

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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The Honorable Roger M. Young  
Case No. 2011-CP-10-400

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SC Court of Appeals

Jacquelin S. Bennett, Genevieve S. Felder and Kathleen S. Turner, individually, as Co-Trustees and beneficiaries of the Marital Trust and the Qualified Terminable Interest Trust created by the Thomas Stevenson Will, and Jacquelin S. Bennett, and Kathleen S. Turner, as Co-Personal Representatives on behalf of the Estate of Jacquelin K. Stevenson,

Appellants,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Douglas Capital Management, Inc.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison.

Defendants,

Of Whom

Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and  
Lynne L. Kerrison are

Respondents.

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APPELLANTS' RETURN TO  
THE PETITION FOR REHEARING

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ATTORNEYS FOR APPELLANTS

This case involves accountants (the Respondents) who knew that trustees were stealing monies from family trusts and not only kept the thefts secret, but assisted the trustees in taking money from the trusts. This Court's opinion recognized that the Respondents' actions supported an action for aiding and abetting the breach of fiduciary duty.<sup>1</sup> In its Petition for Rehearing, Respondents ignore the Court's clear reasoning, raise issues not relevant to this Court's opinion, and repeat arguments already rejected by this Court. As set forth in more detail below, the Petition should be denied.

**1. The federal statute, 26 U.S.C.A. § 7216 did not bar Accountants from disclosing the improper withdrawals.**

Respondents claim that this Court failed to consider their claim that 26 U.S.C.A. § 7216 would preempt any duty the Accountants had to disclose the withdrawals. However, this Court properly disregarded Respondents' argument as Section 7216 is a criminal statute which imposes misdemeanor liability on a tax preparer who "uses any such information for any purpose other than to prepare, or assist in preparing, any such return..." 26 U.S.C.A. § 7216(a)(2). The tax preparer "shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." *Id.* Respondents ignore that the claims in this case do not arise out of tax preparation services, but a rather the general obligations of a public accounting firm and its members, who performed bookkeeping services and maintained the checkbooks for the trusts, and provided checks Tom or Dan upon request, despite participating in and knowing that the withdrawals were not proper.

Furthermore, there is no indication that this statute preempts any common law duties of

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<sup>1</sup>All members of the panel were in agreement about the aiding and abetting cause of action. While Judge Few wrote a separate opinion dissenting in part and concurring in part, those issues are not relevant here.

the Accountants. Preemption can be explicit or implicit: “Congress’ intent may be explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Section 7216 does not have any explicit preemption language. It is clear from the language of the statute that it was not meant to occupy the field so as to displace state common law duties of an accountant. As one court noted, the purpose of this section was “primarily oriented to discourage the misuse of confidential information received by nonprofessionals preparing tax returns.” *Mitsui & Co. (USA), Inc. v. Puerto Rico Water Res. Auth.*, 79 F.R.D. 72 (D.C. Puerto Rico 1978).

Moreover, contrary to the Accountants’ claim, the exception would allow Accountants to make the disclosure to Appellants. This exception specifically allows the Accountants to disclose to a “related taxpayer” information obtained from the first taxpayer. 26 C.F.R. § 301.7216–2(e)(1)(i).<sup>2</sup> Included in the definition of “related taxpayer” is a “*trust or estate and beneficiary*” 26 C.F.R. § 301.7216–2 (e)(2) (emphasis added). Accountants argue that the exception only applies if the information is needed to prepare the tax return of the “related taxpayer.” Accountants have already admitted that they prepared tax returns for Tom, Dan, Mrs. Stevenson, the trusts, and Kathleen. R.p. 888-890. Kathleen, as holder of the power of attorney, stood in the shoes of her mother and the other Appellants, as beneficiaries of the Trusts, are related taxpayers. Thus, the exception clearly applied. In addition, the Accountants made disclosures to Tom, Dan, and the Attorneys without any concern as to the statute; yet now, Accountants try to invoke it as protection. Even if the statute did apply, the Accountants cannot

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<sup>2</sup>Section 7216 (b)(3) states that the disclosure prohibition does “not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section.” 26 U.S.C.A. 7216(b)(3).

pick and choose when the statute applies.

Furthermore, Appellants claim that they would be placed in the “untenable position” of having to choose between facing civil liability for nondisclosure or criminal liability for disclosure. Motion for Rehearing, p. 5. However, instead of breaching their ethical duties and assisting in the looting of a trust, the Accountants could have resigned and avoided potential liability.

**2. Aiding and Abetting the breach of fiduciary duty is based is not based in fraud and thus, was not abated by Mrs. Stevenson’s death.**

Respondents argue that the claims against them are based on fraud and deceit and, relying on *Ferguson v. Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94 (2002), argue that the claims cannot survive Mrs. Stevenson’s death. However, *Ferguson* does not apply to this case.

In the *Ferguson* case, the plaintiff sued a car dealership claiming that the assessment of a closing fee and failure to disclose it were unfair acts. The Court held that:

At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices.

*Id.*, 349 S.C. at 565. However, in this case, Accountants have aided and abetted the breach of Tom and Dan’s fiduciary duties as Trustees, which ***are rooted in statute***:

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article.

S.C. Code § 62-7-801. Furthermore, “[a] trustee shall administer the trust solely in the interests of the beneficiaries.” S.C. Code § 62-7-802(a). In addition:

A trustee shall keep the qualified beneficiaries of the trust reasonably informed

about the administration of the trust of the material facts necessary to protect their interests.

S.C. Code § 62-7-813.<sup>3</sup> It is undisputed that Tom and Dan were in breach of these statutory duties, and they were assisted in those breaches by the Accountants, who allowed the looting to continue for years and even wrote checks upon demand by Tom and Dan. Thus, the claims against the Accountants are not based in fraud, but go directly to their actions in assisting Tom and Dan in breaching their fiduciary duties. Appellants' claims clearly survive the death of Mrs. Stevenson.<sup>4</sup>

Moreover, our courts allow evidence of fraudulent acts to support surviving claims. In *Brailsford v. Brailsford*, 380 S.C. 443, 450, 669 S.E.2d 342, 345-46 (S.C. Ct. App. 2008), the Court of Appeals rejected the argument that the fraud exception to survivability prevented a court from considering evidence of fraud on any other type of claim:

We, however, do not read *Ferguson* to go so far as to deny the admission of evidence of fraudulent conduct to support an otherwise surviving claim.... to the extent the Order may be interpreted to suggest that causes of action which do survive William cannot be supported by evidence of the defendant's fraudulent and deceitful conduct, the Order is hereby modified.

*Id.* Thus, any fraudulent conduct by Tom and/or Dan can be considered evidence in determining

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<sup>3</sup>Similarly, personal representatives are fiduciaries who must observe the standards of care applicable to trustees and must act "for the best interest of the successors of the estate." S.C. Code § 62-7-703.

<sup>4</sup>The Accountants claim that survivability is crucial to a fraud case because the state of mind of the victim is an issue. Here, however, the claims in this case are rooted in aiding and abetting a breach of fiduciary duty. The state of mind of the victim (Mrs. Stevenson) is not an issue because the elements of aiding and abetting 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, 662 S.E.2d 444 (Ct. App. 2008). The trustees' fiduciary duty is clear, and the Accountants do not deny that they did not disclose the withdrawals to Mrs. Stevenson or Kathleen as her attorney-in-fact. Thus, Mrs. Stevenson's (or Appellants') state of mind is irrelevant in this case.

Appellant's surviving claims of aiding and abetting the breach of fiduciary duty against the Accountants.

### 3. Damages

Respondents claim that this Court failed to address, as an additional sustaining ground, that Appellants had no damages because they had no right to inherit. However, Respondents completely ignore the fact that, after the death of Mr. Stevenson in 1988, Appellants were vested beneficiaries.

In support of their argument, Respondents cite *Church v. McGee*, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011), for the proposition that a claim for the object of a bequest arises when the legatee has a legal right to it. However, the *Church* case does not apply here as it involved an estate with insufficient funds and the priority of creditors. The instant case is about trustees stealing from trusts and the Accountants and Attorneys hiding and furthering the thefts; thus, an affected beneficiary has suit for damages. See, *Fortune v. First Union Nat. Bank*, 371 S.E.2d 483 (N.C. App. 1988) (Trust beneficiary could maintain action in his individual capacity against trustee for damages, due to trustee's mismanagement of property trustee held in his fiduciary capacity); *Alioto v. United States*, 593 F.Supp. 1402, 1412 (N.D.Cal.1984) (in action where beneficiary has been damaged by trustee and third party, beneficiary may bring action against third party separately); *Booth v. Security Mut. Life Ins. Co.*, 155 F.Supp. 755, 761 (D.N.J.1957) (where trustee transfers property in breach of trust with assistance of third parties, third parties are primarily liable to the beneficiary, rather than to the trustee; the right of the beneficiary against the third party is a direct right not derived through the trustee). Furthermore, as noted previously, since Appellants' interests in the trusts were vested in 1988 upon the death of their father, they thus had a vested right in the trusts, unlike the plaintiff in *Church v. McGee*.

Moreover, Respondents ignore the fact that Kathleen, as holder of the Power of Attorney, stands in the shoes of her mother, whose estate was substantially reduced by the thefts. *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008). Finally, all three Appellants were appointed as successor trustees and there is no question that the trusts have been damaged, which allows the successor trustees to pursue this litigation. South Carolina law explicitly addresses the power of a successor trustee:

Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee.

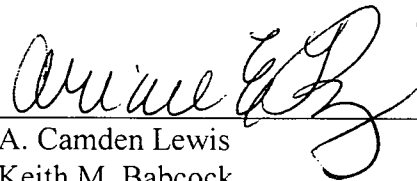
S.C. Code § 62-7-812. The trusts obviously have been injured as they have been depleted by the improper withdrawals. Appellants, as successor trustees, must act on behalf of the trusts to enforce the claims of the trusts for this depletion. “A substitute or successor trustee when appointed steps into the place of the former trustee.” 76 Am. Jur. 2d Trusts § 237; *Boone v. Wachovia Bank & Trust Co.*, 163 F.2d 809, 173 A.L.R. 1285 (App. D.C. 1947). *See also, e.g., Pierce v. Lyman*, 3 Cal.Rptr.2d 236 (Cal. App. 1991)(A beneficiary/successor trustee could sue attorney for acting in furtherance of his or her own financial gain or making express misrepresentations to the beneficiaries.)

The actions of the Accountants in furthering Tom and Dan’s thefts from trusts in which Appellants had a vested interest has caused resulting damages to Appellants. Expert George DuRant clearly opined that Appellants have suffered substantial damages. (R.pp. 364-366). Mr. DuRant considered the monies taken by Tom and Dan and created an analysis in which the monies plus interest were paid and converted to cash. (R.p. 436:2-13). Mr. DuRant’s analysis demonstrates the amount the Appellants would have received versus the amount they will receive under the Proposal for Distribution dated August 17, 2011. (R.p. 436:14-19).

Furthermore, the extent of Appellants' damages is an issue of fact, and the Accountants' argument does not provide an additional sustaining ground in favor of summary judgment.

### CONCLUSION

The Accountants have continued to ignore Appellants' arguments and this Court's clear reasoning. The Petition for Rehearing simply repeats arguments already rejected by this Court. The Petition for Rehearing is baseless and should be denied.



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Columbia, South Carolina.  
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CERTIFICATE OF SERVICE

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I, Connie W. Grugan, secretary for the law firm of Lewis Babcock L.L.P., hereby certify  
that I have served **Appellants' Return to the Petition for Rehearing** upon opposing counsel, by  
mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to  
said opposing counsel at the following address:

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Connie W. Grugan

This 9th day of November, 2015.