

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**SC SUPREME COURT**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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

Unpublished Opinion No. 2015-UP-491  
Filed October 14, 2015

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

Respondents,

v.

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

Defendants,

Of Whom

Dixon-Hughes and Lynne L. Kerrison are

Petitioners.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI  
Volume I, Pages 1 - 139

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The 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 the Respondents.

Appellate Case No. 2013-001893

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Appeal From Charleston County  
Roger M. Young, Sr., Circuit Court Judge

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Unpublished Opinion No. 2015-UP-491  
Heard June 3, 2015 – Filed October 14, 2015

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**AFFIRMED IN PART, REVERSED IN PART, AND  
REMANDED**

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Keith M. Babcock, A. Camden Lewis, James Mixon  
Griffin and Ariail Elizabeth King, all of Lewis Babcock  
& Griffin, LLP, of Columbia, for Appellants.

M. Dawes Cooke, Jr., of Barnwell Whaley Patterson &  
Helms, LLC, of Charleston, and Frederick K. Sharpless,  
of Greensboro, N.C., for Respondents.

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**HUFF, J.:** 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 (QTIP) 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 (collectively Appellants) appeal the trial court's order granting summary judgment to Lynne Kerrison and her accounting firm Dixon-Hughes (collectively Respondents). We affirm in part, reverse in part, and remand.

1. We agree with Appellants' argument the trial court erred in holding the statute of limitations began to run on their claims on April 19, 2006. We find the trial court erred by holding Appellants were bound by Kathleen S. Turner's response to the request for admission: "Thomas Stevenson informed you that he and Daniel Stevenson removed money from the trust on April 19, 2006." *See* Rule 36(b), SCRCP ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 651, 579 S.E.2d 151, 157 (Ct. App. 2003) ("[A] trial court may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment." (citation and internal quotation marks omitted)); *id.* at 648, 579 S.E.2d at 155-56 ("The efficacy of these admissions is akin to the doctrine of judicial estoppel . . ."). Not only is this request for admission ambiguous and the last of 171 requests, it is in direct conflict with Kathleen's deposition testimony. Whether due to the sheer number of requests for admission or the confusing language of this request, Kathleen's response did not reflect her actual position that Thomas did not discuss the withdrawals of money at this meeting. Because the record contains conflicting evidence, presentation of the merits would be furthered by the withdrawal or amendment of the response. In addition, Respondents are not prejudiced by the withdrawal. Respondents were aware of Kathleen's deposition

testimony and Appellants argued the contradictory testimony made summary judgment inappropriate. No expert witness relied on Kathleen's admission in forming an opinion. We also believe the trial court erred in finding the motion to amend or withdraw the response was untimely. The court informed the parties of its decision to grant summary judgment on June 10, 2013. Respondents submitted the proposed order on June 13, 2013. Appellants filed their motion to amend or withdraw the response three days later. The trial court did not file its order until July 3, 2013. *See Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An order is not final until it is written and entered by the clerk of court.").

2. We find without the admission, only a conflict in the testimony remains with Thomas testifying he told Kathleen about his and Daniel's withdrawals of money from the trusts and Kathleen's denial that the withdrawals were discussed. *See Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000) ("Application of the discovery rule . . . , as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence."); *L & W Wholesale, Inc. v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991) (stating the trial court does not weigh conflicting evidence or make credibility determinations during consideration of summary judgment); *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.")

3. We agree with Appellants' argument the trial court erred in holding the statute of limitations began to run May 21, 2003. *See Moriarty*, 341 S.C. at 338, 534 S.E.2d at 681 ("Application of the discovery rule . . . , as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence."); *L & W Wholesale, Inc.*, 305 S.C. at 253, 407 S.E.2d at 659 (stating the trial court does not weigh conflicting evidence or make credibility determinations during consideration of summary judgment); *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Thomas testified that during the May 21, 2003 meeting he showed Kathleen a piece of paper detailing the assets of the Trusts, including the "investments" in his and Daniel's companies. Kathleen testified Thomas looked down at a piece of paper in his lap and mumbled so badly she did not understand a

word he said. Although Kathleen indicated she thought something was very wrong, nothing about the meeting would raise a red flag concerning the trusts if she truly was unable to hear what Thomas said. We find the question of whether Kathleen had notice of the loans on this date involves an issue of credibility and, thus, was inappropriate for summary judgment.

4. We agree with Appellants' argument the trial court erred in granting summary judgment on their individual claim for aiding and abetting a breach of fiduciary duty. We find the statute of limitations did not begin to run in October 2001 on their claims because Kerrison's notice to Heyward Carter, who was the attorney for Jacquelin K. Stevenson (Mother), could not serve as notice to Appellants individually as he was not their attorney. We also find Appellants presented sufficient evidence to withstand summary judgment. *See Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) (stating the elements for the cause of action for 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"); *id.* ("The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach."). Thomas and Daniel, as trustees, owed the beneficiaries of the trusts a fiduciary duty.<sup>1</sup> *See Univ. of S. Cal. v. Moran*, 365 S.C. 270, 281, 617 S.E.2d 135, 141 (Ct. App. 2005) (stating a trustee "has a fiduciary obligation to administer the trust in the best interests of the trust beneficiaries"). Kerrison admitted she believed the withdrawals of money from the trusts by Thomas and Daniel were not proper and one "could probably call" the transactions self-dealing. Upon her discovery of the withdrawals from the trusts, she questioned the propriety of the transactions, contacted Carter, and met with Thomas and Daniel, who were advised to disclose the withdrawals to their siblings. She admitted she was aware Thomas and Daniel continued to remove funds from the trusts until the spring of 2006. In addition to taking no further action regarding Thomas's and Daniel's activities, Kerrison's firm actually had possession of the trust checkbooks and wrote the checks for Thomas's and Daniel's withdrawals of funds from the trusts. We find Appellants presented at least a scintilla of evidence from which a jury could infer Respondents knowingly participated in Thomas's and Daniel's breach of their fiduciary duty.

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<sup>1</sup> *See Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 659, 640 S.E.2d 480, 485 (Ct. App. 2006) ("It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment which marks the difference between a vested and a contingent interest.").

5. We find Appellants' argument concerning a breach of fiduciary duty is conclusory and, therefore, abandoned. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when an appellant "fails to provide arguments or supporting authority for his assertion"); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

6. We find Appellants' argument the trial court erred in granting summary judgment on their individual claim for professional negligence is conclusory and, therefore, abandoned. *See First Sav. Bank*, 314 S.C. at 363, 444 S.E.2d at 514 (noting an issue is deemed abandoned where an appellant "fails to provide arguments or supporting authority for his assertion"); *Eaddy*, 355 S.C. at 164, 584 S.E.2d at 396 ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). In their brief, Appellants focus on Kathleen's role as the holder of Mother's power of attorney. They fail to develop or support with authority any argument on a duty owed to Appellants individually as Appellants were not Respondents' clients. When questioned at oral argument, Appellants only offered as support for their claims the supreme court's recent case of *Fabian v. Lindsay*, in which the court affirmatively recognized "a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent." 410 S.C. 475, 492, 765 S.E.2d 132, 141 (2014). We do not see how this case is applicable as Appellants have not argued they are third-party beneficiaries in Respondents' provision of accounting services to Mother and Thomas and Daniel as trustees. *See id.* at 490, 765 S.E.2d at 140 (finding the "intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries"); *id.* ("Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney. It is the breach of the attorney's duty to the client that is the actionable conduct in these cases.").

7. We disagree with Appellants' argument the trial court erred in holding notice to Carter started the running of the statute of limitations on their remaining claims. *See Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority."); *id.* at 309, 257 S.E.2d at 498 ("An

equally well-recognized exception to this general rule exists in situations where the agent is acting fraudulently against his principal or for any other reason has an interest in concealing his acquired knowledge from his principal." ). The record contains no evidence Carter advanced any interest of his own by not telling Appellants directly about Thomas's and Daniel's withdrawals from the trusts. He was always acting in what he believed was Mother's best interest. Only Mother was his client, and she was competent at the time Kerrison told Carter about Thomas's and Daniel's withdrawals. While Kerrison could have disclosed any information to Kathleen that could have been disclosed to Mother, the power of attorney did not create a separate duty of disclosure to Kathleen independent of disclosures made to Mother while she remained competent. *See* 3 Am. Jur. 2d *Agency* § 20 (2013) ("An attorney-in-fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts which by their nature, by public policy, or by contract require personal performance." ). Appellants make no other argument challenging the trial court's ruling the statute of limitations began to run no later than October 2001. Accordingly, we find the trial court did not err in finding the statute of limitations barred Appellants' remaining claims.<sup>2</sup>

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.**

**WILLIAMS, J., concurs.**

**FEW, C.J., concurring in part and dissenting in part:** I agree with the majority's rulings on points 1 through 4. As to points 5 and 6, I agree with the result reached by the majority. As to point 7, I respectfully dissent.

As to points 5 and 6, the majority holds Appellants abandoned the claims. To explain my position, it is necessary to identify the claims the majority is addressing. Appellants contend Kerrison had a fiduciary duty and a duty of due care, each of which required her to take some action based on what she observed while preparing the trust's tax returns in 2001 and subsequent years. Kerrison concedes the existence of some duty. The following dialogue occurred at oral argument:

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<sup>2</sup> We take no position on whether Respondents satisfied their duty of care by the disclosure to Carter in October 2001. Appellants' argument challenging the trial court's holding regarding the running of the statute of limitations beginning in October 2001 was limited to the issue of the imputation of notice. They did not raise to the trial court or this court the issue of continuous accrual.

Kerrison: [F]actually, Ms. Kerrison sees in 2001, or as she is preparing the 2000 tax return in 2001, she sees some transactions that she has some questions about.<sup>3</sup> That's uncontested.

The Court: And from that sight there's no question that there arose a duty on her part to take some action.

Kerrison: There arose a duty on her part to take some action, and we'll talk about what that action might be.

This dialogue identifies the questions remaining to be resolved at trial. The question is not whether Kerrison owed a duty *to the beneficiaries*. Appellants maintain a claim against Kerrison based on the duty she concedes exists—a duty to the trusts. As to this duty, the questions are, first, whether the plaintiffs presented evidence to support a factual finding that Kerrison breached her duty to the trusts based on what she observed, and, second, whether the beneficiaries may bring an action for breach of that duty.<sup>3</sup> In my view, the answer to the first question is "yes," and the circuit court did not address the second question. Under the majority's analysis, Appellants' claims that Kerrison owed duties to the beneficiaries are abandoned. However, under the majority's analysis, the two questions I listed above regarding Kerrison's conceded duty to the trusts must be remanded for trial. As to points 5 and 6, therefore, I concur in the result reached by the majority.

As to point 7, the majority holds the statute of limitations began to run in October 2001—the date Kerrison informed Carter of what she observed. I respectfully disagree with that holding. Carter represented only Mother, and specifically denied in his answer he represented the trusts. Kerrison's duty was to the trusts. Because Carter did not represent the trusts, informing Carter did not inform the trusts, and thus did not put the trusts on notice of any claim.

Even under the majority's analysis, however, Appellants' claims against Kerrison for damages resulting from breaches of duty Kerrison committed subsequent to

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<sup>3</sup> If it makes any difference whether the duty is fiduciary, that question may be resolved at trial.

October 2001 remain viable for trial on remand. This is true for two reasons: first, Kerrison's October 2001 actions could not have put anyone on notice of a claim that had not yet accrued, and second, the circuit court did not address the merits of any claim of the trusts that accrued after October 2001.

As to the statute of limitations for these claims, Kerrison continued to observe misconduct by the trustees after she informed Carter in October 2001. For any claims for damages resulting from misconduct by the trustees that occurred after Kerrison informed Carter what she observed in 2001, the statute of limitations could not begin to run in 2001 because the claims had not yet accrued. Because we are reversing summary judgment as to all subsequent dates the circuit court determined the statute began to run, those claims remain viable for trial on remand.

As to the merits of these claims, the majority does not address the circuit court's finding that "any duty to disclose was satisfied by the October 21, 2001 notice to . . . Carter" because its holding that the statute began to run then made doing so unnecessary. The circuit court made no determination as to whether any subsequent act by Kerrison of informing Carter satisfied Kerrison's duty to the trusts. As to the subsequent actions of Kerrison, the summary judgment analysis would be different from the analysis of her 2001 actions. In my opinion, Kerrison's actions subsequent to October 2001 present questions of fact as to whether she breached her duty to the trusts. By Kerrison's own observation, her October 2001 action of informing Carter was insufficient. When Kerrison saw the trustees committing the same misconduct in 2002 and subsequent years, she knew she had not taken sufficient action to protect the trusts. Her duty of care required her to consider that her previous action had been unsuccessful, and to act accordingly. What additional action should have been taken is a question of fact for a jury.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

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

RECEIVED

OCT 29 2015

SC Court of Appeals

Appellate Case No. 2013-001893  
South Carolina Court of Appeals Unpublished Opinion No. 2015-UP-491

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.; 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

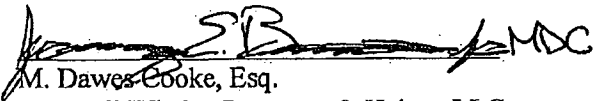
Petitioners/Respondents.

RESPONDENTS' PETITION FOR REHEARING

The Respondents, Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison, petition the South Carolina Court of Appeals for rehearing of the Court's decision in *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 v. T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison, Unpublished Op. No. 2015-UP-491, (S.C. Ct. App. filed October 14, 2015). The grounds for this Petition for Rehearing are set forth in the accompanying memorandum. This Petition for Rehearing is based upon the Court's decision in 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 v. T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison, Unpublished Op. No. 2015-UP-491, (S.C. Ct. App. filed October 14, 2015); the arguments herein; the Parties' Briefs and the Record on Appeal; SCACR Rule 221(a); SCACR Rule 240; and all other applicable rules of court.*

  
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October 27, 2015  
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## INTRODUCTION

The Respondents petition this Honorable Court for rehearing of the recent decision of *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 v. T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison*, Unpublished Op. No. 2015-UP-491, (S.C. Ct. App. filed October 14, 2015). The Respondents respectfully submit that this Honorable Court failed to address three arguments by Respondents, any of which, if accepted, are dispositive of this action.

This lawsuit was filed on April 24, 2009, by:

- (1) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder in their individual capacity;
- (2) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder as trustees;
- (3) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder as beneficiaries of the marital and QTIP trusts created by the will of their father, Thomas C. Stevenson, Jr.; and
- (4) Kathleen S. Turner and Jacquelin S. Bennett as personal representatives of the estate of their mother, Jacquelin K. Stevenson.

(R. p. 0031).

The Defendants were Heyward Carter, Jr., Evans Carter Kunes & Bennett, PA, Douglas Capital Management, Inc., Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., PA, and Lynne L. Kerrison.<sup>1</sup> (Id.) On December 14, 2011, Plaintiffs moved to amend their

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<sup>1</sup> The claims against Douglas Capital Management were later dismissed.

complaint to include a claim for aiding and abetting a breach of fiduciary duty. The court allowed the amendment by order dated May 17, 2012, and it was filed May 31, 2012. (R. p. 0088-0096). In this lawsuit, the Plaintiffs, residual beneficiaries of two trusts created by their father's will, seek to hold defendant-accountants liable for telling their mother, but not them, that their brothers, while trustees of the two trusts, engaged in self-dealing transactions. Plaintiffs seek damages in excess of six million dollars.

Following discovery, all Defendants moved for summary judgment. (R. pp. 0108-0110). Claims against the attorney, Heyward Carter, Jr., were resolved. (R. p. 1855, lines 10-11). Following hearing on the motions, Plaintiffs moved to withdraw a response to a Request for Admission. (R. pp. 0453-0460). An order was entered on July 3, 2013, granting Ms. Kerrison's and Dixon Hughes' motion for summary judgment. (R. pp. 0001-0022). A later motion to alter or amend the order was denied, as was the motion to withdraw the Request for Admission. (R. pp. 0027-0030). This appeal followed.

On October 14, 2015, this Court issued an Order affirming the trial court's grant of summary judgment to Respondents on Appellants' claims other than for aiding and abetting a breach of fiduciary duty, and reversing the trial court's grant of summary judgment on the claim for aiding and abetting a breach of fiduciary duty.

This matter is presently before the Court on Respondents' Petition for Rehearing, pursuant to Rule 221(a), SCACR, to address three arguments overlooked by the Court in its decision. As discussed below, this Court erred in reversing the trial court's grant of summary judgment on the claim for aiding and abetting a breach of fiduciary duty. Respondents respectfully request that this Court grant Rehearing to address these additional arguments, and affirm the trial court's entry of summary judgment on all claims.

## STANDARD OF REVIEW

Under Rule 221(a), SCACR, a party may file a petition for rehearing in accordance with Rule 240(d), SCACR. For the losing party to prevail on the petition, that party "must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The purpose of a petition for rehearing "is not to present points the lawyers of the losing parties overlooked themselves or to have the case tried in the Court of Appeals a second time." *Checker Yellow Cab Co., Inc. v. Checker Cab & Parcel Serv., Inc.*, 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986). The appellate courts "will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Rule 221(c), SCACR.

## ARGUMENTS

**1. THIS COURT SHOULD ADDRESS RESPONDENTS' ARGUMENTS THAT ALLOWING LIABILITY TO BE IMPOSED WOULD CONFLICT WITH FEDERAL LAW, ARGUMENTS THAT PLAINTIFFS' CLAIM ABATED ON THE DEATH OF JACQUELIN STEVENSON, AND ARGUMENTS THAT PLAINTIFFS SUFFERED NO LEGALLY COGNIZABLE DAMAGE**

**A. The Court Should Address Respondents' Argument That Imposition of Liability in this Matter Would Conflict with Federal Law, 26 U.S.C. § 7216**

In 1971, Congress enacted 26 U.S.C. § 7216, which prohibits "any person who is engaged in the business of preparing, or providing services in connection with the preparation of" federal tax returns from disclosing to other than specified persons or organizations any information "furnished to him for, or in connection with, the preparation any such return" and imposes criminal sanctions for a violation of this prohibition. The legislative history of the bill clearly indicates that Congress sought to prohibit tax preparers from disclosing information received during the preparation of

tax returns by providing for criminal penalties. Congress allowed only three exceptions to the general rule.<sup>2</sup>

Any common-law duty to disclose taxpayer information to third parties is preempted by 26 U.S.C. § 7216. "If a state statute, administrative rule, or common law cause of action conflicts with a federal statute, it is incontestable that the state law has no efficacy." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 264, 644 S.E.2d 755, 763 (Ct. App. 2007). "Such a conflict arises when either compliance with both laws is impossible or when the state law frustrates the federal purpose and creates an obstacle to the fulfillment of federal objectives." *Profl Samplers, Inc. v. S.C. Emp't Sec. Comm'n*, 334 S.C. 392, 397, 513 S.E.2d 374, 377 (Ct. App. 1999). The disclosures that Plaintiffs seek to mandate are exactly the disclosures that 26 U.S.C. § 7216 prohibits. Thus, absent consent from the client (which they did not have), federal law prohibited Lynne Kerrison and Pratt-Thomas Gumb from disclosing confidential information they learned in the course of work for the trustees of the trusts, who at that time were only contingent beneficiaries.

Plaintiffs argue that regulations adopted by the Internal Revenue Service implementing 26 U.S.C. § 7216, in particular those at found at 26 C.F.R. § 301.7216-2(e), allow disclosure to "related taxpayers," including beneficiaries of a trust. Plaintiffs are simply incorrect about the regulation. 26 C.F.R. § 301.7216(e)(2) permits a tax preparer to use information of a related party to prepare the tax return of another related party. It does not permit disclosure of information, nor its use, for any other purpose. The regulation says:

- (e) Disclosure or use of information in the case of related taxpayers.

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<sup>2</sup> In addition to the three original exceptions to the general rule that tax information may not be disclosed (court orders, preparation of state taxes, and disclosures required by the Internal Revenue Code) in 1989 Congress allowed tax information to be disclosed for the purposes of "quality or peer reviews." 26 U.S.C. § 7216 (b) (3).

- (1) In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax return preparer obtained from a first taxpayer if—
  - (i) The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;
  - (ii) The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and
  - (iii) The first taxpayer has not expressly prohibited the disclosure or use.
- (2) For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to another taxpayer if they have any one of the following relationships: Husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

To adopt the position advocated by Plaintiffs, that accountants have a duty to tell non-clients of the possible misdeeds of their clients, would place tax preparers in the untenable position of having to choose between facing civil liability for nondisclosure or criminal liability for disclosure. That conflict is evident in this case. Plaintiffs allege that Lynne Kerrison and Pratt-Thomas Gumb breached a duty of care owed to the beneficiaries by "failing to inform the Plaintiffs, including Kathleen Turner as power of attorney for Jacquelin Stevenson, of the improper self-dealing withdrawals known to these Defendants." (Complaint, R. p. 0037-0038, ¶ 44.) The disclosure of information to other beneficiaries, as non-clients, would have subjected Lynne Kerrison and Pratt-Thomas Gumb to criminal liability under federal law.

Plaintiffs further argue that Mrs. Stevenson was a “related taxpayer” and that disclosure was required to her directly or to her power of attorney. Again, Plaintiffs misunderstand the regulation, but in any case, disclosure was made to Mrs. Stevenson through her attorney, Carter, and this Court held there was no separate duty of disclosure to Kathleen as her mother’s power of attorney independent of the disclosures made to Carter. (Slip Op. at 6).

Plaintiffs offered no argument justifying this Court in creating a duty from an accountant to non-client trust beneficiaries, and the circuit court was correct to dismiss Plaintiffs’ claims. In any event, any such duty was satisfied by the disclosure to Carter.

**B. The Court Should Address Respondents’ Argument that Plaintiffs’ Claim For Aiding and Abetting a Breach of Fiduciary Duty Abated on the Death of Jacquelin Stevenson**

Although not cited by the trial court as a basis of its decision, Respondents argued that the trial court’s decision should be affirmed for other grounds appearing in the record. (Rule 220(c), SCACR). In the present case, Plaintiffs’ claim for aiding and abetting a breach of fiduciary duty, of which fraud is an essential element, did not survive the death of Jacquelin K. Stevenson.

While S.C. Code Ann. § 15-5-90 provides that actions based on injuries to an individual shall survive the death of that person, the common law recognizes an exception to the survivability of a claim in cases involving fraud or deceit. Furthermore, the “fraud exception to survivability is not limited only to a cause of action titled ‘fraud’” but to all actions based on theories of fraud or deceit. *Brailsford v. Brailsford*, 380 S.C. 443, 449-50, 669 S.E.2d 342, 345-46 (Ct. App. 2008). The label given to the claim by a plaintiff is irrelevant where the claim arises from fraudulent and/or deceptive conduct.

*Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 97 (2002). To determine whether a claim is foreclosed by the death of the original plaintiff, notwithstanding the survival statute, courts in South Carolina look to the “nature and substance of the cause of action, rather than the form of the remedy....” *Id.* Because the actions in this case are based on the alleged fraudulent conduct of Thomas and Daniel Stevenson towards Jacquelin Stevenson, they did not survive the death of Jacquelin Stevenson.

Plaintiffs’ claim against Defendants Lynne Kerrison and Dixon Hughes must derive from the allegation that:

During Thomas C. Stevenson, III and Daniel R. Stevenson, II’s terms as co-trustees both improperly took money from the Marital Trust, QTIP Trust and the Estate of Jacquelin K. Stevenson.

(Amended Complaint, R. p. 0091, ¶ 19). The only wrongdoing alleged against Ms. Kerrison was her failure, upon learning of the withdrawals, to tell the Plaintiffs of Thomas and Daniel Stevenson’s actions.

Plaintiffs’ sole surviving claim, while labeled aiding and abetting a breach of fiduciary duty,<sup>3</sup> is actually based on a duty of Lynne Kerrison to disclose information directly to the Plaintiffs. (Amended Complaint, R. pp. 0091, 0092, 0094, 0095, ¶¶ 19, 24, 43, 47, 48, 52). A “nondisclosure is fraudulent when there is a duty to speak.” *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). The essence of the Plaintiffs’ claim against Defendants Lynne Kerrison and Pratt-Thomas Gumb for aiding and abetting breach of fiduciary duty is that they failed to disclose the fraudulent actions

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<sup>3</sup> Aiding and abetting breach of fiduciary duty is the only remaining claim. This Court affirmed summary judgment dismissing the claims for professional negligence and breach of fiduciary duty.

of Thomas and Daniel Stevenson, and by its very nature this claim is, in effect, a claim of fraud for failure to disclose the fraud of another. Because this is an action arising out of a fraud, in the guise of an action for aiding and abetting a breach of fiduciary duty, it did not survive the death of Jacquelin Stevenson.

In *Brailsford v. Brailsford*, this Court determined that an action by the widow of a trust beneficiary, both individually and in her capacity as personal representative of the estate, against trustees for various instances of fraudulent conduct did not survive the death of her husband. *Brailsford*, 380 S.C. at 449-50, 669 S.E.2d at 345-46. This Court reasoned that the widow's causes of action were "essentially a cause of action for fraud simply disguised under a different title." *Id* The Court relied on the case of *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564-565, 564 S.E.2d 94, 97 (2002), in which the South Carolina Supreme Court found that when the alleged misconduct amounted to misleading the deceased by either intentional deception or gross negligence, such actions fit within the ambit of fraud or deceptive conduct and, regardless of the label given, did not survive the deceased.

In this case, the claim of aiding and abetting a breach of fiduciary duty is entirely premised on the purported fraud committed by the Trustees; this is not a claim merely supported by evidence of fraudulent conduct. In fact, fraud by the Trustees is an essential element to the claim of aiding and abetting a breach of fiduciary duty.<sup>4</sup> Because the claim for aiding and abetting a breach of fiduciary duty arises by its very nature from the purported fraud of the Trustees, it does not survive Mrs. Stevenson's death.

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<sup>4</sup> "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 (Ct. App. 2008).

The reasoning behind disallowing suits based on theories of fraud to survive an individual is that evidence of the state of mind of the victim is crucial to determining whether a fraud was perpetrated. In *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991), finding that civil conspiracy claims did not survive the death of the victim, the Fourth Circuit upheld the constitutionality of S.C. Code Ann. § 15-5-90 and the recognized exception for fraud. The Court acknowledged that a rational basis for the fraud exception to the survivability statute is "that fraud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital." *Id.*; see also *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941); *Ferguson v. Charleston Lincoln Mercury, Inc.* (2002); *Pamlico Bank and Trust Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972); *Cline v. S. Ry. Co.*, 113 S.C. 440, 102 S.E. 641 (1920).

Because the issue of Jacquelin Stevenson's state of mind, potential consent and ratification and knowledge are crucial to the issue of whether a duty was breached and a fraud committed, either by trustees Thomas and Daniel Stevenson or Defendant Lynne Kerrison, Plaintiffs' claims did not survive Jacquelin K. Stevenson's death.

**C. The Court Should Address Respondents' Argument that Plaintiffs Suffered No Legally Cognizable Damage**

Although not cited by the trial court as a basis for its decision, this Court may affirm the trial court for any reason appearing in the record. Rule 220(c), SCACR. Because Plaintiffs, as individual, contingent, residuary beneficiaries, suffered no recognized damages as they had no enforceable right to inherit, their claims should be dismissed.

Kathleen could have asserted this claim on her mother's behalf during Mrs. Stevenson's lifetime has no bearing on whether Plaintiffs have suffered individual damages.

Plaintiffs' argument that they are entitled to pursue the claim as successor trustees is equally flawed. Again, the claim for aiding and abetting a breach of fiduciary duty is an individual claim, not a claim on behalf of the Trust. Moreover, any such claim by the Estate or Trust would be barred by the statute of limitations, which this court has already determined began to run in 2001 upon notice to Mrs. Stevenson's attorney.

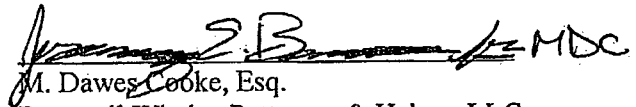
Plaintiffs cannot show that their individual rights were invaded. Plaintiffs do not allege that anything was improperly taken from their personal assets, only that Thomas and Daniel Stevenson "both improperly took money from the Marital Trust, QTIP Trust, and Estate of Jacquelin K. Stevenson." (Complaint, R. p. 0034, ¶ 20). Because Plaintiffs held no right to the assets of either trust while their mother lived, nor any protected expectation in the remainder, and no money was taken from them personally, Plaintiffs, as individuals and trust beneficiaries, suffered no damages, and therefore Defendants are entitled to summary judgment as a matter of law.

#### CONCLUSION

For the foregoing reasons, Respondents, Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison, respectfully request that this Court grant their Petition for Rehearing, that it address three arguments overlooked by the Court in its decision.



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October 28, 2015  
Charleston, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

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

**RECEIVED**

OCT 29 2015

SC Court of Appeals

Appellate Case No. 2013-001893  
South Carolina Court of Appeals Unpublished Opinion No. 2015-UP-491

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.; 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

Petitioners/Respondents.

PROOF OF SERVICE

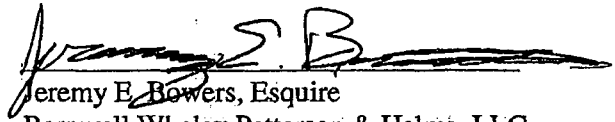
I certify that I have served the Respondents' Petition for Rehearing on Appellants by depositing a copy of same in the United States Mail, postage prepaid, on October 29, 2015, addressed as follows:

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**ATTORNEYS FOR  
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October 29, 2015  
Charleston, SC

# The South Carolina 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., and Lynne L. Kerrison are the Respondents.

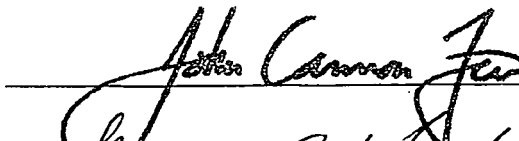
Appellate Case No. 2013-001893

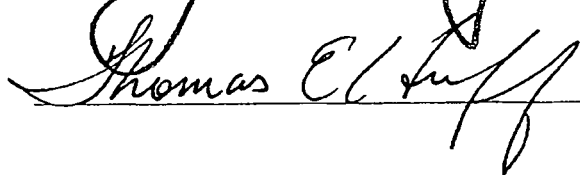
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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_  
C.J.

  
\_\_\_\_\_  
J.

K B W

J.

Columbia, South Carolina

cc:

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The Honorable Roger M. Young, Sr.

FILED

December 16, 2015

STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

RECEIVED

APR 24 2014

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

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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### **Statement of the Issues on Appeal**

1. Did the lower court err in holding that Appellants' case was barred by the statute of limitations?
2. Did the lower court err in finding Respondents owed no duty to the Appellants?
3. Was the lower court wrong in holding that Respondents had not "knowingly participated" in the breach of fiduciary duty perpetuated by the trustees?

### Statement of the Case

This cases arises out of family trusts, for which two brothers, Thomas C. Stevenson, III (Tom) and Daniel R. Stevenson, II (Dan)(collectively "the Brothers"), were trustees and beneficiaries. Their sisters, Appellants Jacquelin S. Bennett (Jacquelin), Genevieve S. Felder (Genevieve) and Kathleen S. Turner (Kathleen), were also beneficiaries. In early 2006, Appellants learned that the Brothers had been stealing money from the trusts and describing the thefts as loans. Appellants sued the Brothers on January 22, 2008 and in discovery, learned about the professional negligence of certain attorneys and accountants. T. Heyward Carter, Jr. and Evans, Carter, Kunes & Bennett, P.A., the attorneys for Mrs. Stevenson ("the Attorneys"), and Lynn Kerrison and Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A., the accountants for the trusts and Mrs. Stevenson, as well as for Dan and one of his companies ("the Accountants") (collectively "the Professionals"), had been keeping secret the illegal activities of the Brothers in taking money from the trusts.

Appellants then brought this action for professional negligence, breaches of fiduciary duties, and aiding and abetting a breach of fiduciary duty. The defendants included both the Attorneys and the Accountants; the claims against the Attorneys have been resolved. (R.p. 1855:7-11). The actions of the Professionals resulted in losses to the Appellants of almost five million (\$5,000,000) dollars. (R.p. 364).

Appellants, along with the Brothers, are beneficiaries of the Last Will and Testament of their late father, Thomas C. Stevenson, Jr.<sup>1</sup> (hereinafter "Thomas Stevenson Will") and the Last

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<sup>1</sup>Mr. Stevenson died in 1988. (R.p. 1252:1-8).

Will and Testament of Jacquelin K. Stevenson, their mother,<sup>2</sup> (hereinafter "Jacquelin Stevenson Will"). (R.pp. 1275:15-17; 1456-1479; S.R.p, 94). The Thomas Stevenson Will created two testamentary trusts: the "Jacquelin K. Stevenson Marital Trust" (hereinafter "Marital Trust") and a qualified terminable interest property trust (hereinafter "QTIP Trust"). (R.pp. 1456-1479).

Tom and Dan served as two of five trustees for the trusts until 1999. In that year, after other trustees had passed away or become ill, the two brothers were left as the only trustees. Now serving as the only trustees, Tom and Dan began stealing money, disguised as loans. In 2001, the Professionals told Tom and Dan that there were questions as to the propriety of making "loans" to themselves. (R.p. 1402:2-9). From 1999-2006, the Brothers, with the knowledge and assistance of the Attorneys and the Accountants, improperly withdrew millions of dollars. Appellants learned of their brothers' actions on April 27, 2006 and the resulting loss of over \$5 million and sued the Brothers.<sup>3</sup> Ultimately, one brother settled and a verdict was reached against the other, but very few funds were available to be recovered. During discovery in that suit, the activities of the Professionals came to light.

Appellants filed this suit, on April 24, 2009, against the Attorneys and the Accountants. (R.p. 31). After conducting extensive discovery, both the Attorneys and the Accountants moved for summary judgment. (R.p. 108 ). Prior to the April 29, 2013 hearing on these motions, Appellants resolved the action against the Attorneys. (R.p. 1855:7-11). After a hearing on the matter, it became apparent that the lower court was attributing meetings between Kathleen and

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<sup>2</sup>Mrs. Stevenson died in 2006 (R.p. 519:19-20).

<sup>3</sup>In 2007, Kathleen and Jacquelin were appointed Personal Representatives of Mrs. Stevenson's Estate. (R.pp. 621:22-25; 795:15-796:15; 876). All three Plaintiffs were appointed as co-Trustees of the Trusts, replacing Tom and Dan. Id.

the Brothers (where the Professionals were not mentioned or involved) as somehow starting the statute of limitations for this action. With the court's confusion as to the events of these meetings, and in an abundance of caution, Appellants moved to withdraw a response to a Request for Admission. (R.p. 453). On June 19, 2013, before an order was entered, Appellants moved to withdraw or amend a response to a confusing Request for Admission. (R.p. 464). The lower court issued an order on July 3, 2013, which granted the Accountants' summary judgment based upon meetings in which the Accountants were not involved or mentioned. The lower court failed to address the amendment of the admission. (R.p. 1). Appellants moved to alter to amend the order. (R.p. 469). The Court declined to alter its judgment and denied Appellants' motion to alter or amend the response to the Request for Admission.<sup>4</sup> (R.pp. 23; 27). This appeal followed.

#### **Statement of the Facts**

The Thomas Stevenson Will, which created two trusts, was executed on February 5, 1985 (R.pp. 1456-1479). Mr. Stevenson died in 1988 and he was survived by his wife. (R.p. 1252:1-8). Appellants and their brothers, Tom and Dan, are beneficiaries of both trusts. (R.pp. 1435:12-28; 1436:8; 1456-1479). The Marital Trust provided Jacquelin K. Stevenson with a power of appointment to name the beneficiaries of the Marital Trust in her Will; she named Jacquelin, Genevieve, Kathleen, Tom and Dan, as well as her child from a former marriage, James King, as beneficiaries of the Marital Trust upon her death. *Id.*

The Thomas Stevenson Will also provided that, upon the death of Jacquelin K. Stevenson, the beneficiaries of the QTIP Trust would be his children-- Jacquelin, Genevieve,

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<sup>4</sup>The Court did correct certain language in the original order to reflect the actual arguments made by Appellants, but did not reverse its grant of summary judgment.

Kathleen, Tom, and Dan. (R.pp. 1242:10-22; 1456-1479). Mr. Stevenson's Will also named Tom and Dan (along with Norman W. Stevenson, Henry Buist and James G. Boyd) as co-trustees of both the Marital Trust and the QTIP Trust. Id. As of 1999, Tom and Dan were the only remaining co-trustees. (R.pp. 795:15-796:15).

In late 2000, Mrs. Stevenson had become ill and was in an assisted care facility. (R.p. 1303:6-10). On January 4, 2001, Mrs. Stevenson executed a Durable Power of Attorney in favor of Kathleen and Dan, which had been prepared by Carter. (R.pp. 835-841). Mrs. Stevenson remained in the assisted care facility and eventually passed away in 2007. (R.p. 519:19-20).

From 1999 through 2006 -- a time period in which the Brothers served as the only trustees-- they both stole money, hiding the thefts by describing them as loans to various business owned by either Tom or Dan.<sup>5</sup> (R.pp. 912:3-25; 924:10-12). The Professionals learned in 2001 that the Brothers were acting improperly as trustees. (R.p. 1331:10-16). Kerrison and Carter both recognized the borrowing scheme was illegal. (S.R.p. 62:1-2). Kerrison told Carter about the improprieties in the fall of 2001, but did not advise any of the Appellants, not even Kathleen, who held a power of attorney for Mrs. Stevenson. (R.pp. 966:22-967:5; 1034; 1116; 1300:3-15). Carter also failed to inform Appellants. Instead, Kerrison and Carter determined that they should have a meeting with Tom and Dan to discuss their illegal activities. (R.pp. 1027:24-1028:3).

On October 23, 2001, Kerrison and Carter met with Tom and Dan--the ones stealing the money-- to tell them to stop taking money from the trusts and to tell their sisters. Id. As Carter testified, "we did discuss the propriety of that and the -- the fact that it was not something the

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<sup>5</sup>The Professionals acknowledged the impropriety of the Brothers' conduct. (R.pp. 1482-1485)

trustees were supposed to be doing.”<sup>6</sup> (R.p. 1331:13-15). Carter never told Kathleen or anyone else that what the Brothers were doing was illegal. In fact, the Professionals took no further action at that time and let the scheme continue. Id. At the time of the October 23, 2001 meeting, Dan had already stolen \$717,000 (R.p. 384) and Tom had stolen \$500,000. (R.pp. 383; 386).

As time passed, neither Carter nor Kerrison stopped the Brothers from looting the trusts. In fact, Kerrison’s firm began doing the bookkeeping for the trusts and Mrs. Stevenson after her personal bookkeeper passed away at the end of 2002. The Accountants actually took possession of the trusts’ checkbooks and *wrote* the improper checks to Dan and Tom. (R.pp. 916:23-25; 957:6-16; 1046:6-20). Tom or Dan would come to the Accountants’ office and meet with one of the employees, who would then write the check as requested by Tom or Dan, totally ignoring Accountants’ earlier recognition that such was illegal. (R.p. 957:9-16).

When the Accountants wrote checks to Dan, he invested the money in his business, Fabtech. While this was occurring, Harold Pratt-Thomas, a partner with the Accountants, was also investing in Fabtech and sat on its board. (R.p. 989:12-17). Thus, the Accountants had a financial interest in the business and an incentive to keep the business solvent by allowing the improper withdrawals. (R.p. 989:12-17). In addition, Kerrison, a partner with Accounting firm, filed tax returns for the trusts (and Mrs. Stevenson) each year and knew that Tom and Dan had continued to take money from the trusts. The loans (thefts) continued even after the October 23, 2001 meeting in which Kerrison and Carter told the Brothers it was improper. (R.pp. 943:5-25; 966:13-16; 979:24-981:5). Incredibly, just one month after the October 23, 2001 meeting, Dan

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<sup>6</sup>Carter also testified that at the time that meeting was held he “was concerned that they had breached their fiduciary duties.” (S.R.p. 62:1-1).

had stolen an additional \$40,000 and Tom had stolen an additional \$150,000. (R.pp. 383-384; 386).

Tom and Dan continued to take monies from the trust, but no one informed Appellants. In a letter to Tom and Dan dated November 25, 2002, Carter even acknowledged that Appellants, especially Kathleen who held the power of attorney, needed to be told. (S.R.p. 72:3-21; 74:21-75:10). Neither Kerrison nor Carter informed Appellants of the Brothers' illegal actions. Amazingly, Kerrison and Carter participated in the preparation of promissory notes for Tom and Dan, in an attempt to further hide the thefts. (R.pp. 1011:11-22; 1481). With the knowledge and assistance of the Accountants, Tom and Dan continued to engage in stealing millions of dollars from the Trusts. By the end of the year 2005, Tom had stolen \$750,000 and Dan had stolen \$3,668,276 (R.pp. 381-386).

In March of 2006, Kerrison and Carter, obviously aware that Tom and Dan had continued to loot the trusts, drafted a letter, dated March 27, 2006, to finally inform Appellants that the trusts held millions of dollars worth of unsecured promissory notes (in actuality, the monies stolen by the Brothers).<sup>7</sup> (R.pp. 1368:3-15; 1482-1483). However, at the request of Tom and Dan, this letter was not actually sent. (R.p. 1484-1485).

On April 27, 2006, Kathleen Turner attended a meeting with Carter and Kerrison, as well as the Brothers. It was at this meeting where Kathleen was first informed that Tom and Dan had stolen money from the Trusts. (R.pp. 1378:1-1379:16). Carter and Kerrison have admitted that the purpose of this meeting was to provide "full disclosure" to Kathleen (which had never been

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<sup>7</sup>The letter of Carter and Kerrison does not state from who the notes were, nor does it mention that the Brothers had been illegally looting the trusts. (R.pp. 1482-1483).

given) and that it was at this meeting where documentation of the withdrawals was finally provided to Appellants. (R.pp. 966:22-967:9; 1034; 1116:3-21). By that time, Tom and Dan had stolen almost five million dollars (\$5,000,000) from the trusts. (R.p. 364). Appellants filed suit against the Attorneys and the Accountants on April 24, 2009.

The lower court granted summary judgment to the Accountants on July 3, 2013. The lower court held that the statute of limitations began to run on one of three dates:

- 1) an April 19, 2006 meeting in which Tom said he disclosed investments and loans in Fabtech and Easy Tray (the Brothers' businesses). The Professionals were not at that meeting and their knowledge and participation was never mentioned.
- 2) a May 21, 2003 meeting between Kathleen, Tom and Dan, in which Kathleen Tom mumbled for a little while, which lead Kathleen to believe something was wrong with Tom personally. The Professionals were not mentioned.
- 3) in October 2001, when Kerrison told Carter about the Brothers' thefts and they both agreed that Brothers' actions were improper. None of the thefts were disclosed to Kathleen or the other Appellants.

Essentially, the lower court ignored the fact that none of the meetings between Kathleen and Tom disclosed the thefts to Kathleen, nor mentioned the Professionals. The lower court further ignores that the April 27, 2006 meeting was the first time that the thefts were "fully disclosed."

The lower court also ruled that the Accountants had no duty to any of the Appellants despite the fact that Mrs. Stevenson, who was elderly and ill, had been a client of the Accountants, and Kathleen held her mother's power of attorney.

Finally, the lower court found that the Accountants had not “knowingly participated” in Tom and Dan’s breach of duties, even though the evidence in the record shows a history of both knowledge and participation by both writing checks, preparing promissory notes, and keeping the Brothers’ scheme a secret. (R.pp. 1481-1485).

## **ARGUMENT**

### **Standard of Review**

This Court reviews the grant of a summary judgment motion *de novo*, applying the standard of Rule 56, SCRPC that summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006); *Pittman v. Grand Strand Entm’t, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *B & B Liquors, Inc. v. O’Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) (emphasis added).

**I. The lower court erred in finding the Appellant’s case was barred by the statute of limitations.**

The lower court found that the statute of limitations began on one of three dates:

- 1) on April 19, 2006, when Tom Stevenson allegedly told Kathleen about his investments and loans of trust funds into his business;
- 2) on May 21, 2003, where Tom lead Kathleen to believe something was wrong with

him personally; or

- 3) in October 2001 when Carter and Kerrison came to the conclusion that the Brothers were improperly taking money from the trusts (but kept that secret from Appellants).

The fact that the lower court posited so many alternatives (all of which are based on disputed factual issues) suggests that this issue was not appropriate for determination on summary judgment. Moreover, the statute of limitations could not begin to run until the full disclosure meeting of April 27, 2006 at which time Kathleen first learned about the looting of the trusts.

Section 15-3-530 of the South Carolina Code (Supp.2003) sets forth a three-year statute of limitations for negligence actions. Under the discovery rule, the statutory period begins to run from the date the injured party either knows or should have known that a cause of action arises from the wrongful conduct. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). One is charged with discovery when the facts and circumstances would put a person of common knowledge and experience on notice that some claim might exist against a particular party. *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct.App.1987). The injury alone is not sufficient; the statute is only triggered by notice of a cause of action against another person. *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). Appellants were not put on notice until "full disclosure" of the loans (thefts) was given on April 27, 2006.

The record indicates that the only meeting at which any of the Appellants were informed about assets and the withdrawals by Tom and Dan was on April 27, 2006; at all other meeting prior to this, the attorneys were not present or discussed. Kerrison testified that she told Carter

about the improper withdrawals in 2001. (R.pp. 918:11-25; 936:10-17). She also testified that she knew that Dan and Tom were supposed to hold a family meeting but did not do so. (R.pp. 957:17-959:6). Carter's billing records and testimony indicate he participated in a conference with Tom and Dan Stevenson, Kathleen Turner, Lynne Kerrison on April 27, 2006. (R.pp. 1378:1-1379:16). It was at this meeting that Kathleen was fully informed about the "funds that had been taken out over a period of time by Dan and Tom out of the two trusts." Id. Obviously, Kathleen could not have known about the involvement by the Attorney and Accountants' until she learned of the thefts themselves. Kerrison also acknowledged being at that meeting and that Kathleen was shown various documents regarding the withdrawals by Dan. (R.pp. 966:22-967:9; 1034). Kerrison has described it as the meeting which was designed to fully disclose to Kathleen the improper withdrawals:

Q. Are you referring to the meeting at Heyward Carter's office on April the 27th, 2006?

A. Yes, sir.

\* \* \*

Q. Oh, okay. So on the second page you indicate Heyward Carter, Lynne Kerrison, Tom Stevenson, Dan Stevenson, Kathleen Turner were at the meeting?

A. Yes, sir.

Q. And this is the meeting to do the full disclosure to Kathleen?

A. Yes, sir.

(R.p. 1116:3-21).

A. **The lower court improperly ruled that an April 19, 2006 meeting at Tom Stevenson's business started the statute of limitations as to the Accountants, who were not there nor mentioned.**

The lower court's conclusion that the statute began running on April 19, 2006 is based upon conversations (in which Professionals were not mentioned) and a confusing request to admit with more than one interpretation. The interpretation advanced by Accountants has been directly contradicted by Kathleen. Appellants moved to withdraw or amend the request, as more fully discussed in Section I.B, *infra*. However, even if the admission stands, the ambiguous nature leads to multiple interpretations, and at summary judgment, all inferences must be construed in favor of the non-moving party. Moreover, the confusing nature of the request should not allow the lower court to erroneously include the Professionals in the admission. This suit is against the Accountants who were not participants in conversations that Tom and Dan had with Kathleen. The Accountants are not mentioned in the Request for Admission. Thus, the admission, even if allowed to stand, cannot be held against Kathleen as to her claim against the Accountants.

On May 11, 2011, the Accountants served Requests to Admit on each of the three Appellants. Kathleen was served with 171 Requests, while Genevieve and Jacquelin each received 167 Requests. The request at issue is the very last request of the 171 Requests to Kathleen, which stated:

171. Thomas Stevenson informed you that he and Daniel Stevenson removed money from the trust on April 19, 2006.

(R.p. 211).

This request is confusing in that it does not state how much money was removed. The request does not state for what purpose the money was removed. More importantly, the request does not show that the Appellants admitting anything with regard to the Professionals. It is

certainly ambiguous in that, even if Tom had “removed” any money, the Request does not include what the removal was for or whether the Accountants knew about that withdrawal.

Case law dictates that this ambiguous request must be construed against the Accountants. *Adams v. Orr*, 260 S.C. 92, 194 S.E.2d 232 (1973)(Trial court was correct in refusing to hold that the requested matters were admitted where admission as worded was subject to more than one interpretation); *Talley v. U.S.*, 990 F.2d 695, 699 (1st Cir. 1993)(To the extent that the request is ambiguous, that ambiguity is to be construed against the party whose lawyer drafted the request).

More importantly, however, is the fact that the lower court, without evidence, attributed Tom’s alleged “removal” of money to the Accountants. The Request for Admission does not include any mention of the Accountants. There is no testimony that Kathleen was told of the Accountants or Attorneys’ knowledge of the thefts by the Brothers until April 27, 2006. In other words, even if the lower court properly deemed admitted the fact that on April 19, 2006, Tom told Kathleen he had removed money from the trust, Kathleen had no notice of any claims against the Accountants or Attorneys. As this Court has held “...knowledge of an injury alone” does not trigger the statute of limitations; there must be knowledge of facts to put a person on notice that she has a cause of action against another. *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997).<sup>8</sup> How can admissions by Tom-- that he “removed” money from the trusts-- put Kathleen on notice as to the existence of a cause of action for professional negligence against the Accountants? There is nothing in the Request or the response to show that Appellants had

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<sup>8</sup>In the *True* case, the court found that although the injury was caused by the attorney’s failure to include a cost-of-living provision in a 1973 lease drafted for his client, the statute of limitations did not start to run until 1990, when the client discovered that the attorney had failed to disclose the fact that he also represented the lessee in that transaction.

knowledge of a claim against Accountants as result of Tom and Dan's "removals" until the April 27, 2006 meeting with Carter and Kerrison. In addition, as previously discussed, under Rule 56, SCRCF, the lower court was required to construe Kathleen's response to this ambiguous request to admit in her favor. The lower court erred in construing an admission of the Brothers--that never mentions the Professionals--as notice to Kathleen of the negligence of the Accountants, as well as failing to construe all ambiguities in favor of Appellants.

**B. The lower court erred in denying Appellants' timely motion to withdraw a response to a Request for Admission.**

As noted, the lower court failed to construe the ambiguity within the request to admit in favor of Kathleen and concluded that the statute began running on April 19, 2006, which is contrary to Kathleen's detailed testimony. Furthermore, the lower court wrongly applied the request, which involved Tom and Dan only, to the Accountants. Appellants objected and, on June 19, 2013, moved to withdraw the Requests for Admission prior to the entry of the lower court's Order granting summary judgment to the Accountants. (Plaintiffs' Objections to Proposed Order of Defendants Lynn Kerrison and Dixon Hughes, or in the Alternative, Motion to Amend a Response to a Request to Admit). The order granting summary judgment was issued on July 3, 2013, but did not address Appellants' motion to amend or withdraw. On July 25, 2013, Appellants moved to alter or amend the order, and requested the court to rule on their motion to withdraw the request for admission.

The lower court refused to allow a withdrawal or amendment of the admission, wrongly claiming that the motion was untimely.<sup>9</sup> (R.p. 27). However, Appellants made the motion as

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<sup>9</sup>At the time of Appellants' motion to withdraw the request, there was no final order and thus, no untimeliness. See *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259,

soon as it became apparent that confusion abounded; the lower court, despite the fact that there was no admission as to Kathleen's knowledge of the Accountants' conduct, was using the admission concerning Tom and Dan's "removal" of money from the trusts to start the statute of limitations for professional negligence against the Accountants. The lower court also found that "the ultimate result would not be changed" by amendment of the admission because of its other rulings on the statute of limitation, which is not a proper consideration for a motion to amend (R.p. 27).<sup>10</sup>

The lower court disregarded Rule 1 of the South Carolina Rules of Civil Procedure (which guarantees the just determination of all actions) in ignoring Rule 36, SCRPC and the case law on the amendment of admissions with regard to a confusing request for admission. Rule 36(b), SCRPC governs requests to admit and states:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose.

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260 (1999) ("An order is not final until it is written and entered by the clerk of court. Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly.").

<sup>10</sup>The lower court order also notes that Appellants did not re-argue all previous positions, but only included issues that were raised and not ruled upon. (R.p. 29). Of course, Appellants merely followed the rule for a Rule 59(e) motion. See, *Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004). A motion to alter or amend under Rule 59(e) is not an appeal in which the moving party argues the court's errors on rulings of issues actually addressed.

Thus, Rule 36 sets forth a two-part test for withdrawal or amendment of an admission: 1) whether a presentation of the merits furthered by the amendment; and 2) whether the party who obtained the admission can establish prejudice because of the amendment. Rule 36(b); *Barber v. Hobbs*, 313 S.C. 319, 321, 437 S.E.2d 409, 410 (Ct. App. 1993). Moreover, the case law is clear that courts allow amendments to requests to admit, especially when the truth becomes apparent in later discovery. See, *Barber v. Hobbs*, 313 S.C. 319, 437 S.E.2d 409 (1993). In *Barber*, the court allowed a defendant to withdraw or amend his answer to a requests for an admission even though the trial had already started. In that case, the plaintiff brought an action for wrongful death. Dr. Hobbs answered a request to admit as follows:

REQUEST: Do you admit that on May 22, 1987, the Defendant diagnosed plaintiffs decedent's condition as pneumonia?

RESPONSE: Admitted.

At his deposition several months after the admission, Dr. Hobbs testified that he "suspected" pneumonia the night of May 22. At trial, Dr. Hobbs testified that although he was worried about pneumonia on May 22 and ordered x-rays, he did not diagnose pneumonia until the following morning after reviewing the x-ray report. The plaintiff extensively examined Dr. Hobbs concerning the inconsistency. Dr. Hobbs then moved to amend his admission. The trial court granted the motion, reasoning it would be an injustice to preclude Dr. Hobbs from denying the admission and noting that presentation of the merits would be furthered by the amendment.

Several federal cases have specifically considered an admission affecting the statute of limitations. In *F.D.I.C. v. Prusia*, 18 F.3d 637, 639 (8th Cir. 1994), the court specifically considered an admission which affected the statute of limitations and whether the plaintiff had

timely filed an amendment. In that case, the court found withdrawal of the admission was proper, noting that reliance on the mistaken admission would deny the plaintiff the opportunity to have the merits of its claim considered. The court stated:

Because allowing the erroneous admission to stand might have barred the FDIC's claim, permitting the amendment would have subverted the presentation of the merits.

*F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994).<sup>11</sup> In other words, because courts favor decisions on the merits, the party whose admission prevents a trial on the merits can withdraw the admission.

In *Ropfogel v. United States*, 138 F.R.D. 579 (D. Kan. 1991),<sup>12</sup> the court identified several factors to be considered in allowing withdrawal of admissions: (1) whether the admission is contrary to the record in the case; (2) whether an admission is no longer true because of changed circumstances; (3) whether, through an honest error, a party has made an improvident admission; and (4) whether the effect of upholding the admission would be practically to eliminate any presentation on the merits.

In this case, at least three out of the four factors are present. While the Accountants argue that Kathleen admitted that she was told on April 19, 2006, about Tom and Dan's "removal" of money, Kathleen's testimony is completely opposite. Kathleen testified that she met with Tom at his place of business on April 19, 2006 and that she got a tour of his business-- and later Dan's

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<sup>11</sup>Like the case here, that matter was before the Court on a motion for summary judgment.

<sup>12</sup>The Notes to Rule 36, SCRCP state: "This is the language of the current Federal Rule 36...." Federal case law can provide guidance where the state rules are based on the Federal Rules. See, *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

business. (Turner Dep. p. 97-98). Kathleen also stated that, during that tour, he did not tell her about monies taken from the trusts. (R.pp. 585:24-586:9). Moreover, the other evidence, such as Heyward Carter's billing records showing the May 27, 2006 meeting, corroborate Kathleen's testimony. Under both the first factor in *Ropfogel*, and the holding in the *Barber* case in South Carolina, the admission should not stand when it is clearly contradictory to the record.

In addition, the request may have been improvidently admitted (the third *Ropfogel* factor). The request here was the very last one of **171 requests**. Furthermore, it was poorly drafted and was ambiguous as to the date of the conversation and/or the date of the withdrawals. While the meaning of the request was unclear,<sup>13</sup> Kathleen's testimony is clear that on April 19, 2006, Tom did not inform her that he had stolen or taken from the Trusts. Because of the excessive amount of requests and the ambiguous nature of the request, it was improvidently admitted and meets the third factor of the *Ropfogel* supporting the withdrawal of the admission.<sup>14</sup> Furthermore, as noted above, ambiguous requests must be construed against the drafting party -- here, the Accountants. *Adams v. Orr, Talley v. U.S., supra.*

Finally, allowing the admission to stand -- despite the fact it is in contradiction to the evidence and was accidentally or improvidently admitted -- would wrongly eliminate any

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<sup>13</sup>In *Adams v. Orr*, the Supreme Court affirmed the trial judge who had refused to hold that an ambiguous request admitted, stating that "[i]n view of the fact that the request for admission was subject to more than one reasonable interpretation, we cannot say that the trial judge erred" in setting aside the admission. Similarly, in *Talley v. U.S.*, 990 F.2d 695, 699 (2d Cir. 1993), the court considered a purported admission by the defendant and stated "[t]his last request, whether deliberately or not, is an invitation to confusion." The court noted that the request could be construed in two different ways and that "[t]o the extent that the request is ambiguous, that ambiguity is to be construed against Talley (whose lawyer drafted the request)."

<sup>14</sup>Moreover, even if Tom did admit to taking money on that day, Kathleen had no notice that the Professionals had been involved until the meeting on April 27, 2006.

presentation of the merits, which is disfavored. See, *Barber*; Rule 36, SCRCR, *supra*.

Moreover, there is no prejudice to the Accountants as they have already questioned Kathleen about the events of that day. Kathleen testified that she toured Tom's business but that he did not tell her that he took money from the Trusts to fund his business. (R.pp. 585:24-596:17).

The lower court could not have relied on the admission, as Kathleen testified to the true facts at her deposition. Furthermore, as recognized in *Wright Miller & Kane, 8B Fed. Prac. & Proc. Civ. § 2264* (3d ed.), relying on admissions in preparing a motion for summary judgment does not, by itself, constitute prejudice (citing *Conlon v. U.S.*, 474 F.3d 616 (9<sup>th</sup> Cir. 2007)).

**C. The lower court erred in ruling that any May 21, 2003 conversation concerning the borrowing of money by Tom and Dan Stevenson has the effect of starting the statute of limitations for the Accountants.**

The lower court next held that the Appellants were on notice of any claim as of May 21, 2003, a date when Kathleen's met with the Brothers. However, the lower court erred as there was disputed testimony as to Tom's statements that day, but there is no dispute that the Accountants (and/or the Attorneys) were not present. In addition, there is no evidence that the improper conduct of the Accountants or the Attorneys was disclosed that day.

Tom claims that he provided a document entitled "Stevenson Family Assets" to Kathleen, although this document has never been produced. Even if the document existed, it would have, at most, listed the loan (theft) values and not the illegality of the loans.<sup>15</sup> (R.pp. 1653-1654). Regardless, there is no evidence that any knowledge or participation by the Accountants was included in that document. . Kathleen clearly testified that Tom mumbled for a few minutes but

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<sup>15</sup>It should be remembered that it is not the fact of whether there are good loans, but whether or not there are any loans. (R.p. 1331:13-16).

did not say anything about stealing from the trusts and that she was not provided an asset sheet. (R.pp. 552-555). Furthermore, there is absolutely no evidence to indicate that the Accountants' knowledge and participation was discussed at this meeting.

On a motion for summary judgment, "the court may not judge the credibility of the witnesses...." *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989).

Furthermore,

at the summary judgment stage of litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact... Nor does the judge make credibility determinations with respect to statements made in affidavits ... or depositions.

*L & W Wholesale, Inc. v. Gore*, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...." *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003).

The evidence is conflicting as to whether an asset sheet was produced on May 21, 2003. The Accountants did not attend this meeting and have no personal knowledge of any conversations.<sup>16</sup> Kathleen denies that Tom and Dan told her they had taken money. Kathleen testified that Tom mumbled for a few minutes but did not explain the improper withdrawals and did not provide her with any written information on the family assets. (R.pp. 552-555). However, what is clear is that there is no testimony by anyone that Kathleen was informed of the Accountants' knowledge or actions.

The lower court found that because Kathleen testified that she thought "something must

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<sup>16</sup>Tom and Kathleen have both testified that the only people attending were themselves and Dan. (R.pp. 548:20-24; 1741:24-1742:2).

be very wrong” (R.p. 570), the matter was appropriate for summary judgment. Obviously, Kathleen was worried about her brother’s personal well being. However, there was no indication that the meeting was about the trusts or that Tom and Dan had stolen from them. The court is misconstruing a sister’s worry that something might be wrong with her brother *personally*. Regarding the May 21, 2003 meeting, Kathleen has stated that she thought “something was bothering Tom” and that she was “concerned,” but she did not know what was bothering him. Turner 5/21/09 Dep. 43-44. Kathleen also clearly testified that: she was not informed about the subject matter of the meeting ahead of time (R.pp.550:24-551:1; 567:8-12); she did not understand any of Tom’s mumbling in the approximately 10-15 minute meeting (R.pp. 552:6-16; 553:20-554:1); that Dan said nothing (R.p. 571:11-18); and that Tom kept whatever document he had in his lap and never showed it to her (R.p. 564:17-23). In other words, as Kathleen testified, she was concerned something might be wrong with Tom, but there was nothing to put her on notice of a claim against even Tom or Dan (let alone the Accountants) during this 2003 meeting. The lower court took a sister’s observation that something might be wrong with her brother personally, and it turned that comment into the trigger for the statute of limitations against the Professionals. Kathleen’s testimony should not be so construed on a motion for summary judgment.

Moreover, even if had Tom admitted taking money from the trusts at the May 21, 2003 meeting, his disclosure did not include the professional negligence of Accountants so as to trigger the statute of limitations against them.

In fact, the testimony of Carter supports Kathleen’s testimony and indicates that the only meeting in which any of the Appellants were informed about assets and the loans (thefts) by Tom

and Dan [and the Professionals' knowledge of the loan (thefts)] was on April 27, 2006.<sup>17</sup>

Carter's billing records and testimony indicate that there was a conference with Tom, Dan, Kathleen, Kerrison and himself on April 27, 2006, at which Kathleen was informed about the "funds that had been taken out over a period of time by Dan and Tom out of the two trusts."

(R.pp. 1378:1-1379:16). Carter has agreed that this meeting was one in which full disclosure of the loans was finally made:

Q. Would you characterize that as full disclosure of the trusts--of the loans from the trusts?

A. I think it would have been, at least as far as I had any information on them and I think as far as Lynne Kerrison would have had any information on them as far --which as far as I know was complete.

(R.p. 1379:17-24).

Other evidence in the record indicates that Appellants were not informed of any trust withdrawals until the April 27, 2006 meeting. Carter testified that in March 2006, he drafted a letter for Lynne Kerrison and himself to sign, which letter would inform Kathleen about the alleged loans. (R.pp. 1368:3-15; 1482-1483). Obviously, if Dan and Tom had already advised Kathleen of the loans, no letter from the Carter was needed. This letter was not actually sent in March, 2006 as a result of a request by Dan and Tom (R.pp. 1484-1485). Furthermore, Carter wrote a letter to Dan and Tom, dated March 28, 2006, (with courtesy copies to Kerrison), which stated:

I want to confirm my statement to you at our meeting yesterday afternoon, that I would delay sending the letter which Lynne Kerrison and I have signed and which

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<sup>17</sup>And indeed, a reasonable jury could conclude that common sense indicates that the April 27, 2006 meeting would not have been needed if Tom and Dan had already disclosed the withdrawals on any prior occasion.

is dated March 27, 2006, addressed to Dan and your sister Kathleen, for a reasonable time until you and Dan have a chance to talk to Kathleen or we have met again with Lynne and Howell Morrison present. I understand from a message left by Tom this morning that you plan to talk to Kathleen as soon as you can arrange it, and may like to meet again with me and Lynne Kerrison.

Id. The letter continued:

As I conveyed to you at our meeting yesterday afternoon, I believe that you have placed me in a very awkward position by not following through on what I clearly understood to be your commitment three years ago to meet with all the beneficiaries of your father's trusts....

Id. Clearly, as of that March 28, 2006 letter, no one had advised Appellants of the loans (thefts), and certainly no one had informed Appellants of the Professionals' knowledge and furtherance of the loans (thefts).

Additionally, Kerrison's testimony supports the fact that the loans (thefts), and her knowledge and involvement, was not disclosed to Appellants until April 27, 2006. She testified that she told Carter in 2001. (R.pp. 918:11; 936:10-17). She also testified that she knew that Dan and Tom were supposed to hold a family meeting but did not. (R.pp. 957:17-959:6). She agreed to the March 27, 2006 letter to Kathleen drafted by Carter (which he then did not send).<sup>18</sup> Obviously, there was no need for the letter or the April 27, 2006 meeting if Kathleen had already been informed. The testimony and evidence in the record supports Kathleen's testimony that the April 27, 2006 meeting was the first and only time she was informed about the thefts that the Brothers called loans, and it was only thereafter that she became aware of the Attorneys' and Accountants' knowledge and participation in the withdrawals.

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<sup>18</sup>As noted previously, the March 27, 2006 letter did not truly disclose the illegality of Tom and Dan's withdrawals, but merely advised securing the supposed loans with sufficient assets.

**D. The conclusion by Lynn Kerrison and Heyward Carter that Tom and Dan Stevenson were illegally removing funds from the trusts does, which was never disclosed to Appellants, not start the statute of limitations as to professional negligence.**

The lower court found that notice to an attorney is notice to his client, and thus, once Kerrison told Carter in October 2001 of the improper withdrawals, the statute began to run. The lower court primarily relies on *Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998). In *Dorman*, because the lawyer had been notified that a house was below flood level, his clients (the buyers) were also found to have on notice at that time, even if they had no actual notice. The *Dorman* court noted that the Dormans had viewed the house several times; had hired “a host of professionals” to inspect the house; had received both a plat showing the house was a flood hazard area and a flood elevation certificate that clearly indicated the house was below the base flood elevation. In finding that the contents of the letter to the attorney was imputable to his clients, the court stated:

The plain reading of the letter, along with the other facts of this case, would put a reasonable person on notice of a flood elevation problem and a potential problem with the lower level addition.

*Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (emphasis added).

Again, the court in *Dorman* reiterated that notice to the attorney alone was not the basis for the decision:

We find that Buist’s letter, in conjunction with the other evidence, put the Dormans on notice that some problem may have existed with the addition was below flood level.

*Id.* at 186, 500 S.E.2d at 789 (emphasis added). Here, unlike *Dorman*, there is the absence of any “other evidence” to put Appellants on notice of any problem with the trusts. Thus, the

Accountants disclosure to Heyward Carter does not serve as notice to Appellants and does not start the clock for the statute of limitations.

Moreover, there is an exception to the rule that a principal is affected with knowledge his agent receives. *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979). This exception “exists in situations where the agent is acting fraudulently against his principal or for any other reason has an interest in concealing his acquired knowledge from his principal.” *Id.* Here, a jury would likely conclude that Carter acted fraudulently in that he protected the thieves, Dan and Tom, under the misguided idea that he needed to keep the family “harmonious.” (S.R.p. 73:6-16). Instead of following his duty to inform Mrs. Stevenson, and by extension, Kathleen as the holder of the Power of Attorney, Carter thought it was better that Tom and Dan tell their sister, so he concealed his knowledge. (R.p. 429:3-13). Carter also drafted, or assisted in drafting Promissory Notes, to cover up the thefts of the Brothers, which is was clearly concealing knowledge from his client. Thus, Carter’s knowledge in 2001 cannot be attributed to Appellants.

In conclusion, the lower court failed to apply the proper factors and erred in refusing to set aside the admission. Furthermore, the evidence in the record shows that Kathleen was not informed of Tom and Dan’s thefts and the Accountants’ knowledge and participation until the April 27, 2006 meeting. Thus, this action, filed on April 24, 2009, was filed within the three-year statute of limitations.

**II. The Accountants owed a continuing duty to Appellants to tell them of the illegal activity of the trustees, Tom and Dan Stevenson.**

The lower court erred in concluding that the Accountants did not owe any duty to

Appellants because they were not clients, and in its alternative conclusion any duty that Accountants had was satisfied by the October 2001 disclosure to Carter Heyward. The lower court misunderstood the law and facts of the case and completely ignored the 2001 power of attorney granted by Mrs. Stevenson to Kathleen.<sup>19</sup>

The lower court held that “if there was a duty owed to [Appellants], it had to be owed as result of the relation between [Accountants] and one or more [Appellants], not as a result of a relation between [Accountants] and Jacquelin Stevenson.” (R.pp. 28-29). In so ruling, the lower court wrongly disregarded the importance of the fact that Kathleen held her mother’s Power of Attorney and as such, she was clearly in a fiduciary relationship with the Accountants. This is especially true since, during the entire time Kathleen was her mother’s attorney-in-fact, her mother was ill and in a hospital or nursing facility.

Kathleen was appointed as Mrs. Stevenson’s attorney-in-fact under a Power of Attorney in 2001. “It has been said that *an attorney in fact is essentially an alter ego of the principal....*” *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. App. 2000) (emphasis in original), citing 3 *Am.Jur. 2d Agency* § 21. *See also, Estate of Keatinge v. Biddle*, 789 A.2d 1271, 1274 (Maine 2002); (“In essence, an attorney-in-fact is the alter ego of the principal.”). “Furthermore, a person acting as an attorney-in-fact under a POA is an agent, one who stands in the shoes of a principal.” *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008). Kathleen was the attorney-in-fact and alter ego of her mother, and the duty the Accountants owed to Mrs Stevenson extended to her. Therefore the Accountants did have a duty to disclose the loans

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<sup>19</sup>Appellants sued in all of their capacities, in an abundance of caution. However, the fact that Kathleen has held power of attorney for Mrs. Stevenson since 2001 is a critical fact. Amazingly, the lower court does not even recognize the status of the power of attorney.

(thefts) to Kathleen, especially since Mrs. Stevenson was elderly, infirm, and either hospitalized or in a nursing facility. The Affidavit of George DuRant, a certified public accountant and expert for Appellants, specifically noted that the Accountants should have given notice to Kathleen, in her capacity as the holder of a power of attorney, of the improprieties with regard to the trusts. (R.p. 355 ¶11).

The Order concluded that Plaintiffs were not clients and could not assert claims for breach of any professional duties. However, Mrs. Stevenson was a client of the Accountants -- as they admitted in their Answer to the Complaint. Paragraph 42 of the Amended Complaint stated:

Defendants Kerrison and Dixon-Hughes served as accountants for the two subject Trusts and Jacquelin K. Stevenson.

(R.p. 94 ¶42). The answer to that paragraph was "Admitted." (R.p. 102 ¶42). Moreover, Paragraph 46 of the Complaint alleged, in part, that "Defendants Kerrison and Dixon-Hughes were in a fiduciary relationship with Plaintiffs..." and Paragraph 47 alleged that:

Defendants Kerrison and Dixon-Hughes were required to fully disclose to Plaintiffs, including Jacquelin K. Stevenson via her power of attorney, Kathleen Turner, all known significant and material information including but not limited to the fact that the trustees were engaging in improper self-dealing withdrawals.

(R.p. 95 ¶47). In the Answer to both of these paragraphs, the Accountants stated:

Defendants admit that they performed accounting services for the benefit of the subject trusts and Jacquelin K. Stevenson and **had duties towards those the subject trusts and Jacquelin K. Stevenson that they undertook contractually, and that are implied by law.**

(R.p. 102 ¶ 47). Thus, the Order's holding that "the only clients to whom Lynn Kerrison and Dixon Hughes provided accounting services" were Tom and Dan is contrary to the admissions of

the Accountants.<sup>20</sup> Mrs. Stevenson was a client and the Accountants did owe her a duty.

Appellant Kathleen was appointed as attorney-in-fact for her mother in 2001. The holder of a power of attorney steps into the shoes of the grantor, and is basically an alter ego of the grantor. *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. App. 2000), citing 3 *Am. Jur. 2d Agency* § 21. In other words, as of January 2001 when the Power of Attorney was executed, Kathleen Turner was Mrs. Stevenson and the duties owed to Mrs. Stevenson, to which Respondent have already admitted existed, were extended to Kathleen. The lower court erred in finding that the duty had to exist between Appellants and Respondent independently of the Respondent's duty to Mrs. Stevenson.

The lower court, citing *ML Lee Acquisition Fund L.P.D. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), also wrongly found that there was no duty to disclose client information to non-clients except where non-clients justifiably rely on information affirmatively communicated by an accountant. However, because Kathleen held the Power of Attorney for Mrs. Stevenson, she was a client and the duty to disclose extends to her. Thus, the Order's reliance on *ML Lee* has no application; the Power of Attorney extends the client relationship to Kathleen. In addition, one of the other cases cited by the lower court actually supports Appellants argument. In *Johnson v. Robert E. Lee, Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012) the court held that an accountant's duty did not extend to a third party absent a "statute, contract, relationship, status, property interest, **or some other special circumstance.**" *Id.*, 401 S.C. at 504, 737 S.E.2d at 514 (emphasis added). The Power of Attorney held by Kathleen is a special

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<sup>20</sup>The Accountants went so far as to write improper checks to the Brothers.

circumstance extending the duty of the Accountants.<sup>21</sup>

The lower court also erred in finding that 26 U.S.C.A. § 7216 would preempt any duty the Accountants had to disclose the withdrawals. 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.* Here, the claims do not arise out of tax preparation services, but rather the general obligations of a public accounting firm and its members. Furthermore, there is no indication that this statute preempts any common law duties of 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).

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<sup>21</sup>The lower court also cited cases from other jurisdictions which disallowed actions by beneficiaries against accountants serving the trusts. However, as noted earlier, in this case, the Accountants also owed duties to Mrs. Stevenson and Kathleen, as the holder of the power of attorney, and thus, those cases have no relevance here. In addition, since the Appellants are Personal Representatives of Mrs. Stevenson’s Estate, they can bring any claims she had against her Accountants.

Moreover, there is an exception allowing the 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>22</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). 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 lower court erred in finding that the Accountants were barred by § 7216 from disclosing the withdrawals.<sup>23</sup>

In conclusion, the Accountants admittedly owed duties to Mrs. Stevenson, which extend to the holder of the power of attorney, Kathleen. The existence of these duties support causes of action for both professional negligence and/or breach of fiduciary duty. The lower court erred in holding there were no duties owed by the Accountants, and should be reversed.

**III. The Accountants, who admittedly knew the activities of the trustees were illegal and who helped the trustees, clearly "knowingly participated" in the breach of fiduciary duties by the trustees.**

The lower court found that the Accountants could not have aided or abetted Tom and Dan Stevenson's breach of fiduciary duties. The lower court reasoned the Accountants had not acted with knowing participation in the improper withdrawals, stating: "Beyond showing Ms. Kerrison and the firm's admitted knowledge of the trustee's actions, plaintiffs offered no evidence of

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<sup>22</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).

<sup>23</sup>Furthermore, the Defendant here were not releasing confidential information used to prepare tax returns, but actively writing improper checks to two trustees who were looting the Trusts.

participation of the trustees' breaches of duty, or any other affirmative act on the part of Ms. Kerrison or the firm." (R.p. 21). This statement is factually incorrect. The Accountants knew that it was improper and a breach of duty for the Brothers to withdraw money from the trusts but wrote the checks for the withdrawals for years. In other words, the Accountants knew that the trustees were breaching their fiduciary duties and assisted by actually providing and writing the checks:

Q. And that Dixon Hughes at some point in time upon the death of Pat<sup>24</sup> started writing the checks?

A. Yes, sir, we wrote the checks.

Q. And who okayed the checks to be written?

A. Any of the siblings would come into the office and they would meet with Angela Heisenbottle, and Angela would write the checks and then either Dan or Tom would sign the checks.

(R.p. 957:9-16).<sup>25</sup> At the time that the Accountants were issuing these checks, one of the partners in the accounting firm, Harold Pratt-Thomas, had invested in one of Dan's businesses which was being funded by the stolen trust funds. (R.p. 989:12-17). Thus, the Accountants had an interest in keeping Dan's business solvent by allowing the improper withdrawals.<sup>26</sup>

Furthering improper withdrawals constitutes "knowing participation." Cf. *Smith v. Smitty McGee's, Inc.*, 24 Del. J. Corp. L. 297, 306 (1998) (wife/manager who wrote checks associated

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<sup>24</sup>Pat Napolitano served as Mrs. Stevenson's personal bookkeeper (R.p. 909:16-17).

<sup>25</sup>Certainly, after learning in the October 23, 2001 meeting that the Brothers were in breach of fiduciary duty, the Accountants should not have written the checks. (R.p. 1331:10-16; S.R.p. 26:19-22).

<sup>26</sup>In addition, the Accountants helped legitimize the thefts by drafting promissory notes making it appear as if the money had properly been borrowed. (Rp.p. 1011:11-22; 1481).

with husband's breach of fiduciary duties was evidence of knowing participation); *Envtl. Equip. & Serv. Co. v. Wachovia Bank, N.A.*, 741 F. Supp. 2d 705, 727 (E.D. Pa. 2010)(aiding or abetting claim available if the bank knowingly or recklessly cashed unauthorized checks and turned a blind eye to irregular banking practices). There is no question that the Accountants knew Dan and Tom were not supposed to be withdrawing money (and were in breach of fiduciary duty) and that the Accountants aided the withdrawals by providing the checks any time Dan and Tom so requested.

Furthermore, contrary to the lower court's ruling, in addition to active participation, a person can also provide assistance (and therefore aid and abet) through inaction or nonfeasance. See, e.g., *Kerbs v. Fall River Indus., Inc.*, 502 F.2d 731, 740 (10th Cir. 1974) (stating that party who assists in fraudulent acts may be liable, though assistance was comprised of mere silence or inaction) (abrogated on other grounds); *Green v. Jonhop, Inc.*, 358 F. Supp. 413, 419 (D. Or. 1973) (holding defendants liable for acquiescence in misleading financial prediction by remaining silent in face of inaccuracy). In *Chapin v. University of Massachusetts*, 977 F.Supp. 72 (D.Mass.1997), the court held the plaintiff had an actionable claim against the police chief for aiding and abetting sexual harassment where chief failed to act. The court noted that in situations where the nonfeasance results from "deliberate indifference" and not mere inattention or negligence, such nonfeasance "is not 'mere inaction,' but a designed and willful act of forbearance in a situation where action is required." *Id.* at 79 (emphasis supplied).

The culpability of the Accountants is obvious and stems both from active participation and through their inaction when they had a duty to act. Respondent Kerrison became aware in 2001 that Tom and Dan had withdrawn money from the Trusts. (R.p 909:9-17). She knew there

was a question about the legality of these withdrawals. (R.pp. 923:23-924:7; 924:10-925:1). She attended a meeting with Dan, Tom and Carter on October 23, 2001, during which she was specifically advised by Carter of the impropriety of the withdrawals. Carter explained that "It was not something the trustees were supposed to be doing, at least without the consent of beneficiaries." (R.p. 1331:10-16). The Accountants not only failed to inform Kathleen and the other beneficiaries of the improper withdrawals, but also continued to issue the checks to Dan and Tom from the trust accounts.

Kerrison failed to discharge her professional obligations and continued to be an integral part of Tom's and Dan's misconduct throughout 2002, 2003, 2004 and 2005. (R.p. 966:9-16). As a result, Tom and Dan were free to continue raiding the trusts for years, causing millions of dollars in damages, for which the Accountants are liable. A reasonable jury could conclude that the actions of the Accountants in issuing checks, along with their silence while knowing that Tom and Dan were acting improperly, clearly constitute knowing participation in the breach of fiduciary duty.

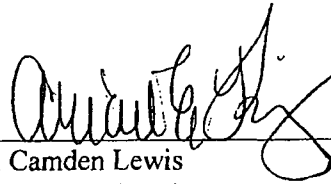
### CONCLUSION

The lower court, in finding that the statute of limitations had run, ignored the fact that the Accountants were not mentioned at any meetings between Kathleen and Tom in which admissions were allegedly made by Tom; construed ambiguities in favor of the Accountants instead of Appellants; and, allowed the Professionals' 2001 activities, which were hidden from Appellants, to start the statute of limitations against Appellants' claims.

Furthermore, without explanation, the lower court failed to recognize or explain why the power of attorney gave no rights to the holder (Kathleen).

Finally, although the Accountants had an interest in the entity receiving stolen money at the same time they were helping to facilitate the Brothers' stealing of the money, the lower court wrongly found that the Accountants had not knowingly participated in the breach of fiduciary duty.

For these reasons, and as set forth more fully above, the lower court's grant of summary judgment must be reversed.



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Columbia, South Carolina.  
April 22, 2014

STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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

RECEIVED

APR 24 2014

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,

SC Court of Appeals

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,

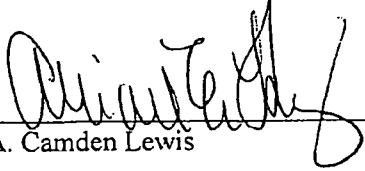
Of Whom

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant complies with Rule 211(b), SCACR.

  
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Columbia, SC  
April 22, 2014

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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

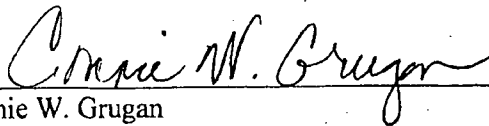
Respondents.

PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby  
certify that I have served the **Brief of Appellants and Reply Brief of Appellants** upon opposing  
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\_\_\_\_\_  
Connie W. Grugan

This 24<sup>th</sup> day of April, 2014.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

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

RECEIVED  
APR 28 2014  
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.; 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.

FINAL BRIEF OF THE RESPONDENTS DIXON HUGHES  
AND LYNNE L. KERRISON

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### **COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Did the trial court properly grant Defendants' motion for summary judgment because the uncontested evidence showed that this action was commenced more than three years after the Plaintiffs knew or by exercise of reasonable diligence should have known that they had a cause of action?
2. Did the trial court properly grant Defendants' motion for summary judgment because the uncontested evidence showed that Defendants owed the Plaintiffs no duty of care?
3. Did the trial court properly grant Defendants' motion for summary judgment on Plaintiffs' claim for aiding and abetting a breach of fiduciary duty because the uncontested evidence showed that Defendants did not "knowingly participate" in any breach of fiduciary duty by the trustees?
4. Should the trial court's judgment be affirmed because Plaintiffs' claims, if any, all derive from a fraud affecting Jacquelin Stevenson during her lifetime, and those claims abated on her death?
5. Should the trial court's judgment be affirmed because Plaintiffs suffered no legally cognizable damage?

## COUNTERSTATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

This lawsuit was filed on April 24, 2009, by:

- (1) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder in their individual capacity;
- (2) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder as trustees;
- (3) Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder as beneficiaries of the marital and QTIP trusts created by the will of their father, Thomas C. Stevenson, Jr.; and
- (4) Kathleen S. Turner and Jacquelin S. Bennett as personal representatives of the estate of their mother, Jacquelin K. Stevenson.

(R. p. 0031).

The Defendants were Heyward Carter, Jr., Evans Carter Kunes & Bennett, PA, Douglas Capital Management, Inc., Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., PA, and Lynne L. Kerrison.<sup>1</sup> (Id.) On December 14, 2011, Plaintiffs moved to amend their complaint to include a claim for aiding and abetting a breach of fiduciary duty. The court allowed the amendment by order dated May 17, 2012, and it was filed May 31, 2012. (R. p. 0088-0096). In this lawsuit, the Plaintiffs, residual beneficiaries of two trusts created by their father's will, seek to hold defendant-accountants liable for telling their mother, but not them, that their brothers, while trustees of the two trusts, engaged in self-dealing transactions. Plaintiffs seek damages in excess of six million dollars.

Following discovery, all Defendants moved for summary judgment. (R. p. 0108-0110). Claims against the attorney, Heyward Carter, Jr., were resolved. (R. p. 1855, lines 10-11). Following hearing on the motions, Plaintiffs moved to withdraw a response

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<sup>1</sup> The claims against Douglas Capital Management were later dismissed.

to a Request for Admission. (R. pp. 0453-60). An order was entered on July 3, 2013, granting Ms. Kerrison's and Dixon Hughes' motion for summary judgment. (R. pp. 0001-0022). A later motion to alter or amend the order was denied, as was the motion to withdraw the Request for Admission. (R. pp. 0027-0030). This appeal followed.

## **B. FACTUAL BACKGROUND**

### **1. The Trusts and Parties**

This case arises out of a family dispute, in which the children of Thomas C. Stevenson, Jr., and Jacquelin K. Stevenson have, "to the last syllable of recorded time," "followed the way to dusty death," through a series of lawsuits against each other and third parties.

Mr. Thomas Stevenson, Jr., Plaintiffs' father, died in June of 1988. Mr. Stevenson's will (Amended Complaint, R. pp. 0090-0091, ¶¶ 11-16; Answer to Amended Complaint, R. p. 0099, ¶¶ 11-16; Turner Deposition, Exhibit 5, Will, R. pp. 0843-0867) created two testamentary trusts: the "Jacquelin K. Stevenson Marital Trust" ("marital trust") and a "Qualified Terminable Interest Property Trust" ("QTIP trust") (together the "trusts"). Thomas Stevenson, Jr.'s widow, Jacquelin K. Stevenson, was the sole lifetime beneficiary of both trusts. (R. pp. 0852-0853). The residual beneficiaries of the QTIP trust were Mr. Stevenson's children: Thomas C. Stevenson, III, Daniel R. Stevenson, II, Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder. (Amended Complaint, R. p. 0091, ¶ 14; Answer to Amended Complaint, R. p. 0099, ¶ 14). The residual beneficiaries of the marital trust were the same people, but subject to a power of appointment held by Jacquelin K. Stevenson. Neither trust instrument provided any means by which trust assets could be distributed to any of the residual beneficiaries during Jacquelin K. Stevenson's lifetime. By 1999, the only remaining living co-trustees of both trusts were Plaintiffs' brothers, Thomas and Daniel

Stevenson (the “trustees”). (Amended Complaint, R. p. 0091, ¶ 15; Answer to Amended Complaint, R. p. 0099, ¶ 15.)

On January 4, 2001, Jacquelin Stevenson executed a non-durable power of attorney in favor of Kathleen Turner and Daniel Stevenson. (Turner Deposition, Exh. 3, Power of Attorney dated 1/4/01, R. pp. 0835-0842). She signed a second, durable power of attorney on February 18, 2003, in favor of Kathleen Turner and Daniel Stevenson. (Turner Deposition Exh. 6, Power of Attorney dated 2/18/03, R. pp. 0868-0875). On September 17, 2007, Jacquelin Stevenson died. (Turner Deposition, Exh. 22, R. p. 0876). Within four months of Ms. Stevenson’s death, the Plaintiffs, Jacquelin S. Bennett, Genevieve S. Felder and Kathleen S. Turner, brought suit against their brothers, Thomas C. Stevenson, III, and Daniel R. Stevenson, II, (February 13, 2013, Dep. of Thomas C. Stevenson, R. p. 1687, lines 19-24) beginning the legal tale that continues “in this pretty pace” to the present day.<sup>2</sup>

Defendant Lynne Kerrison worked with Pratt-Thomas Gumb & Co., PA, (“Pratt-Thomas Gumb”) a public accounting firm, in 1997. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0978, lines 4-10). In 1997, she began preparing tax returns for Mrs. Jacquelin Stevenson and for the trustees of the two trusts. (July 13, 2011, Dep. of Lynne Kerrison, R. p. 0956, lines 22-25 – p. 0957, lines 1-5). Preparing tax returns was her only engagement for the trustees. An employee of the Stevenson family, Pat Neapolitan, kept the trusts’ records and wrote and signed all of the checks for the trusts. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0997, lines 19-24). Ms. Neapolitan provided Ms. Kerrison with the information needed to complete the tax returns. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0912, lines 7-10). As long ago as 2001, Ms. Kerrison was concerned

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<sup>2</sup> The lawsuit against the trustees resulted in a settlement with Thomas C. Stevenson, III, and a judgment against Daniel R. Stevenson, II. Plaintiffs recovered substantial money and property, and caused the trustees to forfeit any interest in either trust or their mother’s estate. (Responses 45-52 to Requests for Admission to Turner, (R. pp. 0180-0181, 0180A-0180B) to Felder (R. pp. 0266-0267) and to Bennett (R. pp. 0225-0226), and Exhibits A-E thereto). Defendants contend, and Plaintiffs dispute that Plaintiffs were more than fully compensated for any losses through the recoveries from their brothers.

about how checks written to Daniel Stevenson from the trusts should be characterized, and she contacted Ms. Neapolitan to discuss the checks. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0912, lines 3-23 – p. 0998, lines 1-3 – p. 1003, lines 6-25 – p. 1004, lines 1-15). Ms. Neapolitan expressed no concerns about the checks and even characterized them as “gifts.” (July 13, 2011 Dep. of Lynne Kerrison, R. p. 1000, lines 4-8 – p. 1004, lines 7-15).

**2. Ms. Kerrison Advises the Beneficiaries of the Trustees’ Actions in 2001**

Notwithstanding Ms. Neapolitan’s assurances, Ms. Kerrison contacted Ms. Stevenson’s attorney, Heyward Carter, to tell him about the transactions. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 0922, lines 5-17 – R. p. 0926, lines 22-25 – R. p. 0927, lines 1-2, 21-23 – R. p. 0949, lines 21-24; July 14, 2011 Dep. of Heyward Carter, R. p. 1523, lines 6-17). Soon thereafter, on October 23, 2001, Lynne Kerrison met with Thomas C. Stevenson, III, and Daniel R. Stevenson, II, the trustees, and with Jacquelin Stevenson’s attorney, Heyward Carter, to discuss the questioned transactions. (July 13, 2011 Dep. of Lynne Kerrison, R. p. 1027, lines 24-25 – R. p. 1028, lines 1-3; Dep. of Heyward Carter, R. p. 1531, lines 23-25). This was the first, but not the last, time that Ms. Kerrison made representatives of the trustees and beneficiaries (Mr. Carter and Ms. Neapolitan) aware of the trustees’ withdrawals from the trusts. In 2001, the Plaintiffs in this action were only residuary beneficiaries of the QTIP trust and contingent residuary beneficiaries of the marital trust. (Amended Complaint, R. p. 0090-0091, ¶¶ 11-16; Answer to Amended Complaint, R. p. 0099, ¶¶ 11-16; Turner Deposition Exhibit 5, Will, R. pp. 0843-0867). Ms. Kerrison never had any dealings at all with Kathleen Turner (or any other Plaintiff) about Jacquelin Stevenson’s financial matters. (Kathleen Turner’s Responses to Lynne Kerrison’s First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158, R. pp. 0181-0183, 0185-0186, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208).

**3. The Trustees Advise Plaintiff Turner of Their Actions in 2003**

A year and a half later, on May 21, 2003, the trustees themselves met with Kathleen Turner at their mother's Meeting Street home. (November 9, 2011 Dep. of Kathleen Turner, R. p. 0550, lines 2-7). Kathleen Turner admitted that during this meeting she "thought something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, R. pp. 0550-0560, p. 0570, lines 17-25, p. 0571, lines 1-4). Thomas C. Stevenson, III's uncontested testimony was that he provided Ms. Turner with a written accounting of all trust assets, including the loans that had been made to him, to Daniel R. Stevenson, II, to their businesses, and that all was clearly described. (February 13, 2013 Dep. of Thomas C. Stevenson, III, R. pp. 1648-1658). Ms. Turner admits that the meeting occurred and that Thomas C. Stevenson, III, "mumbled" and "looked at a piece of paper," but denied that she received a written accounting. (November 9, 2011 Dep. of Kathleen Turner, R. pp. 0550-0560, 0570).

**4. The Trustees' Actions Continue and in 2006 They Twice Meet with Turner, Who Does Nothing Until After Jacquelin Stevenson Dies**

The trustees' withdrawals continued from the trusts. Neither their mother, Jacquelin Stevenson, nor Kathleen Turner intervened. In early 2006, Ms. Kerrison again spoke with Jacquelin Stevenson's attorney, Heyward Carter, about the ongoing withdrawals. (July 13, 2011 Dep. of Lynn Kerrison, R. p. 0966, lines 13-25 – p. 0967, lines 1-5). On April 19, 2006, Kathleen Turner again met with Thomas C. Stevenson, III. (Plaintiff Kathleen S. Turner's Responses to Lynne Kerrison's First Request for Admissions, 170, R. p. 0211). Again, Thomas C. Stevenson, III, told Kathleen Turner that he and Daniel R. Stevenson, II, had taken money from the trusts. (Plaintiff Kathleen S. Turner's Responses to Lynne Kerrison's First Request for Admissions, 171, R. p. 0211). On April 27, 2006, there was yet another meeting, where Kathleen Turner received additional information about her brothers' actions while trustees. (November 9, 2011 Dep. of Kathleen Turner, R. p. 0600, lines 20-25 – p. 0601, lines 1-9; July 14, 2011

Dep. of Heyward Carter, R. p. 1562, lines 23-25 – p. 1563, lines 1-9). Despite the beneficiaries' knowledge of the trustees' actions in 2001, 2003, and on April 19 and 27, 2006, Plaintiffs did nothing. Even after the April 2006 meetings, the trustees continued to loan money to themselves. Jacquelin Stevenson died in September 2007. Plaintiffs brought suit against the brothers on January 22, 2008.<sup>3</sup>

In their Complaint and Amended Complaint, Plaintiffs contend that Lynne Kerrison and Pratt-Thomas Gumb, while providing accounting services to Mrs. Stevenson and the two subject trusts, breached a duty by failing to sooner inform the Plaintiffs (in addition to their mother) of the "improper self dealing withdrawals" made by trustees Thomas C. Stevenson, III, and Daniel R. Stevenson, II (Amended Complaint, R. p. 0092, ¶24).

## ARGUMENTS

### A. STANDARD OF REVIEW

Plaintiffs' appeal is from the circuit court's grant of summary judgment. In reviewing the circuit court's decision, this Court will apply the same standard as that applied by the circuit court under Rule 56(c), SCRPC. *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009); *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009). Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issue of fact exists, the evidence and all reasonable inferences must

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<sup>3</sup> Contrary to the suggestion in the Plaintiffs' Initial Brief (p.3, n.2), Mrs. Stevenson did not die in 2006, but on September 17, 2007. (Turner Dep. Exhibit 22, R. p. 0876). Nor did plaintiffs' knowledge of Heyward Carter's and Lynne Kerrison's involvement with the trusts have to await discovery in their lawsuit against the brothers – Ms. Turner was present at meetings with Mr. Carter and Ms. Kerrison in 2006.

be viewed in the light most favorable to the nonmoving party. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

Plaintiffs also appeal from the circuit court's denial of their motion to withdraw or amend a response to a request for admission, relied upon by the circuit court as an alternative ground for its ruling on the statute of limitations. Because a motion to alter, amend or withdraw a response to a request for admission is committed to the circuit court's discretion, *See* Rule 36(b), SCRCP; *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590, 315 S.C. 17 (1993), review is limited to whether the circuit court abused its discretion.

**B. THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE CLAIM WAS BROUGHT MORE THAN THREE YEARS AFTER THE PLAINTIFFS "KNEW OR BY EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN" THAT THEY HAD A CAUSE OF ACTION**

The applicable statute of limitations for all of Plaintiffs' causes of action is three years. *See* S.C. Code Ann. 15-5-530(5). The "discovery rule" applies to actions brought under section 15-5-530(5). *See* S.C. Code Ann. 15-3-535. The statute provides:

Except as to actions initiated under section 15-3-545, all actions initiated under section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.

The South Carolina Supreme Court has interpreted the phrase "'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Graham v. Welch, Roberts and Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013) (emphasis in original), quoting *Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The Court of Appeals has made it clear that not

only is the standard an objective one, but that specific knowledge of a specific claim against a particular defendant is not the standard.

Whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

*Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001).

That knowledge of a specific claim against a specific person is not required was emphasized by this Court in *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 633, 682 S.E.2d 1, 4-5 (Ct. App. 2009): “[T]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to ‘act with some promptness.’” quoting *Mahar v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). A plaintiff will be found to be on inquiry or constructive notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed. *Kelly*, 383 S.C. at 634, 682 S.E.2d at 5, quoting *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799-800 (Ct. App. 1997). Applying these rules, this Court held in *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011) that a party’s knowledge of an attorney’s error in giving notice of a third-party settlement related to a workers compensation claim triggered the statute of limitations with respect to the claim against the attorney, notwithstanding the client and attorney’s continued litigation before the workers compensation commission, and despite the absence of an adverse decision on the claim from the commission until several years later. Likewise, in *Graham v. Welch, Roberts and Amburn. LLP*, this Court rejected a tax preparer’s client’s effort to create a triable issue of fact concerning discovery of his cause of action, finding that while the taxpayer may have initially had a reasonable belief that his tax preparer had applied funds toward his tax liabilities, the receipt of an invoice from the tax preparer showing the application

of the funds towards fees put the taxpayer on inquiry notice, at the least, that the funds had not been applied as he believed.

In this case, the court reviewed the evidence and found that there were not one, but at least three, occasions on which the statute of limitations began to run:

1. When Ms. Kerrison told the trust beneficiary's attorney, Heyward Carter, of the trustees' withdrawals from the trusts on October 23, 2001;
2. When the trustees, Thomas C. Stevenson, III, and Daniel R. Stevenson, II, met on May 21, 2003, with Plaintiff Kathleen Turner, who at that time was attorney-in-fact for the trust beneficiary, Jacquelin Stevenson, and who by her own admission knew "something must be very wrong."
3. On April 19, 2006, when trustee Thomas C. Stevenson, III, informed Kathleen Turner that he and his brother, Daniel R. Stevenson, II, had taken money from the trusts.

(Order Granting Defendants Dixon Hughes PLLC and Lynne Kerrison's Motion for Summary Judgment, R. pp. 0005-0010).

**1. The Statute of Limitations Began to Run on October 23, 2001, When Lynne Kerrison Told Heyward Carter That the Trustees Had Taken Money From the Trusts.**

In the fall of 2001, Heyward Carter was the attorney for Jacquelin Stevenson, (July 14, 2011, Deposition of T. Heyward Carter, Jr., R. p. 1493, lines 2-4) who was, at that time, the only current beneficiary of the two trusts (she also held power of appointment over the disposition of the QTIP trust). (Carter Dep., R. p. 1510, lines 19-21; Amended Complaint, R. p. 0090, ¶ 12; Answer to Amended Complaint, R. p. 0099, ¶ 12). "In general, notice to an attorney is notice to his client." *Wardlaw v. Troy Oil Mill*, 74 S.C. 368, 54 S.E. 658 (1906). Furthermore, the "acts and omissions of an attorney are

directly attributable to the client.” *Clark v. Clark*, 271 S.C. 21, 23, 244 S.E.2d 743, 744 (1978), citing *Simon v. Flowers*, 231 S.C. 545, 99 S.E.2d 391 (1957). “Just as a party cannot obtain relief from the consequences of his own neglect, he is without relief when the neglect is that of his attorney.” *See also, Dorman v. Campbell*, 331 S.C.179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (the question of whether a plaintiff received actual notice of facts giving rise to a cause of action was “irrelevant” where the plaintiff’s attorney had knowledge of those facts); *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 308, 257 S.E.2d 496, 497 (1979).

The undisputed facts show that in the fall of 2001, Ms. Kerrison made Heyward Carter, attorney for Jacquelin Stevenson, aware of the loans or disbursements that Thomas Stevenson and Daniel Stevenson were making to themselves. At the latest, Mr. Carter was aware of the loans to Thomas and Daniel Stevenson by October 23, 2001, when he met with the trustees. (July 14, 2011, Dep. of Heyward Carter, R. p. 1509, pp. 1519-1523, p. 1531, lines 23-25). Heyward Carter, as the attorney for Jacquelin Stevenson, had actual knowledge of Thomas and Daniel Stevenson’s actions, and that knowledge is imputed to Jacquelin Stevenson, the sole lifetime beneficiary of the two subject trusts from their creation until her death in 2007 (and the person from whom Plaintiffs’ rights, if any, derive). Based on principles of agency and the well-established principle that notice to an attorney constitutes notice to his client, the statute of limitations then ran no later than October 23, 2004, three years after the date Lynne Kerrison made Heyward Carter aware of Thomas and Daniel Stevenson’s actions.

The Plaintiffs do not deny that notice was given to Heyward Carter, Ms. Stevenson’s attorney, and that the notice, if imputed from the attorney to the client, would be sufficient to bar the statute of limitations. Rather, Plaintiffs argue that the information transmitted was insufficient to place the Plaintiffs personally on notice of a problem with the trusts, and further argue that the adverse interest exception should

apply, so as not to impute the knowledge of the attorney, Heyward Carter, to Jacquelin Stevenson. Neither argument avails the Plaintiffs.

Citing *Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (as do Defendants), the Plaintiffs argue that something more than the notice to the Plaintiffs' attorney was required to find that the Plaintiffs were on "inquiry notice" of a problem with the trusts. The notice to the attorney in *Dorman* was that the house was "below flood level." This, along with other evidence, was cited by this Court as sufficient to place the plaintiffs on notice of an issue with the elevation of the property. However, Ms. Kerrison's notice to Heyward Carter was far more than a cursory communication that there was "a problem" with the trusts. The uncontested evidence shows that Ms. Kerrison told Mr. Carter of the trustees' specific withdrawals by October 23, 2001. Plaintiffs conceded as much to the trial court. (Plaintiffs' Brief in Opposition to Motion for Summary Judgment, R. p. 0334; April 28, 2013; Dep. of Carter, R. p. 1508, lines 22-25 – p. 1509, lines 1-4 – p. 1523, lines 6-17 – p. 1531, lines 23-25). Mr. Carter knew and recognized that the trustees' actions constituted (at the least) improper self-dealing. (Deposition of Carter, R. p. 1511, lines 19-25 – p. 1512, lines 1-2 – pp. 1519-1521). This knowledge, and Ms. Kerrison's role as the source of this information, is imputed to Jacquelin Stevenson.

Ms. Kerrison's actions on October 23, 2001, were sufficient to trigger the running of the statute of limitations. Because "the date on which discovery should have been made is an objective, not subjective question," *Kreutner v. David*, 320 S.C. 283, 285-86, 465 S.E.2d 88, 90 (1995); this Court should affirm the trial court's determination that Ms. Kerrison's notice to Heyward Carter on October 23, 2001, of the trustees' actions was sufficient to trigger the running of the statute of limitations.

Plaintiffs also argue that under the "adverse interest exception" Mr. Carter's knowledge should not be imputed to Jacquelin Stevenson pursuant to the rule that a principal is charged with knowledge received by their agent, as described in *Crystal Ice*

*Co. of Columbia Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979). Plaintiffs argue that Mr. Carter's actions show that he was acting against the interests of his principal, Jacquelin Stevenson, either fraudulently or to protect his personal interest. No evidence supports Plaintiffs' argument. Plaintiffs offered no evidence that Mr. Carter was at any time acting fraudulently or that he sought to further his personal interests, as opposed to those of his client. Indeed, Plaintiffs' Amended Complaint alleges only that Carter was negligent, that he breached fiduciary duties by failing to inform the Plaintiffs of improper self-dealing withdrawals, and that he "aided and abetted" the breach of fiduciary duty committed by the trustees. (Amended Complaint, R. pp. 0092-0094). Plaintiffs' argument fails for lack of any record evidence to create a genuine issue of material fact.

In any case, even if the Plaintiffs raised an issue of Carter's adverse interest, it would not avail them with respect to their claims against Ms. Kerrison. In the *Crystal Ice* case, the South Carolina Supreme Court rejected application of the "adverse interest exception" because even if the attorney had an adverse interest, such an agent's fraud "cannot alter the effect of his knowledge to his principal with respect to third persons who had no connection with the fraud." *Crystal Ice*, 273 S.C. at 309-10, 257 S.E.2d at 498. Ms. Kerrison is such a third person. Plaintiffs' argument fails for lack of both factual support and legal sufficiency. Because Plaintiffs filed their complaint on April 24, 2009, their action is time-barred.

**2. Plaintiffs Were On Notice of Their Claims No Later than May 21, 2003.**

Even if the October 23, 2001, meeting were insufficient to start the running of the statute of limitations, the undisputed facts show that Kathleen Turner, who was at that time attorney-in-fact for Jacquelin K. Stevenson, knew of sufficient facts to place an objectively reasonable person on notice of the claims in this action no later than May 21, 2003, and thus, the statute of limitations ran on May 21, 2006.

As Jacquelin Stevenson's attorney-in-fact, Kathleen Turner was her agent and fiduciary. Her knowledge is charged to Jacquelin Stevenson, as well as to herself. *In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 856 (Ct. App. 2001); *Crystal Ice*, 273 S.C. at 309, 257 S.E.2d at 497 ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority"). Kathleen Turner admitted that she met with her brother Thomas Stevenson on May 21, 2003. (November 9, 2011, Dep. of Kathleen Turner, R. p. 0550, lines 2-17). While Ms. Turner claims that Thomas C. Stevenson, III, "mumbled" and "looked at a piece of paper" while Daniel R. Stevenson, II, "hovered," (November 9, 2011, Dep. of Kathleen Turner, R. pp. 0550-0560), she also admitted that she knew "something must be very wrong." (November 9, 2011 Dep. of Kathleen Turner, R. p. 0570, line 22). At this meeting she received a paper that disclosed the loans that had been made. (February 13, 2013, Dep. of Thomas Stevenson, R. pp. 1653-1658). Despite her effort to indicate some degree of confusion or ignorance concerning her brother's words at this meeting or of what he gave her, Ms. Turner clearly admitted in her deposition "I thought something must be very wrong." (Turner Dep., R. p. 0570, line 22). In spite of this knowledge, she chose not to ask her brother any further questions, to clarify in any way what he was telling her, nor did she make any additional inquiry. (Turner Dep., R. pp. 0550-0570).

Plaintiffs argue that Ms. Turner must have been "worried about her brother's personal well being." (Plaintiffs' Initial Brief, p. 21). The argument lacks any factual basis. No evidence in the record supports the argument that Ms. Turner was concerned for her brother's personal well-being, or any other part of his personal life. Plaintiffs also argue that the disclosure "did not include the professional negligence of accountants so as to trigger the statute of limitations against them," but it is not notice of the specific claim against the specific individual that is required, rather, "[T]he statute of limitations begins to run when the facts and circumstances of an injury would put a person of common

knowledge and experience on *notice that some claim against another party might exist.*" *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (emphasis in original), citing *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987). In *Burgess*, this Court held that a plaintiff's legal malpractice and fraud claims were barred because she knew of an alleged affair between her attorney and an officer of her employer, and had she made inquiry, she would have discovered that communications had occurred between her attorney and her employer. See also *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009) (various communications during the pendency of a medical malpractice action put plaintiff on notice that she was not represented in underlying medical malpractice lawsuit). Ms. Turner's claimed subjective ignorance of facts and circumstances is unavailing; the law provides that if the facts and circumstances could have been known to her through the exercise of ordinary care and reasonable diligence, she is charged with the knowledge she would have had. Thus, even if the statute of limitations did not run on October 23, 2001, it ran no later than May 21, 2006, three years after her meeting with her brothers.<sup>4</sup>

**3. Even if it Did Not Begin Running in 2001 or 2003, the Statute of Limitations Began Running on April 19, 2006.**

Kathleen Turner met again with Thomas C. Stevenson, III, on April 19, 2006. During that meeting, he told her that he and Daniel R. Stevenson, II, had taken money from the trusts. (Plaintiff Kathleen Turner's Responses to Defendant Lynne Kerrison's First Request for Admissions, 170-171, R. p. 0211). Ms. Turner remained her mother's

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<sup>4</sup> Had Ms. Turner exercised reasonable diligence once she knew "something must be very wrong," she could have requested, and would have been entitled to receive, information concerning the trust transactions under S.C. Code Ann. 62-7-813, as it then existed. The statute, effective 2005 through all relevant times, provided that on demand, a trustee was obligated to respond to a beneficiary's reasonable requests for information (S.C. Code Ann. 62-7-813(a)) and to furnish reports to beneficiaries of annual receipts and disbursements and other information (S.C. Code Ann. 62-7-813(c)). Before 2005, S.C. Code 62-7-303(b)(c) (as it then existed) had similar provisions requiring information generally and at least annual statements of accounts.

attorney-in-fact at that time, and her mother was still alive. Her knowledge is therefore charged to her mother, the trust beneficiary, and through her, the Plaintiffs. If this was her first notice, then on this date she would have realized that she had not been told previously of these withdrawals by Lynne Kerrison (indeed Ms. Turner has argued throughout this litigation that the statute of limitations should not be found to run against her because she was not specifically told that she had a cause of action against the accountants). Plaintiffs are bound by their admissions. *See* Rule 36, SCRPC; *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 647, 579 S.E.2d 151, 155 (Ct. App. 2003). This lawsuit was not filed until April 24, 2009, more than three years after this meeting.

**4. The Trial Court Properly Denied Plaintiffs' Motion to Alter, Amend or Withdraw their Response to a Request for Admission.**

Plaintiffs assert that the trial court erred in denying their request to withdraw a response to a request for admission. (Plaintiffs' Initial Brief, pp. 14-20). As a preliminary matter, the trial court's ruling is not essential to the judgment, because the request for admission supported only the alternative accrual of the statute of limitations on April 19, 2006. The trial court found that the statute of limitations began to run October 23, 2001, and also, in May 2003 (Order on Summary Judgment, R. pp. 0005-0009), and the Plaintiffs' claims would be barred in any event, even had they not made the questioned admission. In any event, the request was untimely and the court properly exercised its discretion in denying the request, both on procedural and substantive grounds.

During the lawsuit, these Defendants served Requests for Admissions on Plaintiffs. Plaintiff Turner responded on June 9, 2011. (Turner Responses to Defendants First Requests for Admission, R. pp. 0171-0213). The requests included two (Nos. 168-169) directed to the May 2003 meeting between Plaintiff Kathleen Turner and Thomas C.

Stevenson, III., asking that Kathleen Turner admit that she met with Thomas C. Stevenson, III, in May 2003, and that she was then told that he and Daniel R. Stevenson, II, had taken money from the trusts. (R. p. 0211). Kathleen Turner denied both. (Id.). The two requests were followed by two more (Nos. 170-171) concerning the April 19, 2006 meeting. (Id.). The requests and responses were:

170. You met with Thomas Stevenson on April 19, 2006.

RESPONSE: Admitted

171. Thomas Stevenson informed you that he and Daniel Stevenson removed money from the trust on April 19, 2006.

RESPONSE: Admitted

(Id.)

These Defendants filed their motion for summary judgment on July 13, 2012. (R. p. 0108). The court heard argument on April 29, 2013, and notified the parties that it intended to grant the motion on June 10, 2013. (Amended Order on Plaintiffs' Motion to Alter or Amend Pursuant to Rule 59(e), SCR, R. p. 0027). On June 13, 2013, at the court's direction, Defendants submitted a proposed order and judgment. (Id.). Plaintiffs filed a motion to alter or amend the response to Request for Admission 171 on June 19, 2013. (R. pp. 0453-0460). The court denied that request by its order of August 20, 2013. (Amended Order on Plaintiffs' Motion to Alter or Amend Pursuant to Rule 59(e), SCR, R. pp. 0029-30).

Citing *Ropfogel v. United States*, 138 F.R.D. 579 (D. Kan. 1991), Plaintiffs argue that because the request was ambiguous, was contrary to other evidence (a deposition later given by Kathleen Turner) (Kathleen S. Turner Dep. of November, 2011, R. pp. 0585-0586), and because, said Plaintiffs, the admission frustrated a presentation of the case on the merits, the court erred in refusing to allow Plaintiffs to withdraw the admission. While the *Ropfogel* decision is not controlling on this Court, an examination

of the opinion shows several reasons why this Court should hold that the trial court did not abuse its discretion in denying Plaintiffs' motion.

First, the *Ropfogel* court correctly notes that the decision is committed to the court's discretion, reviewable only for an abuse of discretion. Second, the court noted that it was the party seeking to withdraw the admission that bore the burden of showing that the merits of the action would be served by so allowing. Finally, the court noted that a court should be "cautious in exercising its discretion to permit withdrawal of a request for admission." *Ropfogel*, 138 F.R.D. at 583.

In this case, Plaintiffs' argument for the ambiguity of the request or for inadvertence in the response is belied by the fact that Turner denied the immediately preceding two admissions, which were quite similar, but which addressed the May 2003 conversations. Plaintiffs have not shown how the presentation of statute of limitations issues "on the merits" will be served, particularly when, as in this matter, there are many other reasons to dismiss Plaintiffs' action on summary judgment (including reasons related to the statute of limitations).

The standard to be applied by the trial court was that announced by this court in *Barber v. Hobbs*, 313 S.C. 319, 321, 437 S.E.2d 409, 410 (Ct. App. 1993), and reaffirmed in *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001): (1) Whether a presentation on the merits would be furthered by allowing amendment or withdrawal, and (2) whether the party who obtained the admission could show prejudice. In this case, Plaintiffs showed neither; the presentation of the merits as to the particular defense would not be served, and defendants would be prejudiced by allowing withdrawal after a motion had been submitted, argued, and the court had announced a decision. *See Ropfogel v. United States*, 138 F.R.D. 579, 583 (D. Kan. 1991) (burden to justify withdrawal particularly high after pretrial order entered); *see also Foggie v. CSX Transp. Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590, 315 S.C. 17 (1993) (affirming the trial court's refusal to permit

withdrawal of an admission two days before trial and rejecting argument that the opposing party would not have been prejudiced, given the lateness of the request).

Plaintiffs' arguments concerning the presentation of the merits and the absence of prejudice were presented to the circuit court for the first time after it announced judgment, and the decision made was within the circuit court's discretion. The decision was consistent with the precedents of the South Carolina Supreme Court and the Court of Appeals, and Plaintiffs have shown no abuse of discretion. In any event, a decision on this issue in Plaintiffs' favor would not change the outcome of this case, given the court's other rulings. This court should affirm the trial court's decision concerning the motion to withdraw the admission.

**C. THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE DEFENDANTS OWED NO DUTY OF CARE TO THE PLAINTIFFS AND BECAUSE ANY DUTY WAS SATISFIED**

The Circuit Court found that neither Lynne Kerrison nor Pratt-Thomas Gumb (nor its alleged successor, Dixon Hughes) owed any duty to the Plaintiffs to disclose any actual or suspected malfeasance of the trustees. The Plaintiffs challenge that determination, arguing that the status of one Plaintiff, Kathleen Turner, as Mrs. Stevenson's attorney-in-fact, required Ms. Kerrison and Pratt-Thomas Gumb to provide her with information concerning the trustees' actions. Plaintiffs have no other argument for the existence of a duty. Plaintiffs' argument either stands on its head the law concerning the relationship between principal and agent or establishes that Ms. Kerrison and Pratt-Thomas Gumb (or its alleged successor, Dixon Hughes) satisfied any duty to disclose to the principal, Jacquelin Stevenson, the trustees' actions through the October 23, 2001, notice to Heyward Carter. The evidence is uncontested that Mr. Carter was acting as an attorney for Jacquelin Stevenson, the principal for whom Kathleen Turner was attorney-in-fact. If any duty were owed to Jacquelin Stevenson as the trust beneficiary, it was satisfied on October 23, 2001.

**1. The Plaintiffs Were Not Clients of Lynne Kerrison or Pratt-Thomas Gumb.**

Plaintiffs do not argue that they were clients. Instead, they argue that one Plaintiff, Kathleen Turner, was owed a duty by virtue of her status as attorney-in-fact for her mother, Jacquelin Stevenson. Even if accepted, their argument would avail only Ms. Turner. Not only were Plaintiffs not clients, they had no relationship of any type or kind with Ms. Kerrison or Pratt-Thomas Gumb. Plaintiffs admit that they did not meet with Ms. Kerrison, that they did not discuss the trust finances with Ms. Kerrison, and that they requested no trust information between 1999 and 2005. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158, R. pp. 0181-0183, 0185-0186, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208; Plaintiff Genevieve S. Felder's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158, R. pp. 0267-0269, 0271-0272, 0274-0276, 0278-0280, 0282-0284, 0286-0288, 0290-0292; Plaintiff Jacquelin S. Bennett's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158, R. pp. 0226-0228, 0230-0231, 0233-0235, 0237-0239, 0241-0243, 0245-0247, 0249-0251). There was simply no relationship at all between Plaintiffs and Ms. Kerrison. They were, in both the legal and the ordinary sense of the word, strangers.

**2. Only Ms. Stevenson and the Trustees Were Clients of Ms. Kerrison.**

Plaintiffs contend (and Defendants admit) that Ms. Kerrison had only three engagements related to this claim – (1) an engagement to provide services to the trustees of the marital trust; (2) an engagement to provide services to the trustees of the QTIP trust; and (3) an engagement to provide services to Mrs. Jacquelin K. Stevenson. The circuit court's opinion correctly noted that the only clients to whom Lynne Kerrison and Pratt-Thomas Gumb provided accounting services **related to the trusts** were Thomas

and Daniel Stevenson, the co-trustees of the trusts. Jacquelin K. Stevenson, although a beneficiary, was not the person for whom Ms. Kerrison and Pratt-Thomas Gumb prepared the subject tax returns for the trusts. She was a client, but not with respect to the work for the trustees.

**3. Accountants Do Not Owe Duties of Care to Non-Clients.**

“An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.” *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007), citing, *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). “Without a duty there is no actionable negligence.” *Id.* South Carolina does recognize that “a public accountant who fails to perform in accordance with the accepted professional standards may be liable in tort to his *client* for his negligence.” *Folkens v. Hunt*, 290 S.C. 194, 200, 348 S.E.2d 839, 842-43 (Ct. App. 1986) (emphasis added). No South Carolina court has held that accountants for trusts owe professional duties to non-client prospective, contingent trust beneficiaries. *Cf. Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009) (attorney had no duty to non-client prospective beneficiaries of a will that was not properly executed). “Ordinarily, the common law imposes no duty on a person to act.” *Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 504, 737 S.E.2d 512, 514 (Ct. App. 2012), citing *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003). “In other words, a person has no duty to protect another from harm inflicted by a third person.” *Rayfield v. S.C. Dep’t of Corr.*, 297 S.C. 95, 100-01, 374 S.E.2d 910, 913 (Ct. App. 1988).

Because no accountant-client (or any other) relationship existed between Ms. Kerrison, on the one part, and Plaintiffs as beneficiaries of the trusts, on the other part, Plaintiffs’ claims must fail. South Carolina law places no duty on accountants to disclose information about their clients to non-clients. *ML-Lee Acquisition Fund, L.P. v. Deloitte*

& Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Even though the *ML-Lee* court adopted section 552 of the *Restatement of Torts*, which imposes a limited duty of care by accountants to non-clients to whom the accountants make affirmative negligent misrepresentations, *Id.*, the court held that section 552 of the *Restatement of Torts* "imposes no duty to disclose information." *ML-Lee*, 327 S.C. at 241, 489 S.E.2d at 471, n.3 (emphasis in original).

In *Johnson v. Robert E. Lee Acad. Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012), this Court declined to extend the liability of accountants to third parties in cases not involving negligent misrepresentation. In *Johnson*, the Court noted an "affirmative legal duty exists only if created by statute, contract, relationship, status, property interest or some other special circumstance" and "the common law imposes no duty on a person to act." *Johnson*, 401 S.C. at 513-14, 737 S.E.2d at 504. To similar effect are the decisions of courts in other states. See *Blair v. Ing*, 21 P.3d 452, 473-74 (Hawaii 2001) (an accountant engaged to prepare tax returns owed no duty to trust beneficiaries); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999) (holding that absent evidence of aiding and abetting a breach of trust, an accountant does not owe a duty of care to the beneficiary of the trust); *Gillespie v. Seymour*, 796 P.2d 1060 (Kan. Ct. App. 1990), *rev. on other grounds*, *Gillespie v. Seymour*, 823 P.2d 782 (Kan. 1991) (beneficiaries failed to state a negligence claim against accountants because accountants owed no duty to non-client beneficiaries and had no reason to believe that any services they performed would be relied on by non-client beneficiaries, further finding that no fiduciary relationship existed between accountants and beneficiaries of a trust); *Morin v. Trupin*, 711 F. Supp. 97 (S.D.N.Y. 1989) (accountants are not required "to blow the whistle on their clients"). These courts determined that allowing a beneficiary to sue a trustee or personal representative's attorney or accountant could

subject those professionals to impermissible conflicts of interest, as the professional would hold duties to parties with potentially divergent interests.<sup>5</sup>

Recognizing the conflict of interest that such a duty would create, the South Carolina Supreme Court, in *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009) determined "not to impose a duty on an attorney in favor of a prospective beneficiary." *Rydde*, 381 S.C. at 645, 675 S.E.2d at 432-33. In *Rydde*, the prospective beneficiaries of an unprepared will filed a malpractice suit against the decedent's attorney for failing to draft and cause execution of a will. The beneficiaries "filed this legal malpractice action under various theories, all of which were premised on the position of a duty of Morris [the attorney] in favor of the non-client prospective beneficiary." *Rydde*, 381 S.C. at 645, 675 S.E.2d at 432-33. The Supreme Court upheld the trial court's dismissal under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, finding that the prospective beneficiary's complaint failed to state facts sufficient to constitute a cause of action. *Id.* The Supreme Court held that a plaintiff in a legal malpractice action must show an attorney-client relationship because to hold otherwise would create an impermissible conflict of interest between the duties to the client and to the non-client beneficiaries.

The policy concerns expressed in *Rydde* regarding conflicts of interests are applicable to accountants as well as attorneys. An accountant for a trust holds a duty to the trustee to perform services in accord with the trustee's authority as the holder

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<sup>5</sup> The nature of this conflict lies in the legal obligations and interests of a trustee, as opposed to those of a beneficiary. A trustee is in a fiduciary relationship and is obligated to act in the best interest of the beneficiaries *as a whole*, while a beneficiary's only obligation is to his *own interest*.

of legal title to the property contained in the trust.<sup>6</sup> The adoption of a joint duty to both the trustees and beneficiaries would create the danger of a conflict of interest. In a case where a trustee is in conflict with a beneficiary, or where one or more of the beneficiaries are in conflict with each other, imposing a duty to act in favor of both the trustee(s) and each beneficiary individually would place the accountant in an untenable ethical position. It is this sort of conflict that the *Rydde* court sought to avoid and that this court should decline to create.

Implicit in Plaintiffs' theory of recovery is that this Court impose a duty on accountants to: (1) review all confidential information received in the preparation of tax returns for indications that the client is harming some third-party; (2) identify any and all third parties whom the confidential information may indicate are being harmed; and (3) disclose the confidential information received from the client to the third parties or else face potential civil liability. No statute or common law in South Carolina supports this proposition. Such a duty would be unwise and would place accountants in an untenable position. See also *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

Plaintiffs' efforts to create a novel duty through the affidavit of their expert, George DuRant, are unavailing. "Whether the law recognizes a particular duty is an issue of law to be determined by the Court," *Ellis by Ellis v. Niles*, 324 S.C. 223, 227,

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<sup>6</sup> The AICPA Code of Conduct makes it clear that an accountant may not serve multiple masters with divergent interests, and that some conflicts of interest are ethically impermissible. See ET Section 102.01 - Integrity and Objectivity:

In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others. CODE OF CONDUCT ET 102.1, (Am. Inst. of Certified Pub. Accountants 1988), available at [http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/e1\\_102.aspx](http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/e1_102.aspx)

See also CODE OF CONDUCT ET 102.3 (provision of services to multiple family members with divergent interests may impair objectivity). S.C. Code 40-2-110(7) and Regulation 1-10 of the South Carolina Board of Accountancy adopt the AICPA Code of Conduct and the Ethical Standards of the AICPA.

479 S.E.2d 47, 49 (1996); *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011) and not by the testimony of an expert.

**4. Attorney-in-Fact Kathleen Turner Has No Greater Right to Information than her Principal, Jacquelin Stevenson, and any Duty that Existed Was Satisfied on October 23, 2001.**

In arguing for the existence of a duty extending to at least one Plaintiff, Kathleen Turner, Plaintiffs argue “Mrs. Stevenson was a client and the accountants did owe her a duty.” (Plaintiffs’ Initial Brief, p. 28). They reason that because Kathleen Turner was an attorney-in-fact for her mother, a duty was owed to her. Plaintiffs ignore the fact that as an agent for her mother, Kathleen Turner had no greater rights for information or duties owed to her by the accountants than did her mother herself. And as the uncontested evidence shows, Ms. Kerrison disclosed the trustees’ actions to Heyward Carter, her mother’s attorney, on October 23, 2001. Thus, even if Plaintiffs’ argument that the accountant had a duty to disclose the possible defalcations of the trustee to a beneficiary is accepted, the court was correct in finding that the duty was satisfied on October 23, 2001.

**5. There Was No Fiduciary Relationship Between Ms. Kerrison and Any Plaintiff.**

Plaintiffs’ fifth cause of action was a claim against Ms. Kerrison for breach of fiduciary duty. The court correctly found that no fiduciary duty existed, and the Plaintiffs do not appear to contest that finding.

Whether a fiduciary relationship exists between two people is an equitable issue for the court to decide. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458-59, 578 S.E.2d 711, 715 (2003), citing *Island Car Wash Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987); *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). South Carolina does not recognize any per se fiduciary relationship between accountant and client. Instead, to determine whether such a relationship exists, the court looks to the facts and circumstances of the relationship between the parties. *Pitts*

*v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002).

A "confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith with due regard to the interest of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).

Furthermore:

The term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him. As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship. The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.

*Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) (internal citations omitted) (no fiduciary duty between bank and depositor). The courts have thus usually "reserved imposition of fiduciary duties to legal or business settings often in which one person entrusts money to another." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003) (finding no fiduciary relationship between adviser and student).

The undisputed evidence shows that no fiduciary relationship existed between any of the Plaintiffs and Lynne Kerrison and Pratt-Thomas Gumb. Plaintiffs did not meet with Lynne Kerrison during the relevant time-frame or discuss the status of the trusts with her. (Plaintiff Kathleen S. Turner's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158, R. pp. 0181-0183, 0185-0186, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208; Plaintiff Genevieve S. Felder's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-

59,68-73,83-89,100-107,117-123,134-140, 151-158, R. pp. 0267-0269, 0271-0272, 0274-0276, 0278-0280, 0282-0284, 0286-0288, 0290-0292; Plaintiff Jacquelin S.

Bennett's Responses to Defendant Lynne L. Kerrison's First Request for Admissions, 54-59,68-73,83-89,100-107,117-123,134-140, 151-158, R. pp. 0226-0228, 0230-0231, 0233-0235, 0237-0239, 0241-0243, 0245-0247, 0249-0251).

Lynne Kerrison did not meet Jacquelin Stevenson, but instead communicated with Pat Neapolitan, Heyward Carter, and the trustees regarding preparation of the tax returns for Mrs. Stevenson and the trusts. (July 13, 2011, Dep. of Lynne Kerrison, R. p. 0912, lines 3-19 – p. 0922, lines 5-19 – p. 0928, lines 1-2 – p. 0992, lines 2-25). Ms. Kerrison did not sign checks for Mrs. Stevenson or the trusts. (July 13, 2011, Dep. of Lynne Kerrison, R. p. 0957, lines 13-16). She had no control over Mrs. Stevenson's assets or the assets of the estate. Ms. Kerrison, as an accountant, was never in a position to bind the trust or Mrs. Stevenson in any way or to take advantage of the Plaintiffs for her own benefit. Plaintiffs offered no evidence from which the court could conclude that a relationship of "trust and confidence," or indeed, any relationship at all, existed between Ms. Kerrison, Pratt-Thomas Gumb, Dixon Hughes, PLLC and the Plaintiffs. From these facts, it is impossible to infer a fiduciary relationship.

**6. The Duty that Plaintiffs Wish this Court to Create Would Conflict with Federal Law.**

In 1971, Congress enacted 26 U.S.C. § 7216, which prohibits "any person who is engaged in the business of preparing, or providing services in connection with the preparation of" federal tax returns from disclosing to other than specified persons or organizations any information "furnished to him for, or in connection with, the preparation any such return" and imposes criminal sanctions for a violation of this prohibition. The legislative history of the bill clearly indicates that Congress sought

to prohibit tax preparers from disclosing or making available information received during the preparation of tax returns by providing for criminal penalties. Congress allowed only three exceptions to the general rule.<sup>7</sup>

Any common-law duty to disclose taxpayer information to third parties would be preempted by 26 U.S.C. § 7216. “If a state statute, administrative rule, or common law cause of action conflicts with a federal statute, it is incontestable that the state law has no efficacy.” *Jamison v. Ford Motor Co.*, 373 S.C. 248, 264, 644 S.E.2d 755, 763 (Ct. App. 2007). “Such a conflict arises when either compliance with both laws is impossible or when the state law frustrates the federal purpose and creates an obstacle to the fulfillment of federal objectives.” *Prof'l Samplers, Inc. v. S.C. Emp't Sec. Comm'n*, 334 S.C. 392, 397, 513 S.E.2d 374, 377 (Ct. App. 1999). The disclosures that Plaintiffs seek to mandate are exactly the disclosures that 26 U.S.C. § 7216 prohibits.

Plaintiffs argue that the regulations adopted by the Internal Revenue Service implementing 26 U.S.C. § 7216, in particular those at found at 26 C.F.R. § 301.7216-2(e), allow disclosure to “related taxpayers,” including beneficiaries of a trust. Plaintiffs are simply incorrect about the regulation. 26 C.F.R. 301.7216(e)(2) permits a tax preparer to use information of a related party to prepare the tax return of another related party. It does not permit disclosure of information, nor its use, for any other purpose. The regulation says:

- (e) Disclosure or use of information in the case of related taxpayers.
  - (1) In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax

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<sup>7</sup> In addition to the three original exceptions to the general rule that tax information may not be disclosed (court orders, preparation of state taxes, and disclosures required by the Internal Revenue Code) in 1989 Congress allowed tax information to be disclosed for the purposes of “quality or peer reviews.” 26 U.S.C. § 7216 (b) (3).

return preparer obtained from a first taxpayer if—

- (i) The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;
  - (ii) The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and
  - (iii) The first taxpayer has not expressly prohibited the disclosure or use.
- (2) For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to another taxpayer if they have any one of the following relationships: Husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

To adopt the position advocated by Plaintiffs, that accountants have a duty to tell non-clients of the possible misdeeds of their clients, would place tax preparers in the untenable position of having to choose between facing either civil liability for nondisclosure or criminal liability for disclosure. That conflict is evident in this case. Plaintiffs allege that Lynne Kerrison and Pratt-Thomas Gumb breached a duty of care owed to the beneficiaries by “failing to inform the Plaintiffs, including Kathleen Turner as power of attorney for Jacquelin Stevenson, of the improper self-dealing withdrawals known to these Defendants.” (Complaint, R. p. 0037-0038, ¶ 44.) The disclosure of information to other beneficiaries, as non-clients, would have subjected Lynne Kerrison and Pratt-Thomas Gumb to criminal liability under federal law.

Plaintiffs have failed to offer any argument justifying this Court in creating a duty from an accountant to non-client trust beneficiaries, and the circuit court was correct to dismiss Plaintiffs' claims. In any event, any such duty was satisfied.

**D. THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY BECAUSE THERE WAS NO EVIDENCE THAT THE DEFENDANTS "KNOWINGLY PARTICIPATED" IN ANY BREACH OF FIDUCIARY DUTY BY THE TRUSTEES**

Plaintiffs' sixth cause of action alleged that Lynne Kerrison and Pratt-Thomas Gumb knowingly participated in the trustees' breaches of fiduciary duty by "failing to disclose to Plaintiff Kathleen Turner who held power of attorney for her mother, or the other Plaintiffs as beneficiaries, of the improper self-dealing withdrawals." This allegation is clearly duplicative of the malpractice allegation and for the reasons previously discussed is insufficient to support an independent cause of action. Plaintiffs also allege that "Defendants Kerrison and Pratt-Thomas Gumb also participated in these breaches of fiduciary duty by issuing checks from the subject trusts for the improper self-dealing withdrawals." (Amended Complaint, R. p. 0095, ¶ 52). The circuit court correctly dismissed the claim because Plaintiffs offered no competent evidence of "knowing participation" in any breach of fiduciary duty perpetrated by Thomas and Daniel Stevenson. (Order Granting Defendants' Dixon Hughes PLLC and Lynne Kerrison's Motion for Summary Judgment, R. pp. 0020-0021).

Plaintiffs make much of the fact that for a period of time the accounting firm had custody of the physical checkbook for one or both trusts, while neglecting to point out that the accounting firm had no ability to sign the checks. (Kerrison Dep., R. p. 0957). Plaintiffs argue that because after Pat Neapolitan's death, Pratt-Thomas Gumb, through an employee, Angela Heisenbottle, would give checks to any of the siblings who asked for them, which checks then had to be signed by Thomas C. Stevenson, III, and Daniel R. Stevenson, II (Kerrison Dep., R. p. 0957), they "knowingly participated" in the breach. Plaintiffs' argument ignores the practical problem that as the authorized signers, Thomas C. Stevenson, III, and Daniel R. Stevenson, II, had at all times the ability to go to the bank and request more checks, or simply to withdraw or transfer funds. Thus, there is

simply no causal link between Pratt-Thomas Gumb's custody of a checkbook and Thomas C. Stevenson, III, and Daniel R. Stevenson, II's self-dealing transactions. Plaintiffs also neglect the fact that this occurred only when, and after, the situation had been reported to and examined by the attorneys Heyward Carter and Howard Morrison. (Kerrison Dep., R. p. 0958, lines 13-25 – p. 0959, lines 1-6). Ms. Kerrison's previous report of the trustees' actions to the life income beneficiary's attorney conclusively negates any inference that Ms. Kerrison "knowingly participated" in any breach of duty.

"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 (Ct. App. 2008). The gravamen of a claim for aiding and abetting a breach of fiduciary duty 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). Plaintiffs cannot show that Defendants Lynne Kerrison and Pratt-Thomas Gumb, or its alleged successor, Dixon Hughes, knowingly participated in the alleged breach by the trustees.

At most, Defendants will be able to show Lynne Kerrison learned of the first alleged breaches of duty in 2001, *after the fact*, when Ms. Kerrison was preparing the tax returns for Ms. Stevenson. Ms. Kerrison never assisted or participated in the alleged breaches; she first learned of them after they had been completed. She reported the breaches to Ms. Stevenson's attorney. Again, Plaintiffs' only real complaint is that Ms. Kerrison gave notice to Ms. Stevenson's attorney, Heyward Carter, rather than to Ms. Turner, the attorney-in-fact, but they cannot avoid the fact that notice was given. Absent prior knowledge of the withdrawals, or some evidence of active participation in the alleged malfeasance of the trustees, Plaintiffs' claim for aiding and abetting a breach of fiduciary must fail. *See e.g., Gordon v. Busbee*, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (Ct. App. 2012) (granting a directed verdict on a claim of aiding and abetting a

breach of fiduciary duty based on improper transfers made by a personal representative where the attorney lacked actual knowledge of the transfers either at the time the transfers were made or beforehand.)

**E. THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE PLAINTIFFS' CLAIMS DID NOT SURVIVE THE DEATH OF JACQUELIN K. STEVENSON**

Although not cited by the trial court as a basis of its decision, the record in the case shows that the trial court's decision may be affirmed for other grounds appearing in the record. (Rule 220(c), SCACR). In the present case, Plaintiffs' claims did not survive the death of Jacquelin K. Stevenson.

While S.C. Code Ann. 15-5-90 provides that actions based on injuries to an individual shall survive the death of that person, the common law recognizes an exception to the survivability of a claim in cases involving fraud or deceit. Furthermore, the "fraud exception to survivability is not limited only to a cause of action titled 'fraud'" but to all actions based on theories of fraud or deceit. *Brailsford v. Brailsford*, 380 S.C. 443, 449-50, 669 S.E.2d 342, 345-46 (Ct. App. 2008). The label given to the claim by a plaintiff is irrelevant where the claim arises from fraudulent and/or deceptive conduct. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 97 (2002). Because the actions in this case are based on the alleged fraudulent conduct of Thomas and Daniel Stevenson towards Jacquelin Stevenson, they do not survive the death of Jacquelin Stevenson.

Plaintiffs' claims against Defendants Lynne Kerrison and Dixon Hughes must derive from the allegation that:

During Thomas C. Stevenson, III and Daniel R. Stevenson, II's terms as co-trustees both improperly took money from the Marital Trust, QTIP Trust and the Estate of Jacquelin K. Stevenson.

(Amended Complaint, R. p. 0091, ¶ 19). The only wrongdoing by Ms. Kerrison alleged by Plaintiffs is her failure, upon learning of the withdrawals, to tell the Plaintiffs of Thomas and Daniel Stevenson's actions.

Plaintiffs' claims, while labeled professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, are actually based on the alleged duty of Lynne Kerrison to disclose information directly to the Plaintiffs. (Amended Complaint, R. pp. 0091, 0092, 0094, 0095, ¶¶ 19, 24, 43, 47, 48, 52). A "nondisclosure is fraudulent when there is a duty to speak." *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). The essence of the Plaintiffs' claims against Defendants Lynne Kerrison and Pratt-Thomas Gumb is that they failed to disclose the fraudulent actions of Thomas and Daniel Stevenson, and by their very nature the claims are, in effect, claims of fraud for failure to disclose the fraud of another. Because this is an action arising out of a fraud, in the guise of an action for professional negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, it did not survive the death of Jacquelin Stevenson.

In *Brailsford v. Brailsford*, this Court determined that an action by the widow of a trust beneficiary, both individually and in her capacity as personal representative of the estate, against trustees for various instances of fraudulent conduct did not survive the death of her husband. *Brailsford*, 380 S.C. at 449-50, 669 S.E.2d at 345-46. This Court reasoned that the widow's causes of action were "essentially a cause of action for fraud simply disguised under a different title." *Id.* The Court relied on the case of *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564-565, 564 S.E.2d 94, 97 (2002), where the South Carolina Supreme Court found that where the essence of the alleged misconduct amounted to misleading the deceased by either intentional deception or gross negligence, such actions fit within the ambit of fraud or deceptive conduct and, regardless of the label given, did not survive the deceased.

The reasoning behind disallowing suits based on theories of fraud to survive an individual is that evidence of the state of mind of the victim is crucial to determining whether a fraud was perpetrated. In *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991), finding that civil conspiracy claims did not survive the death of the victim, the Fourth Circuit upheld the constitutionality of S.C. Code Ann. 15-5-90 and the recognized exception for fraud. The Court acknowledged that a rational basis for the fraud exception to the survivability statute is “that fraud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital.” *Id.*; see also *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002); *Pamplico Bank and Trust Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972); *Cline v. S. Ry. Co.*, 113 S.C. 440, 102 S.E. 641 (1920). Because the issue of Jacquelin Stevenson’s state of mind, potential consent and ratification and knowledge are crucial to the issue of whether a duty was breached and a fraud committed, either by trustees Thomas and Daniel Stevenson or Defendant Lynne Kerrison, Plaintiffs’ claims did not survive Jacquelin K. Stevenson’s death.

**F. THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE, INDIVIDUALLY AND AS BENEFICIARIES OF THE TRUSTS, PLAINTIFFS SUFFERED NO RECOGNIZED DAMAGES AS THEY HAD NO ENFORCEABLE RIGHT TO INHERIT**

Although not cited by the trial court as a basis for its decision, this Court may affirm the trial court for any reason appearing in the record. Rule 220(c), SCACR. Because Plaintiffs, as contingent, residuary beneficiaries, suffered no recognized damages, their claims should be dismissed.

Under South Carolina law, trusts or trustees are the devisees of testamentary gifts; “*beneficiaries are not devisees.*” S.C. Code Ann. 62-1-201(8) (*emphasis added*). Moreover, the “point in time that a claim for the object of a bequest arises necessarily

depends on when the legatee has a legal right to it.” *Church v. McGee*, 391 S.C. 334, 348, 705 S.E.2d 481, 489 (Ct. App. 2011). During Mrs. Stevenson’s lifetime, Plaintiffs, as individuals and trust beneficiaries, held *no legal right* to Mrs. Stevenson’s personal assets or the assets of the trusts. Because all of the alleged improprieties occurred during Mrs. Stevenson’s lifetime, Plaintiffs suffered no damages.

Before Mrs. Stevenson’s death, Plaintiffs had only the inchoate expectation of a future interest in the marital trust, subject to Mrs. Stevenson’s use of the trust assets, power of appointment and testamentary wishes. During her lifetime, Mrs. Stevenson was the sole beneficiary of both trusts, and the entire corpus of both trusts could have been used for her benefit. Neither trust instrument provided a means by which trust assets could have been distributed to the residual beneficiaries during Mrs. Stevenson’s lifetime. (Turner Deposition, Exhibit 5, Will). Plaintiffs held no interest in their mother’s personal assets, and Mrs. Stevenson held the legal right to dispose of those assets. Consequently, while Mrs. Stevenson lived, Plaintiffs, as individuals and beneficiaries, held no legal right to the assets of the trusts or Mrs. Stevenson’s personal assets. Plaintiffs’ rights accrued only after Mrs. Stevenson’s death, after the actions alleged in the complaint.

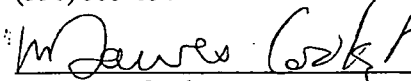
Plaintiffs cannot show that their individual rights were invaded. Plaintiffs do not allege that anything was improperly taken from their personal assets, only that Thomas and Daniel Stevenson “both improperly took money from the Marital Trust, QTIP Trust, and Estate of Jacquelin K. Stevenson.” (Complaint, R. p. 0034, ¶ 20). Because Plaintiffs held no right to the assets of either trust while their mother lived, nor any protected expectation in the remainder, and no money was taken from them personally, Plaintiffs, as individuals and trust beneficiaries, suffered no damages, and therefore Defendants are entitled to summary judgment as a matter of law.

### CONCLUSION

The trial court should be affirmed because it correctly held that Plaintiffs' claims were barred by the statutes of limitation, because it correctly held that the Defendants owed no duty to the Plaintiffs, and because there was no evidence that Ms. Kerrison "knowingly participated" in any of the trustees' breaches of fiduciary duty. Furthermore, the trial court can be affirmed for additional reasons appearing in the record (Rule 220(c), SCACR) because Plaintiffs' claims did not survive the death of Jacquelin Stevenson, and because Plaintiffs suffered no damages.



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Dated: April 24, 2014  
Charleston, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

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

RECEIVED  
APR 28 2014  
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.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison,

Defendants,

Of Whom

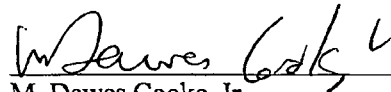
Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison are

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated: 4/24/14

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

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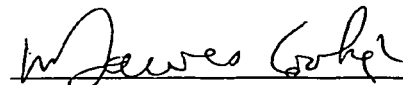
Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison are

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents Dixon Hughes and Lynne L. Kerrison and Certificate of Counsel on Appellants by depositing a copy of same in the United States Mail, postage prepaid, on April \_\_\_\_, 2014, addressed to their attorneys of record, A. Camden Lewis, Keith M. Babcock, James M. Griffin and Ariail E. King at Lewis Babcock & Griffin, LLP, 1513 Hampton Street, P O Box 11208, Columbia, SC 29211.

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STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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

RECEIVED

APR 24 2014

SC Court of Appeals

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as Co-Trustees and beneficiaries of the Marital Trust and the Qualified  
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Jacquelin S. Bennett, and Kathleen S. Turner, as Co-Personal Representatives  
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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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## **ARGUMENT**

### **I. Statute of Limitations**

The main premise of Respondents' Brief is that the Accountants and Attorneys telling two thieving brothers that they were wrong somehow triggers the statute of limitations against the unknowing and innocent sisters (Appellants). The admissions of wrongdoing between the Accountants and Attorneys certainly cannot insulate them against suits by innocent victims.

#### **A. Identity of Wrongdoer**

Respondents ignore the fact that in South Carolina, a statute of limitations cannot begin to run until a plaintiff can identify the wrongdoer:

under the [discovery] rule, one must know not only that he has been injured but also "what or who proximately caused that injury."

*Rogers v. Efird*, 284 S.C. 377, 378, 325 S.E.2d 541, 542 (1985). The injury alone is not sufficient; in a professional negligence action, the statute is only triggered by notice of a cause of action against another person. *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). As the court in *True* clearly stated: "knowledge of the injury alone does not, *a fortiori*, give rise a suspicion of impropriety by [a professional]."<sup>1</sup> There is no indication here that the innocent sisters knew that the Accountant Kerrison and Dixon Hughes ("Accountants") were wrongdoers until the meeting of April 27, 2006, in which the Accountants and Attorneys<sup>2</sup> informed Kathleen Turner ("Kathleen") that Tom and Dan Stevenson ("Tom and Dan") had been stealing money from the trusts. This basic premise set forth by South Carolina has been recognized by other

---

<sup>1</sup>In that case, the statute of limitations did not start to run until client discovered that her attorney had failed to disclose a conflict of interest.

<sup>2</sup>The term "Attorneys" refers to Heyward Carter and his law firm.

courts. See, e.g., *Spitler v. Dean*, 436 N.W.2d 308 (Wis. 1989)(defendant must be identified before cause of action accrues and statute of limitations is triggered); *Tarnowsky v. Socci*, 816 A.2d 728 (Conn. App. 2003)( knowledge of the identity of a tortfeasor is an essential element of a claim for negligently inflicted injuries); *Meyers v. Larreategui*, 509 N.E.2d 971 (Oh. App. 1986)(cause of action for medical practice does not accrue until patient knows the identity of the physician that harmed him).

The first time Appellants could have known that they might have a claim against the Accountants and the Attorneys was at the April 27, 2006 meeting, in which the Accountants and Attorneys advised Kathleen, the innocent sister (and the attorney-in-fact for her mother, Mrs. Stevenson) that Tom and Dan (the crooked brothers) had been stealing from the trusts. In other words, the cause of action against the Accountants and the Attorneys could not have accrued until that date.

Respondents argue that the statute began to run on one of three different dates.<sup>3</sup> They argue that the statute began to run on May 21, 2003, when Kathleen had a meeting with Tom and Dan at their mother's house and Tom allegedly informed Kathleen that he and Dan had taken "loans" from the trusts. (Resp. Brief, p. 5). According to Kathleen's testimony, Tom mumbled for a few minutes, but did not explain that he and Dan had been "borrowing" money from the trusts, and Dan said nothing at all. (R.pp. 552-555). By the testimony, neither the Defendant Accountants nor the Attorneys were even discussed at this meeting. Thus, even if at this May 2003 meeting Tom had told Kathleen that he and Dan had "borrowed" money from the trusts, there is no evidence that the Accountants and Attorneys were discussed at the meeting. The

---

<sup>3</sup>Two of the dates -- May 21, 2003 and April 19, 2006 -- are addressed in this section. The third date-- October 23, 2001 -- is addressed in Section I.C.

statute cannot begin to run until Appellants knew who had caused their injuries. *Rogers v. Efirid, supra*. At the time of the meeting, there was no way to know of *any* professional's involvement in the "borrowing" or thefts from the trusts.

Respondents next argue that the statute began running on April 19, 2006, when Kathleen toured Tom's business. The events of this day are disputed and are not appropriate for summary judgment. Kathleen testified in detail about this day and explained that Tom gave her a tour of his business, but expressly denied that he ever told her of loans or monies "borrowed" from the trusts to invest in the business. (R.pp. 585:24 - 586:9). Neither the Accountants nor the Attorneys were present at this meeting, and there was no discussion about them. Just as with the May 2003 meeting, there was no way for Kathleen to have identified the Accountants or the Attorneys as wrongdoers. Thus, the statute of limitations could not have been triggered against either Professional.

**B. Misstatement of Facts**

Throughout their brief, Accountants misstate the facts in an attempt to create an early start to the statute of limitations. For example, with regard to the May 21, 2003 meeting between Kathleen and Tom, the Accountants assert that, according to Tom's "uncontested testimony," he provided Kathleen with a written accounting of the trusts, including the monies he and Dan had taken. (Resp. Brief, p. 5). Yet Kathleen directly contradicted Tom, stating that while Tom had a piece of paper in his lap "I could not really see it." (R.p. 555:5-20). She followed up by explaining, "he didn't show it to me and I didn't see it and he didn't leave it with me." (R.p.564:17-23). Clearly, Tom's testimony is not "uncontested."

The Accountants also mischaracterize the facts in trying to refute that Kathleen's acknowledgment that she thought something was wrong with Tom indicated her worry about her

brother personally. The Accountants claim that there is no evidence in the record that shows Kathleen was worried about her brother's well being or personal life. (Resp. Brief p. 14).

However, Kathleen testified that "I didn't know if he had something to say, **something very grave about his family....**" (R.p. 565:12-13) (emphasis added). In other words, while Kathleen recognized something was wrong with Tom, she thought it might be a personal or family issue. This is, at the least, a factual issue that is not appropriate at summary judgment as Appellants are entitled to all inferences. See, *Medical Univ. of South Carolina v. Arriaud*, 360 S.C. 615, 602 S.E.2d 747 (2004)(In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party).

**C. No imputation**

Respondents also claim that on October 23, 2001, Accountant Kerrison told Attorney Carter (Mrs. Stevenson's lawyer) about the thefts by Tom and Dan. Respondents argue that since Carter was Mrs. Stevenson's attorney, his knowledge was attributed to her on that date, starting the statute of limitations. However, this case does not involve the imputation principle. When agents and third parties collude against the principal, the principal should not be charged with notice of the agent's actions. See, *Official Committee of Unsecured Creditors v. PricewaterhouseCoopers, LLP*, 607 F.3d 346 (3<sup>rd</sup> Cir. 2010) (Collusion between an agent and auditor makes imputation of the agent's conduct to its principal unavailable because the auditor is aware that the agent will withhold information from the principal). As another court noted:

Under fundamental principles of agency law, the agency relationship between an attorney and his client can be severed, with the result that the client is not constructively charged with his attorney's knowledge or actions, where counsel acts adversely to his client's interest or commits a serious breach of loyalty to his client.

*Cadet v. Florida Dep't of Corrections*, 12-14518, 2014 WL 341050 (11th Cir. Jan. 31, 2014).<sup>4</sup> In other words, when one participant in the cover up (Kerrison) tells another participant in the cover up (Carter) about the thefts and the two then tell the crooked parties (Tom and Dan) to stop stealing, they are acting adversely to the client's interest and there is no imputation.

In this case, Kerrison and Carter chose to protect the thieves, Tom and Dan, and hide the information from Mrs. Stevenson and Kathleen. Thus, Carter's knowledge cannot be imputed to either Mrs. Stevenson or Kathleen. Kerrison and Carter, instead of informing Mrs. Stevenson or Kathleen, met privately with Tom and Dan--the ones stealing the money-- to tell them to stop taking money from the trusts. (R.pp. 1027:24-1028:3; 1331:10-16). To further the cover up, they prepared promissory notes for Tom and Dan, in an attempt to "legitimize" the withdrawals as loans. (R.pp. 1011:11-22; 1481).

Furthermore, the Accountants had conflicts of interest and picked one client over another. As they admitted in the Answer to the Amended Complaint, the Accountants performed accounting services for Mrs. Stevenson (R.p. 102.) and prepared tax returns for Tom, Dan and Kathleen. (R.pp. 984:1-987:18). The Accountants then chose to protect one set of clients (Tom and Dan) over the other their clients (Mrs. Stevenson and Kathleen) in cooperating with the Attorneys to hide the thefts and later preparing promissory notes to legitimize the thefts as loans.<sup>5</sup>

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<sup>4</sup>There is no doubt that Carter committed a serious breach of loyalty to his client when he failed to tell Mrs. Stevenson or Kathleen of Tom and Dan's actions and instead, took action to protect Tom and Dan.

<sup>5</sup>The Accountants are disingenuous in claiming that Kerrison acknowledged that Mrs. Stevenson's bookkeeper, Pat Neopolitan, referred to the thefts as gifts. When asked if Pat referred to the withdrawals as "gifts", Kerrison replied "I don't remember." (R.pp. 1003:21-1004:3). In fact, the question was posed in several different ways and each time, Kerrison did not remember Pat using the word "gift" or "loan" to describe the withdrawals. (R.pp.1003:6-1004:15).

Because of the conflicts of interest of both the Accountants and the Attorneys, and their secret, collusive conduct, the statute of limitations could not have begun to run on October 23, 2001.

## **II. Duty to Appellants**

The Accountants argue that Appellants were not their clients<sup>6</sup> and that there is no duty owed to non-clients. However, Kathleen held Power of Attorney for Mrs. Stevenson since 2001. As they have throughout this matter, Accountants ignore the significance of this Power of Attorney. There is no dispute that Mrs. Stevenson was a client of the Accountants. The Accountants admitted in their Answer that they were accountants for Mrs. Stevenson and owed her a duty of care. Appellants alleged that:

Defendants Kerrison and Dixon-Hughes served as accountants for the two subject Trusts and Jacquelin K. Stevenson.

(R.p. 94). The answer to that paragraph was “Admitted.” (R.p. 102). This duty of care extends to Kathleen who, as the holder of the power of attorney, stands in her mother’s shoes. *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. App. 2000)( “It has been said that *an attorney in fact is essentially an alter ego of the principal....*”); *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008)(a person acting as an attorney-in-fact under a POA is an agent, one who stands in the shoes of a principal).

The Accountants mistakenly rely on *Johnson v. Robert E. Lee, Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012), for the argument that the liability of accountants cannot be extended

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<sup>6</sup>The Accountants assert that they only provided services to Tom and Dan, and Mrs. Stevenson (Resp. Brief, p. 20). However, Kerrison acknowledged that she had also performed services for Kathleen Turner for several years. (R.pp. 986:2-987:4).

<sup>7</sup>The Accountant relationship with Mrs. Stevenson is even expressly acknowledged in their Brief. (Resp. Brief, p. 19).

to a third party. In that case, the court refused to allow a fired bookkeeper to pursue a claim against the accounting firm hired to assist the bookkeeper's employer and the police in an investigation of missing money. The court found that the accountant was hired to assist the police in their investigation of the bookkeeper and then held that an accountant's duty did not extend to a third party absent a "statute, contract, relationship, status, property interest, **or some other special circumstance.**" *Id.*, 401 S.C. at 504, 737 S.E.2d at 514 (emphasis added). The court noted that the accountant's conduct was not designed to protect the bookkeeper.

In this case, there are "special circumstances" that would extend the Accountant's duty. Mrs. Stevenson had severe health problems and Kathleen served as her power of attorney, and stood in the shoes of her mother. In addition, Mrs. Stevenson was a client of the Accountants and the beneficiary of the trusts for which the Accountants prepared tax returns. Thus, their work was undertaken to protect Mrs. Stevenson, unlike the plaintiff in *Johnson* whose conduct was actually being investigated by the accountant.

Similarly, the other case upon which the Accountants primarily rely provides no support for their argument. The Accountants argue the holding in *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009) (a legal malpractice case) is applicable to accountants and supports their argument that there can be no duty to both the trustees and the beneficiaries without a conflict of interest.<sup>8</sup> It is unquestioned that there was a conflict of interest in the present case. Kathleen was

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<sup>8</sup>The *Rydde* court simply held that prospective beneficiaries could not sue an attorney for his failure to effect the drafting and execution of will prior to the decedent's death. Here, Appellants are much more than "prospective beneficiaries." They became vested remainder beneficiaries in the trusts upon their father's death in 1988, even if Mrs. Stevenson could spend corpus. 28 Am. Jur. 2d Estates § 249 (where creator of trust gives to another the power to prevent the remainderman from enjoying the property by consuming or diverting it, the remainder is **vested** subject to defeasance) (emphasis added).

the attorney-in-fact for her mother--the Accountants' client-- and had been since 2001. Thus, the duties the Accountants admittedly owed Mrs. Stevenson extend to Kathleen. By advising Tom and Dan on the cover-up, the Accountants undertook duties to the brothers creating the conflict of interest with their duties to Mrs. Stevenson and Kathleen. Under the ethics rules cited by the Accountants themselves, it is obvious they had an impermissible conflict of interest in representing the trusts/trustees and Mrs. Stevenson:

In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

Code of Conduct ET 102.1 (Am. Inst. of Certified Pub. Accountants 1988) (cited on p. 23 of Resp. Brief). Accountant Kerrison certainly did not act with integrity when she chose Tom and Dan over Mrs. Stevenson and Kathleen. Accountant Kerrison hid the facts from Mrs. Stevenson and Kathleen and cooperated with Attorney Carter in helping Tom and Dan cover up their thefts and in preparing promissory notes that attempted to legitimize the thefts as loans. Clearly, the Accountants had a duty to tell at least Mrs. Stevenson and Kathleen of the thefts. They breached this duty.<sup>9</sup>

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<sup>9</sup>The Accountants also attempt to rely on 26 U.S.C.A. § 7216, for the argument that they were not permitted to disclose Tom and Dan's withdrawals to Mrs. Stevenson (or Kathleen). However, disclosure would not be barred under this law because Mrs. Stevenson falls under the "related taxpayer" exception that was fully discussed in Appellant's initial brief. While the Accountants argue that this exception only applies where the disclosure is needed for the related taxpayer's tax preparation, they ignore the fact that since Mrs. Stevenson was the beneficiary of the trusts, any alleged "loans" or "gifts" from the trusts to Tom and Dan were relevant to her tax preparation. Thus, she does fall within the "related taxpayer" exception and the Accountants were obligated to tell her (or Kathleen), about the monies taken by Tom and Dan. If the Accountant's interpretation of Section 7216 (and related regulations) is accepted, it would prevent an accountant from disclosing to a beneficiary a trustee's breach of fiduciary duties under any circumstances. Thus, an accountant would be forced to avoid her ethical duties and would be aiding and abetting the breaching trustee. That cannot be the congressional purpose and intent behind 7216, and indeed is likely one reason for the "related taxpayer" exception.

### **III. Knowing Participation**

The Accountants attempt to minimize their knowing participation in the thefts by Tom and Dan. The Accountants acknowledge that they had possession of the checkbook and that one of their employees supplied checks to Tom or Dan for the money they stole. The Accountants claim that since Tom and Dan could have simply gone to the bank to withdraw funds or request additional checks, there was no "causal link" between the Accountants' custody of the checkbook and Tom and Dan's actions. However, what Tom or Dan could have done (without the Accountants' knowledge and participation) is irrelevant. The facts are simple and the Accountants' participation obvious:

1. The Accountants met with the Attorneys and the thieves, Tom and Dan, to tell them to stop stealing rather than advise Mrs. Stevenson and Kathleen of the thefts; (R.pp. 1027:25-1028:3; 1331:10-16).
2. The Accountants and Attorneys drafted a letter to clearly inform Appellants about the improper withdrawals, but kept the letter a secret at Tom and Dan's request. (R.pp. 1368:3-15; 1482-1485).
3. The Accountants cooperated with the Attorneys in drafting Promissory Notes that attempted to legitimize the thefts as loans; (R.pp. 1011:11-22; 1481).
4. The Accountants had possession of the checkbook and wrote checks to Tom and Dan upon request. (R.pp. 916:22-25; 957:6-16; 1046:6-20).

Furthermore, at the time that the Accountants were issuing these checks, one of the partners in the accounting firm, Harold Pratt-Thomas, had invested in one of Dan's businesses which was being funded by the stolen trust funds. (R.p. 989:12-17). Thus, the Accountants knowingly allowed Dan to take trust funds to invest in his business, which also furthered the

interest of Pratt-Thomas. The Accountants' actions clearly constituted knowing participation. See, e.g., *Smith v. Smitty McGee's, Inc.*, 24 Del. J. Corp. L. 297, 306 (1998) (wife/manager who wrote checks associated with husband's breach of fiduciary duties was evidence of knowing participation). The Accountants' attempt now to avoid responsibility by claiming that Tom and Dan could have stolen the money without the Accountants' assistance must be rejected.

#### IV. Damages

Incredibly, the Accountants take the position that because Mrs. Stevenson could have spent all of the trust funds, it was okay to allow Tom and Dan to steal from her. Respondents claim, as an additional sustaining ground, that Appellants had no legal right to the trusts' assets because Mrs. Stevenson could have used the entire corpus of both trusts for her own benefit. Respondents then conclude that Appellants were not damaged and thus, judgment as matter of law was appropriate.

In support of this 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.<sup>10</sup> 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

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<sup>10</sup>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*.

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).

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). Furthermore, 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 and Attorneys 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 as result of the Accountants' breaches of fiduciary duties, 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.

#### **V. Survival of Claims**

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 the 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, the claims against the Accountants are based on the professional negligence, breach of fiduciary duties, and aiding and abetting the breach of fiduciary duties that allowed Tom and Dan to violate their duties as Trustees. Tom and Dan's duties 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>11</sup> Tom and Dan were in breach of these statutory duties and were assisted in those breaches by the Accountants and the Attorneys. Thus, the claims against the Accountants are not based on fraud but on their negligence, breach of fiduciary duties, and aiding and abetting Tom and Dan’s breaches.<sup>12</sup> The actions of the Accountants are clearly within the ambit of professional negligence and breach of fiduciary duty. As a result, Plaintiffs’ claims survive the death of Mrs. Stevenson under S.C. Code § 15-5-90.<sup>13</sup>

More over, 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:

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<sup>11</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>12</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 negligence and breach of fiduciary duty. The state of mind of the victim (Mrs. Stevenson) is not an issue because whether a person breached a duty of care is an objective standard, and Plaintiffs’ expert George DuRant has provided an opinion that the duty of care was breached. Furthermore, 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 state of mind is irrelevant in this case.

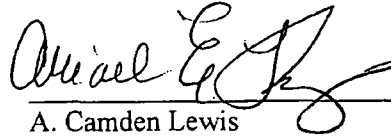
<sup>13</sup>S.C. Code 15-5-90 states: “Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.”

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's can be considered evidence in determining Appellant's surviving claims of professional negligence and breach of fiduciary duty against the Accountants.

### CONCLUSION

The Accountants have misstated facts, ignored Appellants' arguments, and cited inapplicable cases in an attempt to avoid responsibility for their actions -- actions which resulted in the loss of millions of dollars to Appellants. As set forth more fully in Appellants' Brief and herein, the lower court's grant of summary judgment must be reversed.



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Columbia, South Carolina.  
April 22, 2014

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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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

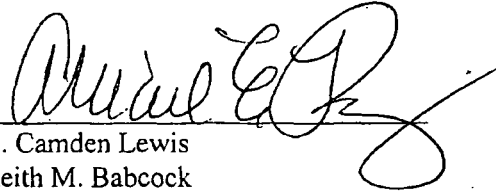
Respondents.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that the Reply Brief of Appellant complies with Rule 211(b),  
SCACR.



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APR 24 2014

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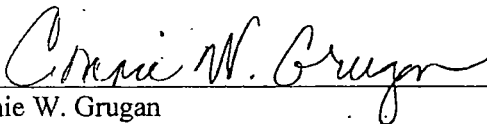
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PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby  
certify that I have served the **Brief of Appellants and Reply Brief of Appellants** upon opposing  
counsel, by mailing a copy of same, postage prepaid and return address clearly indicated on said  
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\_\_\_\_\_  
Connie W. Grugan

This 24<sup>th</sup> day of April, 2014.