

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

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S.C. Supreme Court

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

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

v.

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

Petitioners/Respondents,

Respondents/Petitioners.

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PETITION FOR WRIT OF CERTIORARI

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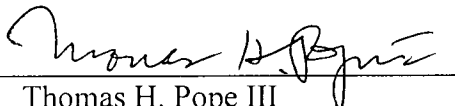
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**CERTIFICATE OF COUNSEL**

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 4, 2012.

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March 5, 2012

Newberry, SC

## QUESTIONS PRESENTED

Where there is evidence that Defendant Busbee had knowledge that the Wachovia certificate of deposit belonged to the “Clara Burch Estate,” yet included it on the Inventory of the George Burch Estate, and that Busbee filed false inventories in both estates, did the lower court err in granting directed verdict on the cause of action for aiding and abetting breach of fiduciary duty and in ruling that Respondent Busbee did not assist George Burch’s breach of fiduciary duty?

Where S.C. Code §62-1-106 allows recovery against any person benefitting from fraud, whether innocent or not, did the Court of Appeals err in affirming the trial judge’s granting directed verdict for Busbee on the cause of action for fraud/fraud benefit under the statute, where there is evidence that she had actual knowledge of improper transfers of Clara’s assets by George yet knowingly allowed Clara’s assets to be listed as an asset of George Burch’s estate; where Laurie received large, unusual gifts; and where she and Defendants Dennis and Laurie Burch benefitted from the fraud of George Burch?

After correctly ruling that the lower court erred in failing to grant directed verdict in favor of plaintiffs against the Estate of George Burch for \$193,303, for breach of fiduciary duty, did the Court of Appeals err in failing to direct the lower court on remand to determine the amount of interest to be awarded on these amounts pursuant to S.C. Code §34-31-20?

## STATEMENT OF THE CASE

The South Carolina Court of Appeals issued Gordon v. Busbee, et al. Opinion No. 4880, filed August 31, 2011, withdrawn, substituted and refiled January 4, 2012) in which the court affirmed the lower court's granting directed verdict in favor of Respondent Busbee, individually and as PR of the Estate of George Burch, on the cause of action for aiding and abetting breach of fiduciary duty and against Busbee and Respondents Laurie Burch and Dennis Burch on the cause of action for fraud/benefit under S. C. Probate Code §62-1-106.

The case centers around transfers by George Burch to himself of Clara Burch's assets while she was mentally incapacitated, and later from Clara's estate. Clara died on April 20, 2000. George made the lifetime transfers under a power of attorney dated February 25, 1995 ("POA") drafted by Busbee, and while serving as personal representative ("PR") under Clara's will. Respondent Busbee served as attorney for Clara's estate, and briefly as statutory fiduciary to Clara's estate under §62-3-609 of the S.C. Probate Code.

The Court's first opinion (filed on August 31, 2011) reversed the lower court's denial of directed verdict in favor of Clara's estate against George's estate for breach of fiduciary duty as to \$159,993.16 which George transferred to himself the week before Clara's death. The decision rested on the fact that the POA did not contain gift-giving provisions and the undisputed testimony that Clara has been continuously incompetent since the summer of 1995. The case was remanded to the circuit court "for a determination of the interest that will be due to the plaintiffs on these sums." (Opinion of 8/31/2011, p. 6).

After motions for rehearing, the substituted opinion (filed on 1/4/2012) added to the items held by George's estate but belonging to Clara's estate a \$33,310 Wachovia CD which

George transferred to himself from Clara's estate on September 21, 2000. This confirmed that the directed verdict against George's estate should have been \$193,303.13. The substituted opinion modified the remand instructions as follows: "We remand...for a determination of whether and in what amount interest will be due to the plaintiffs on these sums." (Opinion of 1/4/2012, p. 5).

The opinion concluded that there was no evidence Busbee had knowledge of any breaches of fiduciary duty. The Opinion further noted that there was no evidence Busbee had knowledge of any improper transfers by George Burch and, thus, no evidence of actual knowledge of improper activity on George's part.

The summons and complaint in this case were filed on April 15, 2003 in the Probate Court for Aiken County. The case was timely removed to circuit court. An amended complaint was filed on August 31, 2004.

Clara's estate sought return of more than \$600,000 of cash and other property transferred by George under the POA prepared by Respondent Busbee. Plaintiff estate asserted causes of action for breach of fiduciary duty, professional negligence, conversion and fraud/benefit under §62-1-106.

The trial was held on October 1, 2007 before the Honorable Doyet A. Early III. At the end of the presentation of the plaintiff's case, the lower court, in relevant part, ruled as follows:

1. As to Laurie and Dennis Burch, directed verdict granted as to all causes of action.<sup>1</sup> (R. p. 897).
2. As to Jackie Busbee, individually and as PR, directed verdict granted as to aiding and abetting, and fraud under S.C. Probate Code §62-1-106.

At the conclusion of the evidence, Clara's estate moved for a directed verdict against George's estate as to all transfers by George of Clara's assets and those of her estate on or after June 30, 1995. The motion was based on Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985) and S.C. Probate Code 62-3-713. It was grounded in Clara's undisputed mental incapacity; the lack of gift-making provisions in the POA dated February 25, 1995; and lack of any other authorization before Clara became incompetent. (R., pp. 1149-1153). The Court denied the motion. (R. p. 1154).

The jury's verdict in favor of the defendant on all causes of action was rendered on October 10, 2007.

Clara's estate made timely motions, including motions related to the granting and denial of directed verdicts referenced above, for judgment notwithstanding the verdict and, in the alternative, for a new trial (R. p.140).

By order entered May 20, 2008 (R. p.6), the lower court denied all of Clara's estate's post-trial motions. Appellants timely filed a notice of appeal dated June 12, 2008. After denial of defendants' motion for reconsideration of the May 20, 2008 order (R. p.197, 1), Clara's estate timely filed notice of appeal of the October 6, 2008 order on

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<sup>1</sup>The verdict as to Laurie was subject to the possibility that she may be called on to repay \$170,000 to the estate of George Burch depending on the verdict with respect to the surviving causes of action. (R., p. 897).

October 20, 2008.

After receiving briefs from all parties, the Court of Appeals held oral argument on March 8, 2011. In its Opinion No. 4880 (amended Opinion filed January 4, 2012), the Court partially reversed the lower court's denial of Clara's estate's motion for directed verdict against George's estate for breach of fiduciary duty, finding that evidence demonstrated that the \$193,303.13 was owned solely by Clara and transferred by George using the POA (or as PR) for his sole benefit while she was incompetent and that the lower court erred in refusing to direct a verdict for plaintiffs on these amounts. The Court remanded the matter to the lower court to enter judgment for plaintiffs (for \$193,303) and to determine whether and in what amount interest is owed on that amount.

The Court of Appeals affirmed the lower court's granting of a motion for directed verdict in favor of Respondent Busbee, individually and as PR, on the causes of action for aiding and abetting a breach of fiduciary duty. In that regard, the Court of Appeals found that there was no evidence that Busbee had actual knowledge of the improper transfers by George. (Opinion, p.7). The Court of Appeals also affirmed the lower court's directed verdict in favor of Busbee, individually and as PR, Dennis and Laurie Burch as to the fraud/benefit cause of action under §62-1-106. The Court of Appeals found that none had committed or benefitted from fraud, and that the record contains no evidence Busbee knew any representations she made in probate court filings were false at the time they were made.

## STATEMENT OF FACTS

Clara Burch was wealthy, incompetent and 91 years old when she died on April 19, 2000. During the week prior to her death, Clara's fourth husband, George, transferred \$159,993.16 from seven of her solely-owned bank accounts to himself.<sup>2</sup>

After Clara became permanently incompetent five years earlier, hundreds of thousands of dollars moved to George, and those he chose to benefit, out of Clara's many once-individual accounts and certificates of deposit (some through joint accounts). George's generous transfers continued as he served as PR of Clara's estate, helping himself to at least one of the estate's accounts. (R., pp. 2331-2341).

Tax returns for Clara's and George's estates, demonstrate that George's modest pensions could not support the more than \$235,000 George loaned daughter Laurie between 1997 and his death on January 18, 2003. Nor could they support the more than \$85,000 that he transferred to others in 2001 after Clara's death. But George made these transfers. Laurie accepted \$235,000 from a person who had never before been known to make a substantial gift or loan. (R., pp. 2324-2330).

When three-times widowed Clara married George in 1984, he was a retired truck driver with a modest pension who had not worked for 14 years. (R., pp. 488, 1297-1298, 2188, 1469-1476, 2322-2328). His first wife had divorced him, and he lived in a rental unit near one of Clara's relatives. He brought no assets to the marriage. He saw his two grown children, Laurie and Dennis, infrequently. His retirement income never exceeded \$30,000 per

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<sup>2</sup> Petitioner incorporates herein the facts contained in the Statement of the Case above.

year. (R., pp. 487-489, 1469, 2188). Dennis had never known his father to make a gift of anything to anyone. (R., pp. 502-503).

In 1994 when Clara entered the nursing home where she remained for the rest of her life, she scored 6 of 30 on a mini-mental status test. (R., pp. 1297-1298). Her closest surviving relatives, nephew Charles Gordon and his wife Barbara, observed that Clara remained totally incompetent from her entry in the nursing home until she died. (R., p. 2323).

In 1995, George engaged Wagener attorney Jackie Busbee to prepare a POA to take to Clara at the nursing home. Busbee had not prepared Clara's will and did not represent her. Busbee did not speak to Clara or witness the POA. (R., pp. 341, 978). Busbee admitted that Clara's competency would be an issue. (R., p. 341).

Except for George's right to live in Clara's home for life, George and Clara each excluded the other from their estate plans. Clara's will was prepared by Aiken attorney Arthur Rich. (R., p. 1751). George's will was prepared by Busbee, who was named George's PR. (R., p. 2342). His POA named her as his agent. (R., p. 2342).

Under Clara's will, Charles was to become PR after George died and:

At the death of my husband, I will and direct that [her home] be sold and the proceeds divided [among Gordon family members]. (R., pp. 1748 – 1751).

George was appointed PR of Clara's estate on July 5, 2000. He engaged Busbee to help in the administration of the estate. He signed a broad authorization for her to receive financial information and anything else he could receive. (R., pp. 1358, 2286-2291).<sup>3</sup>

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<sup>3</sup>George's application to be Clara's PR stated certain additional information was "to be supplied once access

On April 25, 2000, George entered Clara's safe deposit box.<sup>4</sup> (R., p. 1405). His petition for appointment noted that additional information would be provided after inventory of the safe deposit box. (R., p. 1299).

From 2000 until George's death on January 18, 2003, Busbee handled volumes of Clara's financial information, including 1099 forms and other records. She worked with George and tax-preparer, Ruth Nagy. Busbee and Nagy worked on spreadsheets showing the many accounts reported in Clara's name and social security number. (R., pp. 1579-1593). On September 21, 2000, George transferred a \$33,309.87 Wachovia account belonging to Clara's estate to himself.<sup>5</sup>

In October 2000 and throughout the administration, Busbee sought numerous extensions both for filing the Inventory and Appraisement ("I&A") and filing accountings. (R., pp. 1399, 1706, 1708, 1711, 1402).

On December 6, 2000, Clara's first I&A asserted that Clara had only \$70,259.34 in bank accounts. The Wachovia CD was not included. The figure was wholly

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to safe deposit box is gained." (R., p. 199).

<sup>4</sup> Clara's safe deposit box, which she last entered in 1992, contained original CDs, passbooks and information about more than 30 accounts; a key to another safe deposit box; and information about Clara's gifts and inheritances from three deceased husbands. (R., pp. 1306-1333, 1484-1489).

<sup>5</sup> Busbee and George never put the Wachovia account on any Inventory & Appraisement ("I&A") for Clara's estate. Twelve years after Clara's death Busbee is holding it for Laurie and Dennis, George's beneficiaries. (R., p. 1359) [Ex.89. R. 468 - 469]. Six years later, asserting that Clara's account belonged to George, Busbee argued that the account was an IRA, even though it was not. (R., p. 740). The account was created while Clara was still Carter - before IRAs were created in 1974. Further, there have been no withdrawals for the 26 years before Clara died, as would have been required of an IRA.

inconsistent with the records showing her holdings to be much greater.<sup>6</sup> (R., pp. 2543-2547, 1721-1726).

On May 31, 2001, George re-entered Clara's safe deposit box. (R., p. 1405). On October 21, 2001, at Busbee's direction, Smith Barney closed Clara's \$144,000 account and issued checks to beneficiaries. They remained in Busbee's office for six months, becoming stale. The beneficiaries were not notified. On December 6, 2001, Busbee's office directed a bank to convert one of Clara's CD's to cash. (R., p.2293). Despite all of this, no estate account was ever opened. (R., p. 362).

On June 4, 2002, Busbee's office asked Smith Barney to reissue the \$144,000 in stale checks. (R., pp. 2530-2537). In 2002, George transferred about \$130,000 to Laurie. (R., p. 2380). On December 12, 2002, a telephone request was made to Security Federal for George's records of Account No. ... 491. Over 70 pages of information were provided. It showed that, in the last half of 2002 alone, \$179,190.76 had gone through the account. (R., pp. 1411-1888, 1885-1959). At Christmas 2002, Dennis learned of the loans to Laurie.

On January 18, 2003, George died. From January 19 to January 23, 2003, Laurie stayed in Clara's house at the invitation of Charles. While there, Laurie destroyed George's bank records and threw Clara's financial records in the garbage. (R., p. 2329). Without telling Charles, she took home the 2000 tax return and a report George had prepared referring to Clara's " ring and jewelry stolen. (R., pp. 391, 475-476, 2381).

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<sup>6</sup> On October 16, 2001, a supplemental I&A for Clara's estate showed \$85,543.21 of bank accounts. (R., pp. 1727-1733, 2551-2584). On January 9, 2002, George signed Supplemental I&A No. 2. Clara was shown as owning \$163,998.16 in bank accounts.

With Charles in town, but without telling him, Laurie took Clara's safe deposit key to Busbee. (R., p. 474). On Dennis Burch's unauthorized signature, Busbee, Laurie, and Dennis gained access to Clara's safe deposit box at Security Federal. (R., pp. 473-475, 1404). After Laurie left, Charles and Barbara recovered Clara's 1994 tax return and other records from the garbage at Clara's home. (R., p. 384). The return showed Clara's income for 1994 was \$55,652. This was about twice her annual nursing home costs. (R., p. 2282).

On January 24, Busbee became PR for George. She was also statutory PR for Clara's estate under S.C. Probate Code §62-3-609, which required her to protect and deliver Clara's assets to her successor PR, Charles Gordon. Busbee's dual role as fiduciary for both George's and Clara's estates lasted for more than a month as she sought to prevent Charles' appointment as PR and evaded repeated requests to deliver Clara's file to Charles.

On January 30, Charles sought appointment as Clara's PR, but was not appointed because Busbee advised the probate court no successor PR was necessary. According to the probate court clerk, Busbee said that Clara's estate was fully administered and "all money and property had been disbursed prior to Mr. Burch's death." (R., p. 1465). On February 5, Busbee obtained information about George's security Federal accounts. (R., p.1457).

On February 6, 2003, in her effort to prevent Charles' appointment, Busbee filed an incorrect I&A which George had signed in her office three months before his death. (R., pp. 1458-1464). This I&A did not include the Wachovia CD or the six accounts of Clara's that George had transferred improperly to himself in the last month of Clara's life.

When Probate Judge Roe directed that a hearing be held on Busbee's attempts to close the estate, Busbee relented and informed the Court that she did not oppose Charles' appointment. He was appointed PR the following day. (R., pp. 1481-1483). Despite repeated requests, Busbee refused to deliver Clara's file to Charles for more than a month.

On March 4, 2003, without notifying Charles, Busbee entered Clara's safe deposit box, signing as the court-appointed representative. She took the contents, closed the box, and signed a release of the bank. (R., p. 1408-1409, 1484). In April 2003, Busbee obtained from Security Federal the records which showed George's massive transfers in April of 2000. (R., pp. 1492-1552).

On May 13, 2003, Security Federal provided Busbee with additional information showing George's transfers to himself using the Busbee POA on which Busbee made handwritten notes. (R., pp. 2102-2150). On May 29, 2003, Busbee filed the I&A for George's estate which:

- a. failed to disclose insurance payable to Dennis and Laurie;
- b. claimed Clara's Wachovia funds for George's estate;
- c. claimed Clara's Security Federal Accounts for George;
- d. failed to disclose the loans to Laurie that she knew about as an asset (R., pp. 1638-1645).

On October 28, 2003, Charles filed a detailed affidavit with documentation to Busbee of the income, expenses and assets of both Clara and George from 1994 to 2003, George's transfers to himself, and the \$375,968 of unauthorized transfers under the Busbee POA, including the \$235,000 to Laurie.

In February 2004, Busbee, as George's PR, sought sanctions against Charles and his counsel for bringing the suit to recover Clara's funds. She refused repeated requests that she resign. (R., pp. 94-96).

Charles and Barbara Gordon continued to provide Busbee with all information they got about what George took. (R., pp. 2426-2511).

Busbee has never revealed how much insurance George left to Laurie and Dennis. She continues to hold the Wachovia and Security Federal accounts for George's estate. (R., pp. 2587-2596, 2630-2635).

Almost 12 years after Clara's death, none of her funds have been returned.

## ARGUMENTS

### **I. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S GRANTING DIRECTED VERDICT IN FAVOR OF RESPONDENT BUSBEE, INDIVIDUALLY AND AS P.R., ON THE CAUSE OF ACTION FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY.**

#### **A. Standard of Review**

The standard for review of a motion for directed verdict is whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor. Jones v. General Electric Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998). This Court has held that a trial court must deny motions for directed verdict or judgment notwithstanding the verdict "when the evidence yields more than one inference or its inference is in doubt." Steinke v. S.C. Department of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

**B. The Cause of Action for Aiding and Abetting Should Have Been Submitted to the Jury.**

There was sufficient evidence for the cause of action for aiding and abetting breach of fiduciary duty to go to the jury. The Opinion of the Court of Appeals erred in affirming the lower court's granting directed verdict on this cause of action as to Defendant Busbee, individually and as PR. There was both factual evidence and expert testimony presented by appellants to establish the elements of this cause of action. George Burch breached his fiduciary duties to his principal, Clara Burch, when he made improper transfers using his POA and in his capacity as PR of Clara's estate. There was evidence that Defendant Busbee participated in his breaches of fiduciary duty.

The defendant is liable for aiding and abetting the wrongdoing of another person, provided three elements are established: (1) a breach of fiduciary duty owed to the plaintiff; (2) defendant's knowing participation in the breach; and, (3) damages. Vortex Sports and Entertainment, Inc. v. Ware, 378 S.C. 197, 662, S.E.2d 4 (Ct. App. 2008); see also Future Group II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1995); Josephine T. Willis, To Be or Not To Be: The Future of Aider and Abettor Liability in South Carolina, 51 S.C.L.Rev. 387 (2000), summarizing Restatement of Torts 2d §876(b) (1979).

The Opinion of the Court of Appeals has recognized that George Burch breached his fiduciary duties owed to Clara by use of a POA and, after her death, as her personal representative. There is evidence in this record that Defendant Busbee had knowledge of the wrongful acts in at least one instance before George died: the Wachovia certificate of deposit (R., pp. 1752-1755) on April 13, 2001. While the Estate of Clara Burch was open,

documents were faxed to Busbee from Wachovia Bank, pursuant to Busbee's request, which included date of death information on Wachovia certificate #117232 in the name of Clara G. Carter Burch. The fax reflected a date of death balance of \$32,427.66. (R., p. 1752). Notwithstanding that this certificate was owned solely by Clara as of her death and notwithstanding that Busbee learned this fact at least through this fax transmission from Wachovia Bank, Busbee did not list this CD as an asset of Clara Burch's estate. Instead, she listed those funds as an asset of the Estate of George Burch. (R., p. 1654). The documents reflected that George Burch had transferred this CD into his own name on September 21, 2000, over five months after Clara's death. (R., pp. 1755, 1638, 1654). This is sufficient evidence of active participation by Busbee for this cause of action to survive directed verdict.

There is also evidence that Busbee learned of more of George's improper transfers on January 22, 2003, based on documents given to her at that time by Laurie Burch. (R., pp. 358-366, 1410, 1602).

In addition to Busbee's knowledge of the Wachovia account at the time she was attorney for Clara's estate and was personal representative of George's estate, she had duties to place these funds in Clara's estate. Busbee reasonably should have known of the other acts of wrongdoing by George even before his death. Plaintiffs' expert witness, James Hardin, stated that it was a breach of the standard of care for Busbee not to look at the bank statements for the last month of Clara's life. (R., p. 510). He stated further that, if she had seen those statements, she would have known that over \$210,000 was transferred by George

out of Clara's accounts to himself in the last 10 days of Clara's life<sup>7</sup> (R., pp. 510-511). There is sufficient evidence that Busbee substantially assisted George, the primary violator, in the commission of a wrongful act. Busbee's placement of the \$33,000 in the Wachovia CD as an asset on the Estate of George Burch's inventory, when it should have been listed on Clara's estate inventory, was substantial assistance to George in breach of his fiduciary duties. Mr. Hardin testified that the fiduciary of Clara's estate had a duty to retrieve the assets in George's estate. (R., p.547). Because Busbee was PR of the estate that was inappropriately holding Clara's assets, she would "be, in effect, making a claim against herself..." (R., p. 547).

Busbee also participated in George's wrongful acts by filing on February 6, 2003, after George's death, the third supplemental inventory and appraisal of the Estate of Clara Burch dated and signed by George on October 1, 2002. (R., pp. 1458-1464). This filing did not list the Wachovia account or any other of Clara's assets which had been converted by George. At the time that Busbee filed this document after George's death, she was not only PR of George's estate, but she was also the fiduciary of Clara's estate under S.C. Code §62-3-609.<sup>8</sup>

In the Vortex case, the Court of Appeals ruled that the trial court properly denied the defendant's motion for directed verdict on plaintiff's cause of action for aiding and abetting a

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<sup>7</sup>In a filing in the Probate Court in Aiken County in June 2000, Busbee acknowledged that Clara owned a safe deposit box to which she would get access. (R., p. 1299). The safe deposit box contained voluminous records of Clara's assets which were not accounted for by George. (R., pp. 1334-1335, 1484-1489). These assets were converted by George, and Busbee should have reasonably known this.

<sup>8</sup>This code section provides that when a PR dies: "the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate...and shall account for and deliver the estate assets to a successor...personal representative...."

breach of fiduciary duty. The defendant had argued that a plaintiff had not produced evidence that the defendant had knowingly assisted or participated in the attorney's breach of fiduciary duty. The Court of Appeals rejected that argument. It noted that the defendant was aware that attorney Ware was one of the partners and the attorney for the plaintiff, and that Ware had certain financial obligations to the plaintiff. This constituted evidence that the defendant aided and abetted Ware's breach of fiduciary duty.

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

Professor Freeman pointed out that, as fiduciary for Clara's estate, Busbee had a duty to protect, preserve and look after Clara's estate which was a "clear cut obligation." (R., p. 828). At the same time, Busbee as PR of George's estate, had money that was wrongfully taken from Clara and, that being the case, needed to be returned to Clara's estate. (R., p.

828). Freeman then pointed out that when Clara's estate brought suit "to get to the bottom of things," Attorney Busbee's position was to seek sanctions (R., p. 94) and to accuse plaintiffs of frivolous bad faith. (R., pp. 829, 94). Professor Freeman noted that Busbee benefits from her actions by being paid out of an estate from which, as a fiduciary, she had an obligation to recover money. Professor Freeman characterized Busbee's position as "rampant...flagrant, impermissible conflicts of interest." (R., p. 829).

For years, Busbee has sought to aid George and his estate to retain Clara's assets, notwithstanding the fiduciary duties she owed as fiduciary for Clara's estate under §62-3-609. She entered Clara's safe deposit box after George's death without notifying Charles Gordon, PR for Clara's estate. Busbee did not use what she found to help Clara's estate but to protect George, who had breached his fiduciary duties as POA for Clara and as her PR.

These actions by Busbee constituted sufficient evidence to make her an aider and abettor. In affirming the lower court's granting a directed verdict on this cause of action, the Court of Appeals overlooked this evidence. The Court of Appeals erred in affirming the directed verdict in favor of Respondent Jacqueline Busbee on the cause of action for aiding and abetting breach of fiduciary duty and in denying appellants' motion for new trial.

**II. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S GRANTING DIRECTED VERDICT IN FAVOR OF RESPONDENT BUSBEE, INDIVIDUALLY AND AS P.R., RESPONDENT LAURIE BURCH, AND RESPONDENT DENNIS BURCH ON THE CAUSE OF ACTION FOR FRAUD/FRAUD BENEFIT UNDER S.C. CODE §62-1-106.**

The evidence established a false filing in the Probate Court by Defendant Busbee, individually and as PR, which damaged Clara's estate and benefitted the Estate of George Burch, its beneficiaries, and Busbee herself. This evidence was sufficient to establish a cause of action under S.C. Code §62-1-106 for fraud/fraud benefit. This statute allows persons injured by probate fraud (i.e., plaintiffs herein) to recover against "any person...benefitting from the fraud, whether innocent or not, but only to the extent of any benefit received...." (emphasis added).

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

The Court of Appeals affirmed the lower court ruling that there was no false representation by the respondents and that they did not benefit from any alleged fraud by George. This is erroneous. The "fraud benefit" statute provides a mechanism for recovery for those persons, particularly estate beneficiaries such as the plaintiffs in the instant case, who are injured by fraud perpetrated upon the court in a probate proceeding. Under S.C. Code §62-1-106, the fruits of the fraudulent conduct may be in the hands of innocent

persons, from whom recovery is possible, and the cause of action does survive, as it is part of the Probate Code.

A cause of action under S.C. Code §62-1-106 exists where a personal representative perpetrates a fraud on the court (“in connection with any proceeding”), files a false “statement under the Probate Code,” or uses fraud to “circumvent the provision or purposes of the Probate Code.” See Eoff v. Forrest, 789 P. 2d 1262 (N.M. 1990). In that case, an affidavit was filed and the Supreme Court of New Mexico found that the probate court had relied on it.

As pointed out in this Petition, Busbee gained knowledge in April 2001 that the Wachovia CD owned by Clara had been converted by George to his own benefit on September 21, 2000, while he was PR for Clara’s estate. She did not investigate the circumstances of this transfer of Clara’s CD by George to himself, and she filed a false Inventory in Clara’s estate which omitted this CD as an asset. (R., pp. 2566-2571). She also filed a false Inventory in George’s estate which included the Wachovia funds as George’s asset. As attorney for George’s estate, Busbee benefitted from this false filing (increased attorneys’ fee/commission). Respondents Laurie and Dennis Burch also benefitted as the sole beneficiaries of George’s estate.

Busbee also took actions, including filing a known false I&A, which provided evidence that would support finding that she perpetrated or benefitted from the fraud. Her filing of a false I&A in order to prevent the appointment of a PR who was required to be appointed under the will, and telling the Court the estate was fully administered, thus, requiring no successor, meet the provisions of §62-1-106.

In the instant case, the filings of Busbee as personal representative of George's estate made claim to assets in George's estate which belonged to Clara's estate to which she also was a fiduciary under S.C. Code §62-3-609. The jury could have concluded that such filing was false and a "fraud on the court."

Laurie clearly either participated in or benefitted from George's takings, or both.

The Court's analysis as to Dennis – who has not yet received the funds George took and gave to Dennis under his will – presents a novel question. While Clara's money has not yet been put in his hands, under the Probate Code, he is the determined owner. This should be adequate to charge him with benefitting from the fraud to the extent that George's estate funds are allocated to him.

Clara's estate and its beneficiaries have been injured by the fraud, and respondents have benefitted. It was error for the Court of Appeals to affirm the ruling of the lower court granting directed verdict on the plaintiffs' cause of action under S.C. Code §62-1-106.

**III. THE SUBSTITUTED OPINION OF THE COURT OF APPEALS ERRED IN DIRECTING THE LOWER COURT ON REMAND TO DETERMINE "WHETHER" INTEREST SHOULD BE AWARDED ON THE \$193,303. SINCE INTEREST SHOULD BE AWARDED AS A MATTER OF LAW, THIS PORTION OF THE OPINION SHOULD BE REVERSED.**

Under the ruling of the Court of Appeals, the lower court erred in not granting a directed verdict in favor of the plaintiffs in the amount of \$193,303.03 (exclusive of interest).

Through improper use of a POA during April and acting as PR in September 2000, George Burch transferred funds from seven accounts or certificates of deposit owned by Clara Burch for his own benefit. These seven accounts were withdrawn on specific dates, and the specific

balances in each account and/or certificate of deposit were clearly identified from the exhibits at trial.<sup>9</sup>

The applicable statute regarding legal interest or prejudgment interest is S.C. Code §34-31-20(A) which provides as follows:

“(A.) In all cases of accounts stated and in all cases, wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths per cent per annum.”

The language of this statutory provision is mandatory.

The amended complaint of plaintiffs specifically asked for prejudgment interest. (R., p. 117). Instead of remanding this matter to the lower court for a determination and calculation of the exact amount of the interest, the Court of Appeals remanded the case to the circuit court for a determination “of whether and in what amount interest will be due to the plaintiffs on these sums.”<sup>10</sup> (emphasis added). This was error, as all of these improper transfers by George Burch were in liquidated amounts and for “sums certain.” On remand, the lower court should be instructed to calculate the amount of prejudgment and post-

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<sup>9</sup>The following funds were taken from Clara’s estate are all referenced on Plaintiffs’ Exhibit 6 (R., p. 1334):

- (1) \$79,495.11 and \$4,778.46 were withdrawn by George from two of Clara’s accounts at Security Federal on April 13, 2000. (R., p. 1334).
- (2) \$20,026.41 was received by George when he closed Clara’s account at Security Federal on April 17, 2000. (R., pp. 1334).
- (3) \$39,552.98, \$6,235.99, and \$9,904.21 were withdrawn by George from three of Clara’s accounts at Community Bank on April 17, 2000.
- (4) \$33,309.87 was received by George when he closed Clara’s Wachovia’s c.d. (Acct. #117232) on September 21, 2000. (R., pp. 1753-1755).

The total amount of these transfers was \$193,303.03.

<sup>10</sup>The original Opinion of the Court of Appeals, filed on August 31, 2011, correctly remanded this matter to the lower court “for a determination of the interest that will be due to the plaintiffs on these sums.” (emphasis added). Id. at p. 6.

judgment interest on \$193,303.03 from the date(s) when they were improperly transferred<sup>11</sup>.

In Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), this Court held that a shareholder who paid a corporate note pursuant to his personal guaranty was entitled to an award of prejudgment interest from the defendant, his fellow shareholder, because the measure of recovery was fixed by conditions existing at the time the claim arose. Id. at p. 791. In Babb, the Court reversed the lower court's denial of prejudgment interest because the claim was for a sum certain or capable of being reduced to certainty. Also Keane v. Lowcountry Pediatrics, P.A., 641 S.E.2d 53 (Ct. App. 2007) (prejudgment interest in breach of fiduciary duty case was allowed on an obligation to pay money from the time when the payment is demandable, if the sum is certain or capable of being reduced to certainty).

In the instant case, the case for prejudgment interest is even more compelling. The improper transfers were made on specific dates, and the account balances on those dates were ascertainable to the penny. Under §34-31-20, these accounts that George Burch transferred to himself should draw interest at the rate of 8 ¾% per year from the date of the transfer. This is a mathematical computation.<sup>12</sup>

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<sup>11</sup> It is important for this Court to address this issue because it will avoid another appeal. Interest on \$193,303 should be determined by the lower court as a matter of law. The lower court should not be misled into assuming that this issue is in doubt. The transfers were made nearly 12 years ago. This case is now nine years old and has been appealed once before.

<sup>12</sup> The plaintiffs also assert that, because the Court of Appeals has determined that the lower court erred in not granting a directed verdict in plaintiffs' favor on breach of fiduciary duty, judgment should have been entered in plaintiffs' favor per this opinion on October 7, 2007, which is the date that the motion for directed verdict was made. Pursuant to the provisions of S.C. Code §34-31-20(B), a judgment entered after July 1, 2005, draws interest at the annual rate prescribed in that statutory section, as set by the Supreme Court of South Carolina each January for the following year. Pursuant to 34-31-20(B), prejudgment interest is compounded annually.

The plaintiffs herein do not request that this Court make a determination of the amount of prejudgment and/or post-judgment interest which should be awarded by the lower court. Plaintiffs assert that this Court should reverse that portion of the opinion of the Court of Appeals which remands the case for a determination of “whether” interest should be awarded. The remand should direct the Court only to calculate and rule as to the amount of both prejudgment and post-judgment interest which should be awarded.

### CONCLUSION

For the reasons set forth herein, this Honorable Court should reverse the following rulings in the Opinion of the Court of Appeals

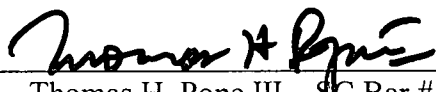
- (a) affirming the granting of directed verdict on the cause of action for aiding and abetting breach of fiduciary duty as to Defendant Busbee;
- (b) affirming the granting of directed verdict on the cause of action for fraud/fraud benefit as to Defendants Busbee, Laurie Burch, and Dennis Burch; and,
- (c) directing the lower court on remand to determine whether interest should be awarded on the cause of action for breach of fiduciary duty in favor of plaintiffs against the Estate of George Burch.

This Court should reverse the Opinion of the Court of Appeals and remand the matter for a new trial as to the causes of action for aiding and abetting breach of fiduciary duty and for fraud/fraud benefit under S.C. Code §62-1-106. It should direct the lower court, on remand of the ruling in favor of plaintiffs against the Estate of George Burch on

the cause of action for breach of fiduciary duty, to determine the amount of interest due plaintiffs on the improper transfers.

Respectfully submitted,

**POPE AND HUDGENS, P.A.**

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March 5, 2012

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

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

v.

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

**PROOF OF SERVICE**

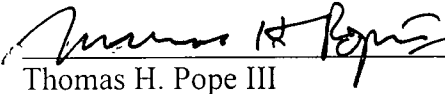
On behalf of the above petitioners, the undersigned hereby certifies that he has served the  
Petition for Writ of Certiorari dated March 5, 2012 in the above case on each of the  
following counsel for respondents by depositing copies in the United States Mail,

postage prepaid, properly addressed to each of the following counsel on the 5<sup>th</sup>  
day of March 2012:

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March 5, 2012