

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC SUPREME COURT

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

Unpublished Opinion No. 2015-UP-491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.; 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

Petitioners.

RESPONDENTS' RETURN TO
THE PETITION FOR A WRIT OF CERTIORARI

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Introduction

This case involves accountants (the Petitioners) who knew that trustees were stealing monies from family trusts, for which the Petitioners performed accounting work. The Petitioners not only kept the thefts secret, but assisted the trustees in taking money from the trusts. The Court of Appeals' opinion recognized that the Petitioners' actions supported an action for aiding and abetting the breach of fiduciary duty.¹ In the Petition for Writ of Certiorari, Petitioners ignore the Court of Appeals' clear reasoning, raise issues not relevant to the opinion, and repeat arguments already rejected by the Court of Appeals. Furthermore, Petitioners completely misconstrue the tort of aiding and abetting. As set forth in more detail below, the Petition should be denied.

COUNTER-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. (R.pp. 1275:15-17; 1456-1479; S.R.p, 94; (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.

By late 2000, Mrs. Stevenson had become ill and was in an assisted care facility. (R.p.

¹All members of the panel were in agreement about the aiding and abetting cause of action. Judge Few wrote a separate opinion dissenting in part and concurring in part, and finding that other causes of action would also be available.

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 her attorney, Heyward Carter.² (R.pp. 835-841). Mrs. Stevenson remained in the assisted care facility and eventually passed away in 2007. (R.p. 519:19-20).

In 2001, Petitioners, along with attorneys for Mrs. Stevenson, told Tom and Dan that there were questions as to the propriety of making unauthorized and undocumented “loans” to themselves. (R.p. 1402:2-9). From 1999 through 2006 -- a time period in which the Brothers served as the only trustees-- they both stole money, hiding the thefts by after-the-fact describing them a loans to various business owned by either Tom or Dan. (R.pp. 912:3-25; 924:10-12). Even though, the Petitioners learned in 2001 that the Brothers were breaching their fiduciary duties as trustees, they did nothing to stop it³ and in fact, actually assisted the Brothers in continuing to steal. Petitioner Kerrison’s firm began doing the bookkeeping for the trusts and Mrs. Stevenson after her personal bookkeeper passed away at the end of 2002. Petitioners actually took possession of the trusts’ checkbooks and *wrote* the improper checks to Dan and Tom. (R.pp. (R.p. 1331:10-16; 916:23-25; 957:6-16; 1046:6-20). Tom or Dan would come to the Petitioners’ office and meet with one of the employees, who would then write the check as requested by Tom or Dan, even though Petitioners knew that Tom and Dan’s conduct was illegal. (R.p. 957:9-16).

²Carter was named in as a defendant in this suit, but that portion of the case has been settled.

³On 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. (R.pp. 1027:24-1028:3). After recognizing the impropriety of Tom and Dan’s withdrawals, Petitioners continued to aid the improper withdrawals.

When Petitioners wrote checks to Dan, he invested the money in his business, Fabtech. While this was occurring, Harold Pratt-Thomas, a partner in the accounting firm, was also investing in Fabtech and sat on its board. (R.p. 989:12-17). Thus, Petitioners had a financial interest in the business and an incentive to keep the business solvent by assisting with the improper withdrawals. (R.p. 989:12-17). In addition, Kerrison, a partner with the 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, while the firm continued to issue checks even though they knew it was improper. (R.pp. 943:5-25; 966:13-16; 979:24-981:5).

In a letter to Tom and Dan dated November 25, 2002, attorney Carter even acknowledged that Respondents, especially Kathleen who held the power of attorney, needed to be told of the illegal withdrawals. (S.R.p. 72:3-21; 74:21-75:10).⁴ Neither Petitioners nor Carter informed Appellants of the Brothers' illegal actions. Amazingly, Petitioners and Carter participated in the preparation of promissory notes for Tom and Dan, in an attempt to further hide the thefts. With the knowledge and active assistance of the Petitioners, 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).

Finally, on April 27, 2006, Appellants were advised that their Brothers had taken millions of dollars from the trusts. (R.pp. 1378:1-1379:16). On April 24, 2009, the Appellants initiated this lawsuit. The Court of Appeals properly held that Appellants had a claim for aiding and

⁴Petitioner Kerrison (along with Mr. Carter), obviously aware that Tom and Dan had continued to loot the trusts, drafted a letter, dated March 27, 2006, to finally inform Respondents that the trusts held millions of dollars worth of unsecured promissory notes (in actuality, the monies stolen by the Brothers, but then did not send the letter at the request of Tom and Dan. (R.pp. 1368:3-15; 1482-1485).

abetting against the Petitioners, thereby reversing the lower court's grant of summary judgment as to that claim.

ARGUMENT

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

Petitioners claim that the Court of Appeals' decision would require Petitioners to disclose information in violation of a federal statute. Petitioners argue that 26 U.S.C.A. § 7216 preempts any duty the Accountants had to disclose the withdrawals. However, the Court of Appeals properly disregarded Petitioners' argument because 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.* The Court of Appeals' decision correctly prevents Petitioners from using this statute as a defense to aiding and abetting the breach of fiduciary duty. Petitioners ignore that the claims in this case do not arise out of tax preparation services, but rather the general obligations of a public accounting firm and its members, who performed bookkeeping services and maintained the checkbooks for the trusts, and provided checks Tom or Dan upon request, despite participating in and knowing that the withdrawals were not proper.

Furthermore, there is no indication that this statute preempts any common law duties of the Accountants. Preemption can be explicit or implicit: "Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Section 7216 does not have any explicit preemption language. It is clear from the language of the statute that it was not meant to occupy

the field so as to displace state common law duties of an accountant. As one court noted, the purpose of this section was “primarily oriented to discourage the misuse of confidential information received by nonprofessionals preparing tax returns.” *Mitsui & Co. (USA), Inc. v. Puerto Rico Water Res. Auth.*, 79 F.R.D. 72 (D.C. Puerto Rico 1978).

Moreover, contrary to the Petitioners’ claim, the exception would allow Petitioner to make the disclosure to Respondents. 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).⁵ 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). Petitioners argue that the exception only applies if the information is needed to prepare the tax return of the “related taxpayer.” Petitioners have already admitted that they prepared tax returns for Tom, Dan, Mrs. Stevenson, the trusts, and Kathleen. R.p. 888-890. Kathleen, as holder of the power of attorney, stood in the shoes of her mother and the other Respondents, as beneficiaries of the Trusts, are related taxpayers. Thus, the exception clearly applied. In addition, the Petitioners made disclosures to Tom, Dan, and the Attorneys without any concern as to the statute; yet now, Petitioners try to invoke it as protection. Even if the statute did apply, the Petitioners cannot pick and choose when the statute applies.

Furthermore, Petitioners claim that they would be placed in the “untenable position” of having to choose between facing civil liability for nondisclosure or criminal liability for disclosure. Petition, p. 12. However, instead of breaching their perceived ethical duties and

⁵Section 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).

assisting in the looting of a trust, the Accountants could have resigned and avoided potential liability.

Apparently desperate, Petitioners also argue, *for the first time*, that the Court of Appeals decision conflicts with the confidentiality requirements of S.C. Code § 40-2-190. It is well-settled that an issue cannot be raised for the first time on appeal. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). This argument was not made in any other court or brief before the Petition for Certiorari, and as such, should not even be considered. Even if the argument is considered, it has no merit. Section 40-2-190 states, in part, that an accountant:

must not voluntarily disclose information communicated by the client relating to and in connection with services rendered. This information is confidential....

Nothing in that code section allows an accountant to actively participate in a client’s breach of fiduciary duty, which Petitioners did here, in providing checks to the Brothers and preparing promissory notes to legitimize the thefts.

II. A claim for aiding and abetting against the Petitioners does not create a new duty for accountants.

Petitioners argue that the Court of Appeals held that there was no fiduciary relationship between Petitioners and Respondents, and that, in holding the Respondents had a claim for aiding and abetting against the Petitioners, the Court of Appeals has created a new duty for accountants to disclose the misdeeds of its clients. Petitioners have misconstrued the tort of aiding and abetting. Aiding and abetting does not require a direct duty to non-clients of accountants. In fact, aiding and abetting involves the actions of the aider/abettor in assisting a third party’s breach of duty.

Petitioners' reliance on the cases cited in their Petition is misplaced. For example, in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), this Court held that the accountants did not owe a duty to a non-client investor to disclose the fact that the non-client had overstated its inventory. *Id.*, 327 S.C. at 241, 489 S.E.2d at 471-72.⁶ Petitioners claim that since no duty is owed to non-clients, at least according to *ML-Lee*, the Petitioners' failure to disclose the thefts of Tom and Dan cannot form the basis for aiding and abetting.⁷ Similarly, Petitioners cite to *Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 504, 737 S.E.2d 512, 513-14 (Ct. App. 2012) for their argument that a "legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance" and that there was no duty here, so Petitioners cannot be liable for aiding and abetting for failing to disclose the brothers' misdeeds. Petitioners misconstrued both the cases cited and the tort of aiding and abetting.

The tort of aiding and abetting does not require a direct fiduciary duty between the aider/abettor and the injured party. The elements for the 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. *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996); *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). ***"The gravamen of the claim is the***

⁶In so ruling, this Court did not actually consider the merits of the arguments, but noted that the trial court had ruled the accountant had no duty and that issue was not appealed. Thus, the *ML-Lee* opinion concluded that the Court of Appeals should not have considered the issue, and it reinstated the trial court's ruling.

⁷Petitioners' discussion of §552 of the Restatement (2d) of Torts also has no bearing on this case. That section simply says that an accountant must exercise competence in disclosing information. It provides no defense for helping a trustee raid a trust.

defendant's knowing participation in the fiduciary's breach." Id.

This case does not involve a mere failure to disclose (although that was also present). Here, Petitioners actively participated in the improper withdrawals from the trust by writing checks for Tom and Dan (and later assisting in creating promissory notes that made the improper withdrawals appear as legitimate loans). The facts are simple and the Petitioners' participation obvious:

1. The Petitioners 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 Petitioners 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 Petitioners cooperated with the attorneys in drafting Promissory Notes that attempted to legitimize the thefts as loans; (R.pp. 1011:11-22; 1481).
4. The Petitioners 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 Petitioners 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 Petitioners knowingly allowed Dan to take trust funds to invest in his business, which also furthered the interest of Pratt-Thomas. The actions of the Petitioners clearly show knowing participation in Tom and Dan's breach of their fiduciary duties, which is the "gravaman" of an aiding and abetting claim. *Vortex Sports*. See, also, *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).

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

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

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

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

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

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

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

A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust of the material facts necessary to protect their interests.

S.C. Code § 62-7-813.⁸

It is undisputed that Tom and Dan were in breach of these statutory duties, and they were assisted in those breaches by Petitioners, who wrote checks upon demand by Tom and Dan and

⁸Similarly, 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.

helped create promissory notes to cover up the thefts. Thus, the claims against Petitioners are not based in fraud, but go directly to their actions in assisting Tom and Dan in breaching their statutory fiduciary duties. Respondents' claims clearly survive the death of Mrs. Stevenson.⁹

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

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

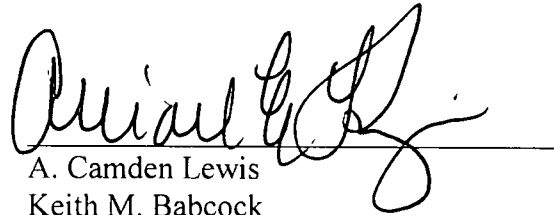
Id. Thus, any fraudulent conduct by Tom and/or Dan can be considered evidence in determining Appellant's surviving claims of aiding and abetting the breach of fiduciary duty against Petitioners.

CONCLUSION

Petitioners have ignored the Court of Appeals' clear reasoning as to the Respondents' claim for aiding and abetting. Petitioners wrongly claim that the Court of Appeals' decision creates a new duty for accountants, when in fact, the gravamen of that tort is the action of the

⁹Petitioners claim that survivability is crucial to a fraud case because the state of mind of the victim is an issue. Here, however, the claims in this case are rooted in aiding and abetting a breach of fiduciary duty. The state of mind of the victim (Mrs. Stevenson) is not an issue because the elements of aiding and abetting are (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008). The trustees' fiduciary duty is clear, and Petitioners neither deny the fact that they wrote checks for Tom and Dan upon demand and participated in preparing promissory notes for the wrongful withdrawal. Thus, Mrs. Stevenson's (or Respondents') state of mind is irrelevant in this case.

aider/abettor, not the duty. The Petition for Rehearing is baseless and should be denied.

A handwritten signature in black ink, appearing to read "Ariail E. King", written over a horizontal line.

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PROOF OF SERVICE

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

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Connie W. Grugan

This 10th day of February, 2016.