfer was an *inter vivos* gift, the argument fails and the Court should deny certiorari on this issue because there is no evidence to support a finding that the transfer was a completed *inter vivos* gift.

A completed *inter vivos* gift of securities requires three elements to be valid: (1) donative intent; (2) sufficient delivery of the stock in order to effect a gift; and (3) acceptance of the gift by the donee. 38 Am.Jur.2d Gifts § 48; *Worrell v. Lathan*, 324 S.C. 368, 371, 478 S.E.2d 287, 288 (Ct.App.1996).

1. Charles Rider Did Not Intend That the Transfers Be *Inter Vivos* Gifts.

In order for a completed *inter vivos* gift to be valid, the purported donor must have intended that the thing be a gift. *Id.* At the trial before the Probate Court, the only testimony,

evidence, or argument as to whether the four transfers constituted gifts consisted of the following four proffers followed by a post-trial letter by Carolyn Rider reiterating the fact that Mr. Rider did not intend the transfers to be gifts: first, a denial by Wachovia that Mr. Rider ever intended the transfers as gifts (App., Vol. I, pp. 155-56); second, an objection by Carolyn Rider that the transfers be characterized as gifts (id.); third, testimony by one of Mr. Rider's attorneys that he wanted the transfers to be made to make sure his wife had adequate funds to maintain her standard of living during probate of his estate (App., Vol. I, pp. 193-94); fourth, the contrast in language between the Letter in which Mr. Rider directs the transfer of assets, and his Will in which he makes specific gifts (App., Vol. I, pp. 254-56); and, Carolyn Rider's post-trial letter to the Probate Court in which she reiterates the fact that "Mr. Rider, in his discussions relative to th[e] June 17, 2005 letter, did not term it a gift, he termed it part of his estate planning." App., Vol. I, p. 418.

Accordingly, because there is no evidence in the record to support a finding that the transfers were completed *inter vivos* gifts, and because Carolyn Rider argued to the contrary before the trial court, her claim that the Fourth Transfer was a completed *inter vivos* gifts fails, and this Court should deny certiorari on this issue.

2. The Fourth Transfer Was Not Sufficiently Delivered to Effect a Gift to Carolyn Rider.

The law is clear that a gift must be delivered to be completed: The "mere intention to give [a gift] without delivery is unavailing, the intention must be executed by a complete and unconditional delivery. The transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery." *Worrell v. Lathan*, 324 S.C. 368, 371, 478 S.E.2d 287, 288 (Ct.App.1996) *quoting Baptist Found. for Christian Educ. v. Baptist College at Charleston*, 282 S.C. 53, 58, 317 S.E.2d 453, 457 (Ct.App.1984). "To

constitute a valid gift, the donee must have an immediate right to the property; in other words, *the donee must be vested with immediate dominion and control." Baptist Found., id.* (emphasis added). In this case, the unconditional delivery was not complete until title to the financial assets was transferred to Carolyn Rider's account. Not until the stock was delivered to her account did she have a right to the property—*not until it was transferred to her account was she vested with the ability to exercise dominion and control over the assets*. The only evidence in the record that demonstrates when Carolyn Rider had a right to the financial assets are the bank records showing the entry dates for the transfers. App., Vol. I, pp. 51-53; Vol. II, p. 618. There is no evidence in the record from which to infer that Carolyn Rider had the right to exercise dominion and control over the assets before the date of the bank entries.

3. Carolyn Rider Did Not Accept the Transfers As a Gift.

Acceptance by the donee of a gift *inter vivos* is an essential element of a gift. *Worrell*, 324 S.C. at 371, 478 S.E.2d at 289, citing 38 Am.Jur.2d Gifts §§ 34, 35. "Acceptance is sufficient if the gift is accepted before revocation by the donor, or *before revocation by the death of the donor." Id.* (emphasis by court). Acceptance by a donee is demonstrated in two ways: (1) by the donee's exercise of dominion over the property; or (2) by the donee's assertion of a right to the property. 38 Am.Jur.2d Gifts § 33. Where a constructive delivery is completed, a like acceptance will suffice. For instance, where the shareholder delivers the fully endorsed stock certificates to his donee prior to writing a letter advising him of the gift, the donee's letter to the donor stating the gift was accepted qualifies as acceptance of the gift. *Little City Foundation v. Capsonic Group, Inc.*, 231 Ill.App.3d 122, 596 N.E.2d 146 (1st Dist. 1992). *Because Charles Rider requested the financial assets be delivered to an agency account for Carolyn Rider, Carolyn Rider could not exercise dominion over, or assert a right to, the financial assets until*

they were transferred to her account. App., Vol. I, p. 48.

Further, Carolyn Rider did not accept a donee gift with any prior act, such as a letter to Charles Rider accepting the purported gifts, nor is there any evidence in the record as to when Carolyn Rider became aware of the Letter or the transfers, other than the record of Wachovia indicating the book entries. App. Vol. I, pp. 51-53. Because the only act of acceptance of the asset transfers was their actual transfer into Carolyn Rider's account, as demonstrated by the book entries, the transfers that occurred after Charles Rider's death on July 8, 2005 were not, and could not be, legally accepted by Carolyn Rider. App., Vol. II, p. 618. Accordingly, because there is no evidence in the record to support a finding that the Fourth Transfer was a completed gift, Carolyn Rider's claim that the post-death transfers were completed gifts fails, and this Court should deny certiorari on this issue.

Finally, Carolyn Rider argues that there are sometimes "exceptional cases or circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below." *Hormel v. Helvering*, 312 U.S. 552 (1941). The Respondents vehemently reject this assertion by Carolyn Rider as to her issues and arguments to this Court. Quite to the contrary, this is a case where a man, while in terminal condition, signed a perfunctory letter transferring $2 Million in assets from his estate, and revised his Will and trust. App., Vol. II, p. 609; Vol. I, pp. 380-414. The exceptional circumstances are that, because Mr. Rider's daughters and grandchildren have maintained a defensive, rather than an aggressive, position in this case, the Third Transfer---though legally part of the estate in accordance with the applicable provisions of the UCC and the Court of Appeals opinion—was deemed otherwise. App., Vol. II, pp. 617-18. The injustice would result if this Court were to grant certiorari for a fourth review of this case

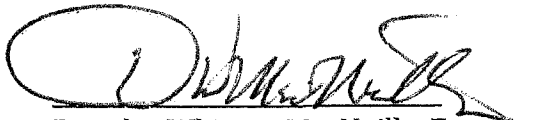
due to the financial and emotional burdens on the daughters and grandchildren of Mr. Rider, unless the Court were to do so to correct the injustice as to the Third Transfer.

CONCLUSION

For the foregoing reasons, Deborah Rider McClure, Ginger C. Rider, Christian M., and Austin M. respectfully request this Court deny the petition for writ of certiorari other than to correct the injustice as to the Third Transfer.

September 26, 2011

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Presiding Judge

Opinion No. 4842 (S.C. Ct. App. filed June 15, 2011)

In the Matter of the Estate of Charles Galen Rider, a/k/a C.G. Rider

Carolyn S. Rider,.....Petitioner,

v.

Estate of Charles Galen Rider, Thomas M. Grady, Personal Representative,.....Respondent,

and

Deborah Rider McClure, Ginger C. Rider, Christian M., and Austin M.,.....Respondents.

CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2011, I served the Return to Petition for Writ of Certiorari on Carolyn S. Rider, Appellant, and Thomas M. Grady, Personal Representative for the Estate of Charles Rider, by depositing copies in the U.S. Mail, postage prepaid, to counsel as follows:

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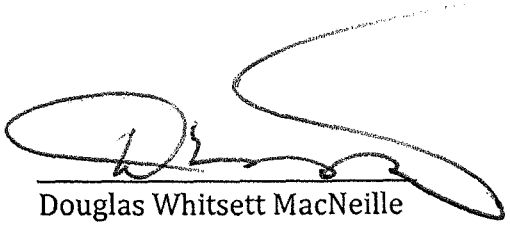

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