

**THE STATE OF SOUTH CAROLINA**

**In the Supreme Court**

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Appeal from Aiken County  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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**RECEIVED**

APR - 3 2012

Case Number 2003-CP-02-0604

S.C. Ct. App. Op. No. 4880

Withdrawn, Substituted & Refiled January 4, 2012

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**S.C. Supreme Court**

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

Petitioners/Respondents,

v.

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

Defendants,

Of Whom Jacqueline F. Busbee, as Personal Representative  
of the Estate of George E. Burch, is

Respondent/Petitioner.

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**Petition for a Writ of Certiorari  
on behalf of Jacqueline F. Busbee, as Personal Representative  
of the Estate of George E. Burch**

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in reversing the judgment entered on the jury's verdict in favor of the Defendant Estate of George Burch and directing a verdict in favor of the Plaintiff Estate of Clara Burch on claims to set aside certain transfers of funds made by George Burch, as Attorney in Fact under a Power of Attorney, from his wife's bank accounts based on the rule established in Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430, 431 (1985), "barring a gift by any attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing"?

- I. Is there sufficient evidence in the record to support a reasonable inference by the jury that the transfers were non-gift transfers outside the Fender Rule?
- II. Can the Court of Appeals retroactively apply its new expansion of the Fender rule to invalidate the non-gift transfers made by George twelve years ago?

### Additional Sustaining Ground

- III. Should the Plaintiffs be allowed to recover on a directed verdict based on a technical application of the newly expanded Fender rule when the Plaintiffs' theory of the case was based on accusations that George Burch was a crook that stole the money from his wife?

## **CERTIFICATION OF COUNSEL**

Counsel for the Petitioner certifies that the Appellants/Plaintiffs filed a Petition for rehearing on September 13, 2011, and the Respondents/Defendants Jacqueline F. Busbee as Personal Representative of the Estate of George E. Burch, and Laurie Burch and Dennis Burch filed a Petition for Rehearing on October 3, 2011.<sup>1</sup> (Rev. App. 17; 53.) The Court of Appeals granted both petitions, in part, by Order dated January 4, 2012, and issued a substituted opinion on January 4, 2012. (Rev. App. 79, 91.)

## **STATEMENT OF THE CASE**

This action arises out of financial transfers and transactions relating to the assets and probate estates of Clara Gordon Burch and her husband, George Burch. More specifically, it is a dispute between the devisees named in Clara's last will and the devisees named in George's last will.

Clara died on April 19, 2000, and George died on January 18, 2003. Pursuant to Clara's will, George was appointed as personal representative of Clara's estate. After George died, Clara's nephew, Charles Gordon, was appointed as successor personal representative of Clara's estate. Pursuant to George's will, Defendant Jacqueline Busbee was appointed as personal representative of George's estate.

After George died, Charles Gordon, as the personal representative of the estate of Clara Gordon Burch<sup>2</sup> commenced an action in Probate Court against George's estate,

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<sup>1</sup> Defendants were granted an extension for filing their Petition for Rehearing through October 3, 2011.

<sup>2</sup> Barbara Gordon was later appointed as co-personal representative and added to the caption of the case by order of June 14, 2007. (R.p. 46.)

George's children (Laurie Burch and Dennis Burch), and Jacqueline Busbee, in her capacity as personal representative of George's estate and in her individual capacity as attorney. (R.p. 60, Complaint, filed April 15, 2003.) The action was removed to Circuit Court by order of April 28, 2003. (R.p. 58.)

Plaintiff filed an amended complaint on August 18, 2004. (R.p. 97.) Causes of action are asserted against George and his estate for fraud, civil conspiracy and breach of fiduciary duty. (R.p. 97-118.) Legal causes of action are alleged against Busbee, in her capacity as personal representative of George's estate, for simple and/or gross negligence, breach of fiduciary duty, fraud, civil conspiracy, tortious interference with expected inheritance rights, and conversion. (R.p. 97-118.) Legal causes of action also are asserted against Ms. Busbee, individually, stemming from her legal representation of George in matters preceding Clara's death and her representation of George with respect to his service as personal representative of Clara's estate; those include causes of action for simple and/or gross negligence, aiding and abetting George's alleged wrongdoing, breach of fiduciary duty, professional negligence, fraud, civil conspiracy, tortious interference with expected inheritance rights, and conversion. (R.p. 97-118.) In addition to alleging legal causes of action seeking damages, the Plaintiffs also alleged causes of action against Busbee, as personal representative of George's Estate, seeking equitable relief in the forms of accounting, constructive trust, and removal of Busbee as personal representative of George's Estate. (R.p. 97-118.)

The legal causes of action alleged against Defendants Laurie and Dennis Burch, George's children and devisees, are simple and/or gross negligence, fraud, civil conspiracy, tortious interference with expected inheritance rights, conversion, and

fraudulent conveyance as against Defendant Laurie Burch. (R.p. 97-118.)

The Defendants deny any wrongdoing. (R.p. 71-93; p. 119-140; Answers.)<sup>3</sup>

The matter came for trial on October 1-11, 2007. At the beginning of the trial, the trial judge ruled that the causes of action seeking equitable remedies against Busbee, as personal representative, would be decided by the court following the jury's verdict. At the close of Plaintiffs' case in chief, various directed verdict motions were made by the Defendants. The colloquy between judge and counsel appears in the Record. (R.p. 869, l. 18 to p. 897, l. 10.) The trial judge ruled as follows:

- As to Dennis Burch, directed verdict granted on all causes of action. (R.p. 897, l. 11-14).
- As to Laurie Burch, directed verdict granted on all causes of action, 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, l. 14-21.)
- As to Jackie Busbee, individually and as attorney, directed verdict granted as to aiding and abetting, fraud, conspiracy, conversion, and intentional interference with inheritance rights. (R.p. 898, l. 10-25). As to negligence and professional malpractice, the motion for directed verdict was denied. (R.p. 897, l. 22 to p. 898, l. 9).
- With respect to Jackie Busbee in her capacity as personal representative of the

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<sup>3</sup> The Defendants made a motion to dismiss the claim on grounds of procedural deficiencies, which motion was granted by the Circuit Court. On appeal to the Court of Appeals, the dismissal was reversed and the case was remanded to where the action proceeded to trial. Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

Estate of George Burch, directed verdict was granted as to all legal causes of action except conversion, for which the estate still had to defend George's actions prior to his death and the appointment of Busbee as personal representative (R.p. 899, l. 1-8).

- With respect to Plaintiffs' claim for punitive damages, directed verdict was granted to the Defendants, except as against the Estate of George Burch. (R.p. 899, l. 12-16; p. 906, l. 15-19; and Special Verdict Form at R.p. 2701-2702).

The Court summarized the result as leaving the malpractice/negligence/breach of fiduciary duty causes of action against Busbee, individually; and leaving the causes of action for negligence, breach of fiduciary duty, fraud and conversion against the Estate of George Burch (not Busbee as PR) with punitive damages still in the case as to the Estate of George Burch. (R.p. 903, l. 12 to p. 904, l. 8).

At the close of all of the evidence, various motions were made and ruled upon as follows:

- Plaintiff's motion for directed verdict as to all transfers made by George from Clara's accounts after June 30, [1995]<sup>4</sup> was denied. (R.p. 1149, l. 12 to p. 1153, l. 25).
- Defendant's motion for directed verdict as to punitive damages was revisited, and the Court refused to change its earlier decision on punitive damages, leaving punitive damages in the case only as to claims made against the estate of George Burch. (R.p. 1154, l. 7 to p. 1156, l.17).

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<sup>4</sup> This is the date that Plaintiffs maintain that Clara became incapacitated. (R.p. 1260, ll. 16-18.)

- Busbee, individually, moved for directed verdict on the malpractice/breach of fiduciary duty claim. (R.p. 1157, l. 3 to p. 1160, l. 12). The motion was denied. (R.p. 1160, l. 24 to p. 1161, l. 3).
- The Estate of George Burch moved for directed verdict as to the fraud cause of action. (R.p. 1161, l. 4-21). The motion was denied. (R. Vol. II, p. 1161, l. 22-23).
- Busbee, as personal representative, moved for dismissal of the claim for removal of Busbee as personal representative. (R.p. 1161, l. 24 to p. 1162, l. 12). The Court reserved ruling on the motion until the equitable causes of action were to be considered by the Court following the jury's verdict on the legal causes of action. (R.p. 1162, l. 13-16).

The jury was charged on the claims against Ms. Busbee for legal negligence and breach of fiduciary duty and claims against George's Estate for breach of fiduciary duty, negligence, conversion, and fraud. (R.p. 1271-45). At the conclusion of the nine-day trial, the jury returned a general verdict in favor of the Defendants on all causes of action submitted to them for decision. (R.p. 2701-2702 and R.p. 1252, l. 3 to 1253, l. 20).

Following announcement of the verdict, the court granted the Plaintiffs ten days to submit post-trial motions. On October 18, 2007, Plaintiffs served a Motion for Judgment Notwithstanding the Verdict, In the Alternative for New Trial, and For Equitable Relief. (R.p. 140-151). By Order dated May 20, 2008, Plaintiffs' post-trial motions were denied. (R.p. 6-45).

By written motion dated and served June 2, 2008, Plaintiffs moved the court to reconsider its Order dated May 20, 2008, which denied their post-trial motions. (R.p.

197-200). By Order dated September 30, 2008, the motion for reconsideration was denied. (R.p. 1-5). Plaintiffs timely appealed both the May 20, 2008 Order denying their post-trial motions and the September 30, 2008 order denying their motion for reconsideration.

The Court of Appeals issued an opinion on August 31, 2011, affirming in part, reversing in part, and remanding. [Rev. App. 1-16.] The Court agreed, in part, with the Plaintiffs that the trial court erred in denying their motion for a directed verdict on the claims concerning transfers George made after Clara became incompetent in 1995; more specifically, the Court held that certain transfers made in April 2000 by George (from accounts in Clara's name to accounts in his name) were improper under the rule set forth in Fender v. Fender, 285 S.C. 260, 262, 329 S.E.2d 430, 431 (1985), because the Power of Attorney executed by Clara in 1994 did not have a gifting provision. The Court ordered that the matter be remanded for these funds to be returned to the Plaintiffs and the trial court to determine the interest that will be due to the Plaintiffs on these sums. [Rev. App. 6.] As to all other issues, the Court of Appeals disagreed with the Plaintiffs' assertions of trial court error and affirmed the judgments in favor of Dennis Burch and Laurie Burch, Jacqueline Busbee, individually and as Personal Representative.

On petitions for rehearing by both Plaintiffs and Defendants, the Court withdrew its prior opinion and issued a substituted opinion in which the Court held, as a matter of law, that the Plaintiffs were entitled to funds George had transferred after Clara's death<sup>5</sup>;

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<sup>5</sup> "\$33,309.87, received by George upon the closing of Wachovia CD Account # 117232 in September of 2000 [after Clara's death], constitutes an improper transfer." [Rev. App. 83.]

and the Court also clarified that the remand allows the trial court to determine “whether and in what amount interest will be due to the Plaintiffs on these sums.” [Rev. App. 83.]

This petition is made by the Personal Representative of George’s Estate as to the claims against the Estate based on transfers of funds made by George, in April 2000, as Attorney in Fact under a Power of Attorney executed by Clara in 1994. To differentiate these claims from those against the PR for her own actions, the Respondent/Petitioner will be referred to herein as the Estate.

### **STATEMENT OF THE FACTS<sup>6</sup>**

Herein the Petitioner Estate of George Burch will set forth relevant evidence regarding the transfers at issue in this Petition. The evidence at trial, fairly summarized and viewed in the light most favorable to the Defendants and which obviously persuaded the jury to its verdict, established that George E. Burch and Clara G. Burch were married on July 30, 1984. (R.p. 375, l. 5-8). At that time Clara was approximately 75 years of age (R.p. 375, l. 12-13), and George was approximately two months from his 70<sup>th</sup> birthday. (R.p. 405, l. 23 to p. 406, l. 3). At the time of Clara’s death on April 19, 2000, they had been married for 17 years. Clara had no children. (R.p. 370, p. 16-17). George had two children from his prior marriage – Defendants Laurie Burch and Dennis Burch. (R.p. 375, l. 5-11; and Amended Complaint paragraph 12 at R. p. 99).

On January 22, 1985, Clara executed her Last Will and Testament<sup>7</sup>, which named George as her personal representative. (Amended Complaint ¶15 at R.p.99-100; R.p.

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<sup>6</sup>References to evidence in the record are not intended to reflect all evidence with respect to the particular “fact.” It is intended to satisfy the requirement that factual findings be supported by some evidence.

<sup>7</sup> The will was not prepared by Defendant Jacqueline Busbee.

696, l. 23-25.) Nine years later, in October 1994, Clara began residing in a retirement home in North Augusta. (R.p. 378, l. 19-24). In February 1995, George asked Ms. Busbee, an attorney in Wagener, to draft a power of attorney for Clara's signature, naming George attorney-in-fact, to assist him in taking care of his wife. (R.p. 977, l. 21 to 978, l. 2). Ms. Busbee drafted the power of attorney, which did not contain a gifting provision. (R.p. 1745-1747). Ms. Busbee did not participate in the execution of the power of attorney (R.p. 978, l. 11-19); rather, she gave George instructions on the proper execution. Clara executed the power of attorney on February 27, 1995, with two employees from the retirement home signing as witnesses. (R.p. 1745-1747).

In April 2000, shortly before Clara died, George transferred funds from accounts held in the joint names of Clara and George, and from accounts solely in Clara's name. Various amounts were transferred into accounts in joint names of Clara and George, and into accounts in George's name only. (R.p. 1335-1354 and 1359-1360). The Plaintiffs' accounting witness testified that, in her estimation, George had misappropriated approximately \$450,000. However, she admitted that she had not conducted an audit or a forensic accounting and she had not examined the banks' signature cards to confirm that all the accounts were in Clara's sole name, but relied upon 1099s from their tax returns. (R.p. 766, l. 5 to 767, l. 23).

Bank records established that, in fact, some of the transfers involved accounts in their joint names. (R.p. 771, l. 9 to 772, l. 9 and p. 802, l. 9 to 809, l. 3). The transfers at issue from Clara's accounts into accounts in George's name are:

- (1) \$79,495.11 and \$4,778.46 withdrawn from two of Clara's accounts at Security Federal on April 13, 2000;

(2) \$20,026.41 received upon the closing of one of Clara's accounts at Security Federal on April 17, 2000;

(3) \$39,552.98, \$6,235.99, and \$9,904.21 withdrawn from three of Clara's accounts at Community Bank<sup>6</sup> on April 17, 2000.

### **Summary of Argument**

The issues presented for review in this petition center on the rule set by the Supreme Court in Fender v. Fender, “barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing.” 285 S.C. 260, 329 S.E.2d 430, 431 (1985). The POA, by which Clara named George as her attorney in fact, did not contain a gifting provision. In April 2000, George, acting as attorney in fact under that POA made a series of transfers in question, including certain transfers from accounts in Clara’s name to accounts in George’s name. The Plaintiffs moved for a directed verdict, arguing that all the April 2000 transfers should be returned to Clara’s estate because George had transferred the funds without Clara’s permission. The trial court denied the motion and submitted the claim to the jury, which returned a verdict for the Defendants on each and every claim submitted.

The Court of Appeals ruled that the trial court erred in denying the Plaintiffs’ motion for a directed verdict, holding that the existence of any oral agreement between Clara and George was insufficient to authorize the transfers because the Fender rule “mandated a grant of directed verdict on transactions which the evidence demonstrated Clara’s solely-owned assets were transferred by George for his sole benefit.” [Rev. App. 6.] The Court of Appeals held that the funds George transferred in April 2000 from Clara’s accounts to accounts in his name, as identified above, should be returned to the

Plaintiffs.

The Respondent/Petitioner Estate of George Burch submits that there are special and important reasons to review the decision of the Court of Appeals. Rule 242(b), SCACR. First, while the rule established in Fender barred George from making a gift to himself, there is evidence to create a jury question as to whether the transfers were non-gift transfers. Second, to the extent that the Court of Appeals has expanded the Fender Rule to bar non-gift transfers, that new rule should not be applied retroactively to invalidate the non-gift transfers made by George twelve years ago. Third, in the alternative, the judgment on the jury's verdict should be sustained on the additional ground of invited error because the Plaintiffs' theory of the case was based on accusations that George Burch was a crook who stole the money from his wife, which theory the jury clearly rejected.

## ARGUMENT

**THE COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT ENTERED ON THE JURY'S VERDICT IN FAVOR OF THE DEFENDANT ESTATE OF GEORGE BURCH AND DIRECTING A VERDICT IN FAVOR OF THE PLAINTIFF ESTATE OF CLARA BURCH ON CLAIMS TO SET ASIDE CERTAIN TRANSFERS OF FUNDS MADE BY GEORGE BURCH, AS ATTORNEY IN FACT UNDER A POWER OF ATTORNEY, FROM HIS WIFE'S BANK ACCOUNTS BASED ON THE RULE ESTABLISHED IN FENDER V. FENDER, 285 S.C. 260, 329 S.E.2D 430, 431 (1985), "BARRING A GIFT BY ANY ATTORNEY IN FACT TO HIMSELF OR A THIRD PARTY ABSENT CLEAR INTENT TO THE CONTRARY EVIDENCED IN WRITING."**

### *Directed Verdict Standard*

When considering a directed verdict motion, the trial court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (citing *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)). "If more than one reasonable inference can be drawn ... the case should be submitted to the jury." *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d

521, 523 (1965) (citing *Mahon v. Spartanburg County*, 205 S.C. 441, 449, 32 S.E.2d 368, 371 (1944)). The trial court should be “concerned only with the existence or nonexistence of evidence,” not its credibility or weight. *Jones v. General Elec. Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) (citing *Garrett v. Locke*, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct.App.1992)).

South Carolina Fed. Credit Union v. Higgins, 394 S.C. 189, 714 S.E.2d 550, 552 (2011).

On appeal from the denial of a motion for a directed verdict, the appellate court may only reverse if there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law. *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 613 S.E.2d 757 (Ct.App.2005); *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 521, 548 S.E.2d 880, 884-85 (Ct.App.2001). The rule in South Carolina is that on motions for nonsuit, directed verdict, JNOV, and new trial, the evidence and all reasonable inferences which have to be drawn from it must be viewed in a light most favorable to the nonmoving party and if there is any testimony tending to prove allegations of the complaint, the motions must be refused. This rule is especially strong in South Carolina where the “scintilla of evidence rule” is applied. *Sweatt v. Norman*, 283 S.C. 443, 446, 322 S.E.2d 478, 480 (Ct.App.1984). If there is any evidence, which could support the jury's findings [...], then the motions for directed verdict, JNOV, and new trial were properly denied. *Cf. Jackson v. S.C. Dept. of Corrections*, 301 S.C. 125, 127, 390 S.E.2d 467, 468 (Ct.App.1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990).

Proctor v. Dept. of Health & Env'tl. Control, 368 S.C. 279, 628 S.E.2d 496, 504 (Ct. App. 2006).

This Court will reverse the trial judge's ruling only when there is no evidence to support the ruling or it is controlled by an error of law. *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 648 S.E.2d 585 (2007).

Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869, 873 (2011);

Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142, 148 (1999).

**I. There is sufficient evidence in the record to support a reasonable inference by the jury that the transfers were non-gift transfers.**

The rule established by this Court in Fender, pursuant to its unambiguous language, bars *gifts* made by an agent to himself when authority for the gift is not in writing: “Therefore, in order to avoid fraud and abuse, we adopt a rule barring a gift by any attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing.” 329 S.E.2d at 431. This rule established by the Court derives from the general, fundamental duties of an agent to his principal:

Absent intention to the contrary, an agent must further the principal’s interests. He may not use his authority in a manner hostile to the principal for the benefit of himself or a third party. 2A C.J.S. *Agency*, § 151, p. 773. It is incumbent upon the agent to act with the utmost good faith and loyalty. 3 C.J.S. *Agency*, § 271, p. 31. Effectively, absent express intention, an agent may not utilize his position for his or a third party’s personal benefit in a substantially gratuitous transfer. *See Estate of Rolater*, 542 P.2d 219 (Okla.App.1975); *Thompson v. Thompson*, 190 Ga. 264, 9 S.E.2d 80 (1940); *See also Aiello v. Clark*, 680 P.2d 1162 (Alaska 1984).

Fender, 329 S.E.2d at 431. The Fender Rule takes agent’s good faith and the principal’s express intention out of consideration and reduces the issue to a technicality in the written documentation. To the extent that the Rule creates a strict requirement it should, likewise, be applied strictly to *gifts*, and the agent/attorney in fact should be able defend by proof that he acted in good faith pursuant to the principal’s intent.

Accordingly, the Respondent/Petitioner Estate of George Burch submits that a non-gift transfer pursuant to an unwritten contract or agreement, and/or to accomplish a purpose that would benefit Clara or her estate, if sufficient evidence of such agreement or purpose is introduced, falls outside the bright-line rule drawn by this Court in Fender. At trial, the witnesses testified about this very subject of non-gift transfers, the jury was

charged on this point, and ultimately, from the general verdict, it must be concluded that the jury found that the transfers were not prohibited transfers. The Court of Appeals has improperly reversed the trial court rulings denying the Plaintiffs' motions for directed verdict and JNOV where, as the Court itself acknowledged, there was at least "slight" evidence showing an arrangement between Clara and George to allow him to make transfers to avoid estate taxes. In addition, as the trial court noted in its May 20, 2008 Order denying Plaintiffs' post-trial motions, there is evidence in the record of four possible good faith, non-gift explanations for George's conduct with respect to the bank account transactions:

ONE, the most cogent and compelling testimony on this point came from Attorney Steven Johnson, the probate expert offered by Defendant Busbee. Attorney Johnson testified that if the transfers were in consummation of some arrangement or contractual agreement between Clara and George, the absence of a gifting clause in the power of attorney would not invalidate the transfers because the transfers would not be in the form of gifts. (R.p.1042, l. 4 to 1044, l. 2). In fact, through their testimony and statements attributed to them, the Plaintiffs gave credence to the existence of the "arrangement". (R.p. 429, l. 6 to 431, l. 7 and p. 1087, l. 13 to 1088, l. 22). Evidence indicated that Plaintiff Barbara Gordon said shortly after Clara's death that Clara did not leave her house to George but "that Clara had settled a good sum of money on [George] instead." (R.p. 1087, l. 23 to 1088, l. 19). Further, the Plaintiffs and their expert (Mr. Hardin) acknowledged the existence of private conversations between husband and wife, the inference being that this arrangement was understood between George and Clara. (R.p. 705, l. 3 to 706, l. 22).

The Court of Appeals acknowledged Attorney Johnson's testimony but held that the purpose of the power was to benefit Clara and the transfers benefited George. However, the question of her desire and who benefited was for the jury, not the Court.

TWO: Defendants also introduced evidence about the payment of taxes and that the transfers were part of a plan to minimize any estate taxes. (R.p. 951, l. 1 - 953, l. 9).

THREE: Additionally, at least some evidence was provided about George's decision to forego filing an elective share petition in Clara's estate. Had he done so, he would have been entitled to an amount equal to one-third of the value of Clara's estate. (R.p. 699, l. 22 to 701, l. 21 and p. 433, l. 5-12 and p. 812, l. 13 to 813, l. 24).

FOUR: Furthermore, far more than a scintilla of evidence was offered on the issue of the money transfers in the testimony from Barbara Gordon (R.p. 424, l. 8 to 427, l. 6), Agnes Asman (Plaintiffs' accounting expert) (R.p. 801, l. 18 to 809, l. 8) and from Defendant Laurie Burch (R.p. 1119, l. 14 to 1121, l. 24) regarding the payment by George for Clara's medical care from joint funds rather than using accounts solely in Clara's name. Even though Plaintiffs attempt to characterize George's pension, Social Security and retirement income as modest, the evidence presented by the Defendants was that he received over \$400,000.00 from these sources over the years he was married to Clara and that he lived very modestly and never spent money extravagantly. (R.p. 954, l. 23 to 955, l. 2). The evidence also showed that George was paying for the majority of Clara's nursing home care from their joint account, to which he had an entitlement as the survivor. (R.p. 425, l. 23 to 426, l. 16). One theory presented to the jury for the transfers was that George was reimbursing the joint account for funds used to pay for Clara's care,

which he could have taken from Clara's funds using the Power of Attorney. (R.p. 425, l. 23 to 426, l. 16).

Respondent/Petitioner Estate of George Burch submits that the Defendants presented a compelling case for the jury to conclude that George's transfers out of the joint account were meant to reimburse himself for his payment from the joint account of Clara's nursing home and related care. (R.p. 801, l. 18 to 809, l. 8). It was shown that the amount of the pre-death transfers closely approximated the total cost of her nursing care over the years, the substantial majority of which was paid from the joint account or from his personal funds. (R.p. 426, l. 6 to 427, l. 6 p. 708, l. 5 to 709, l. 7). Under the power of attorney, George, as attorney in fact, could have paid for Clara's care from her individual accounts and there would be no question as to the propriety of same. The balances in the joint accounts would have been preserved and would have passed upon death without question.

The trial judge acknowledged that it was a jury question as to whether the transfers were for such non-gift purposes. (R.p. 809, l. 2-8). All this evidence was placed before the jury to determine and from the verdict, it can only be concluded that they found it to be sufficient to support a verdict in George's favor. And, under the applicable directed verdict standard of review, the existence of this evidence supports the trial court's rulings on the post-trial motions and the Court of Appeals erred in reversing.

**II. The Court of Appeals’ new expansion of the Fender rule should not be applied retroactively to invalidate the non-gift transfers made by George twelve years ago.**

As discussed above, the rule established by this Court in Fender “bar[s] a gift by any attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing.” 329 S.E.2d at 431. Notwithstanding that the Court of Appeals describes this as a “bright-line rule,” the Court has expanded the Fender rule to prohibit any transfer or transaction, whether by gift or otherwise, made without written authorization in the power of attorney. Respondent/Petitioner Estate of George Burch submits that the expansion of Fender’s “bright-line rule” should not have been applied retroactively to the transfers that occurred twelve years ago.

Every person is charged with knowledge of the **existing** law. Labruce v. City of North Charleston, 268 S.C. 465, 234 S.E.2d 866 (1977). Predictability is an important component of our common law system. Hill v. Mayall, 886 P.2d 1188 (Wyo. 1994), citing Oliver Wendell Holmes, *The Path of The Law*, 10 Harv.L.Rev. 457 (1897); and H.L.A. Hart, *The Concept of Law* 143-44 (1961). Retroactive application of the law destroys predictability. Id. If the Courts decide to change the common law to expand an existing bright-line rule, and thereby move the bright line to encompass transactions that were not absolutely barred previously, the new law should apply only prospectively.

In South Carolina, the general rule is that judicial decisions creating liability where formerly none existed must be applied prospectively. Steinke v. S. Carolina Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 399, 520 S.E.2d 142, 155 (1999). As this Court stated:

“The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively.” *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). “Prospective application is required when liability is created where formerly none existed.” *Id.*; *See also Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007) (the holding that an adult social host who knowingly and intentionally serves an alcoholic beverage to a person between the ages of 18 and 20 created tort liability where formerly there was none, and thus, the Court's decision should be applied prospectively); *Ludwick v. This Minute of Carolina*, 287 S.C. 219, 337 S.E.2d 213 (1985) (employment law case first recognizing the tort of retaliatory discharge, thereby creating a new cause of action and a new substantive right); *McCaskey v. Shaw*, 295 S.C. 372, 368 S.E.2d 672 (Ct.App.1988) (the Court's recognition of a tort for the negligent infliction of emotional distress created a new cause of action and should be applied prospectively).

Carolina Chloride, Inc. v. S. Carolina Dept. of Transp., 391 S.C. 429, 706 S.E.2d 501, 503 (2011). In Fender, the Supreme Court modified the common law to set a bright-line rule that bars an agent from making a gift without written authorization. Here, the Court of Appeals has rewritten that rule in such a way that imposes liability on George's estate for transfers he made twelve years ago under the strictures of the Fender Rule as it then existed. Respondent/Petitioner Estate of George Burch submits that the new/expanded rule should apply prospectively only to transfers made after its pronouncement. See Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 359, 367 N.E.2d 1250, 1256 (1977)(“Since the liability announced herein represents an extension of duty to a new class of plaintiffs, we hold that it be given prospective application. Therefore, except as to the plaintiff herein, the rule shall apply only to cases arising out of future conduct.”)

### Additional Sustaining Ground

**III. The Plaintiffs should not be allowed to recover on a directed verdict based on a technical application of the newly expanded Fender rule when the Plaintiffs' theory of the case, as presented to the jury, was based on accusations that George Burch was a crook that stole the money from his wife.**

The Estate of George Burch submits that the judgment can, and should be, sustained on the additional ground<sup>8</sup> that the theory of the case pursued by the Plaintiffs at trial invited a verdict for the defendants. The Court of Appeals rejected this argument as a misapplication of the doctrine of invited error; however, the Estate submits that the Court of Appeals' view of the doctrine is too restrictive.

The Estate of George Burch maintains, as found by the trial court, that by the Plaintiffs' "scorched-earth" theory of the case in which they chose to pursue character assassinations of George, Plaintiffs caused the court and jury to include as an element in each and every cause of action whether, in making the transfers, George was a "crook," a thief, a criminal. Thus, if the court and jury were not persuaded that George was a "crook" motivated by a criminal intent, the Plaintiffs should not now be permitted to assail their verdict.

The trial transcript shows the Plaintiffs' theory from opening statements, witness testimony, and closing arguments. In his opening statement, the Plaintiffs' counsel described George Burch's conduct as follows: George "raided and destroyed" Clara's estate plan (R.p. 215, l. 1-2). In the opening statement of Defendants Laurie and Dennis Burch's counsel, he said to the jury: "To believe the Plaintiffs in this case, there is only one version that they can submit to you. George Burch was a crook. Pure and simple. If

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<sup>8</sup> Rule 220 (c), SCACR.

they're going to win this case, they've got to prove to you George Burch was a crook.”

(R.p. 226, l. 11-20). **There was no objection to this portion of the opening statement.**

Plaintiff Barbara Gordon testified:

Q. . . . And then you say that George. . . and let's make no mistake about this. There is no point in sugarcoating it. Your contention in this case is that George stold [sic] that money?

A. Absolutely.

Q. You say George stold [sic] it?

A. Absolutely. (R.p. 397, l. 11-17).

She later also testified as follows:

Q. But you come into this courtroom saying that George is a crook. You've said as much. That's what you've alleged?

A. Yea. (R.p. 431, l. 22-25.)

Plaintiffs' probate administration expert, attorney James C. Hardin, III, admitted on cross examination that the theory of the Plaintiffs' case was “that George Burch was a crook.”

(R.p. 693, l. 14-23.)

In addition, Plaintiffs' other expert, attorney John P. Freeman, who testified primarily on matters of attorney ethics, took every opportunity to toss verbal grenades around the courtroom to help the Plaintiffs by denigrating George with the use of language designed to plant in the jurors' minds the image of George as a criminal. Freeman used the words “looting” and “robbed” to describe George's conduct (R.p. 837, l. 9-19); later he described George's conduct in terms of “massive theft” (R.p. 840, l. 18-25). When answering a question about why George delayed estate administration when a quick administration might have avoided detection, Freeman said “it is possible that

somebody could have pulled off a crime without discovery” (R.p. 841, l. 10-14). When testifying about his opinion that Busbee should have made a noisy withdrawal from her representation of George, Freeman said that George was stealing money from Clara’s estate and “that’s theft . . . its indictable” (R.p. 841, l. 22 to p. 842, l. 10). Freeman also testified that Busbee should not shut her eyes “and let a court be misled by a crook.” (R.p. 843, l. 6-23).

In his closing argument to the jury, the attorney for Defendants Laurie and Dennis Burch addressed the Plaintiffs’ theory of the case, without objection, by reminding the jury of his opening statement in which he said that the evidence would show that George Burch was an honorable man, worthy of belief and worthy of trust, and who was “ not a crook out to steal his wife’s money.” (R.p. 1184, l. 4-10.) He also argued, without any objection, that Plaintiffs’ attorney sought to have the jury discount all of George Burch’s positive traits because those traits were inconsistent with his theory of the case. “He wants you to believe George Burch pure and simple is a crook.” (R.p. 1185, l. 20-25.) Again, without objection, he asked the jury the question, “Now, have they presented you anything to show George is a crook? The only thing they have presented is George transferred money, ergo he is a crook.” (R.p. 1198, l. 15-19).

While the Court of Appeals noted that the “Gordons took a trial strategy that did not convince the jury,” the Court of Appeals rejects the Defendants invited error argument as outside the bounds of the doctrine because it does not “touch upon an error by the court.” This restrictive review of the doctrine does not pay sufficient attention to the policy behind the doctrine of protecting judicial economy and integrity. The case law supports the proposition that invited error in trial proceedings and the inducement of

some action at trial may encompass a jury's reaction to invited error in the form of trial strategy.

The doctrine of invited error provides that a party may not set up or induce an action or invite error at trial and thereafter complain about it in post trial motions or appeals. "A party cannot complain of an error induced by the party's own conduct." State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000); Santee Oil Co., Inc. v. Cox, 265 S.C. 270, 217 S.E.2d 789 (S.C. 1975) (a party "may not complain of invited error"); see also 16 S.C. Jur. *Appeal and Error* § 134.<sup>9</sup> Similarly, the theory of the case pursued by a party at trial has consequences. "It is well settled that one cannot present and try his case on one theory and thereafter advocate another theory on appeal." White v. Livingston, 231 S.C. 301, 98 S.E.2d 534, 537 (1957).

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<sup>9</sup> The South Carolina Supreme Court has recognized the doctrine of invited error but the appellate opinions do not offer any detailed analysis. However, it is a well-recognized doctrine with much application in the reported cases of other jurisdictions. Sterling v. Gil Soucy Trucking, LTD, 552 S.E.2d 674 (N.C. App. 2001) (invited error is not grounds for a new trial); Travelers Casualty Co. v. Cincinnati Gas, 169 Ohio App. 3d 207 (2006)(under the invited error doctrine a party may not take advantage of an error that the party invited or induced the trial court to make); Vista Resorts v. Goodyear Tire & Rubber Co., 117 P.3d 60 (Colo. App. 2005) (a party's affirmative action during litigation triggers the invited error doctrine and usually bars appellate review of alleged error arising from such action); Moody v. State, 888 So.2d 532 (Ala. App. 2003), cert. den. Ex Parte Moody, 888 So.2d 605, cert den. 543 U.S. 964 (party may not allege error in trial court proceedings which was a natural consequence of his own actions); Pickett v. Stockard, 605 S.W.2d 196 (Mo. App. 1980) (invited error can arise when a case is tried upon one theory and another theory is argued on appeal); Bryan v. Bryan, 930 So.2d 693 (Fla. App. 3 Dist. 2006); Potter v. Houston, 847 N.E.2d 241 (Ind. App. 2006); Norgart v. Upjohn Co., 981 P.2d 79 (Cal. 1999); In re Breedlove, 979 P.2d 417 (Wash. 1999). The doctrine protects principles underlying judicial economy and integrity by allocating appropriate responsibility for the inducement of some action at trial later asserted to be error. Roberts v. Consolidation Coal Co., 539 S.E.2d 478 (W. Va. 2000). See also 5 C.J.S. *Appeal and Error* §874 (2007).

When Plaintiffs elected to try their case on the theory that George was a bad man who was acting with a criminal *mens rea*, for which they sought to hold defendants liable, such theory and practice should prevail throughout the case. As the above trial excerpts show, Plaintiffs quite intentionally pursued a theory of their case that invited the trial court and the jury to evaluate George's conduct in the context of George having had a nefarious or criminal motive. In response to Plaintiffs' theory of the case, Defendants presented evidence of George and Clara's happy marriage, George's love for and devotion to Clara and to his church, and other facts and circumstances tending to show that George was not a crook, he was not a criminal, and that George had acted in good faith for reasonable purposes in transferring funds from and to the various bank accounts. It is reasonable to conclude that the jury's verdict was based on its rejection of the Plaintiffs' theory of the case that George was a crook or a thief, and to the extent that the evidence, as described above, would support a reasonable inference that George made the non-gift transfers in good faith pursuant to an oral agreement with Clara, the jury's verdict should be sustained.

## **CONCLUSION**

Respondent/Petitioner Estate of George Burch respectfully petitions this Court to grant a writ of certiorari to review the decision of the Court of Appeals for the special and important reasons that the Court of Appeals erred in expanding the Fender Rule and applying it retroactively to set aside the jury's verdict and direct a verdict in favor of the Plaintiff Estate of Clara Burch on transfers George made in April 2000.

While the Fender Rule, as established in 1985, bars a gift by any attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing,

there is sufficient evidence in the record to support a reasonable inference by the jury that the transfers made by George were non-gift transfers. In the alternative, to the extent that the Court of Appeals has rewritten the Fender Rule to bar non-gift transfers, the newly expanded rule should not be applied retroactively to invalidate the non-gift transfers made by George twelve years ago. Finally, the judgment entered on the jury's verdict should be affirmed on the additional sustaining ground of invited error based on the fact that the Plaintiffs' theory of the case was based on accusations that George Burch was a crook that stole the money from his wife, which theory the jury clearly rejected as evidenced by their verdict in favor of the Defendant Estate on all claims.

Accordingly, this Court should grant this petition, reverse the Court of Appeals' opinion, and reinstate the judgment entered on the jury's verdict in favor of the Estate of George Burch.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. Michael Brackett", written over a horizontal line.

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

April 3, 2012

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Case No. 2003-CP-02-0604  
S.C. Ct. App. Op. No. 4880  
Withdrawn, Substituted and Refiled January 4, 2012

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RECEIVED

APR - 3 2012

S.C. Supreme Court

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

Petitioners/Respondents,

v.

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

Defendants,

Of Whom Jacqueline F. Busbee, as Personal Representative  
of the Estate of George E. Burch, is

Respondent/Petitioner.

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PROOF OF SERVICE

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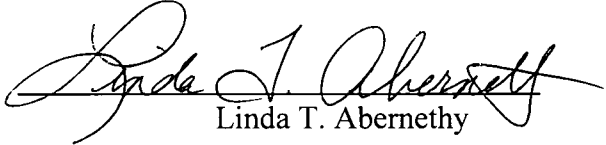
I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondent/Petitioner Jacqueline F. Busbee, as Personal Representative, in the above-captioned matter, do hereby certify that I have served the below named attorneys with copies of Respondent/Petitioner's **Petition for Writ of Certiorari**, by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 3<sup>rd</sup> day of April, 2012, at the following addresses:

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Charles and Barbara Gordon

The Honorable Tanya A. Gee  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

  
Linda T. Abernethy