

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

RECEIVED

MAY - 4 2012

S.C. Supreme Court

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

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..... Respondents/Petitioners.

In the Matter of: The Estate of Clara Gordon Burch

**RETURN TO PETITION FOR WRIT OF CERTIORARI OF
RESPONDENT JACQUELINE F. BUSBEE, INDIVIDUALLY**

William D. Britt, Jr.
Warren C. Powell, Jr.
BRUNER, POWELL, WALL &
MULLINS, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(803) 252-7693
Attorneys for Respondent Jacqueline
F. Busbee, Individually

Other Counsel of Record:

Thomas H. Pope, III
POPE & HUDGENS, PA
P.O. Box 190
1508 College St.
Newberry, SC 29108
P: 803-276-2532
F: 803-276-8684

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

B. Michael Brackett
MOSES KOON & BRACKETT, PC
P.O. Box 100261
Columbia, SC 29202
P: 803-461-2312
F: 803-461-2309
mbrackett@mkb-law.com

Attorneys for Respondent Jacqueline F. Busbee, as Personal Representative of the Estate of George E. Burch

Carlos W. Gibbons, Jr.
ASHLEY & GIBBONS, PA
712 Calhoun St., Suite B
Columbia, SC 29201
P: 803-771-4488
F: 803-736-7334
cgibbons@aglawsc.com

Attorneys for Respondents Dennis E. Burch and Laurie E. Burch

TABLE OF CONTENTS

QUESTIONS PRESENTED4

STATEMENT OF THE CASE.....4

ARGUMENTS

 I. The questions presented for review by the Gordons do not involve any special or important reasons to grant a writ of certiorari12

 II. The Court of Appeals correctly affirmed the trial court’s directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for aiding and abetting a breach of fiduciary duty by George Burch.....12

 A. The Gordons failed to put forth any evidence from which a jury could reasonably conclude that Jacqueline Busbee knew of any improper transfers by George or knowingly participated in any breach of fiduciary duty13

 III. The Court of Appeals correctly affirmed the trial court’s directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for fraud and “fraud benefit” under S.C. Code Ann. § 62-1-10617

 A. The Gordons failed to present clear and convincing evidence of any material representations of fact made to them by Jacqueline Busbee, individually, that she knew to be false18

 B. The Gordons failed to present clear and convincing evidence that they or the Probate Court relied to their detriment on any representation made by Jacqueline Busbee, individually20

 C. The Gordons failed to present clear and convincing evidence that they sustained any damage proximately caused by reliance on any representation of Jacqueline F. Busbee, individually.....21

 D. The Gordons failed to present clear and convincing evidence of any benefit received by Jacqueline Busbee from any fraud22

CONCLUSION23

QUESTIONS PRESENTED¹

- I. Did the Court of Appeals correctly affirm the trial court's directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for aiding and abetting a breach of fiduciary duty by George Burch when the Gordons:
 - A. Failed to put forth any evidence from which a jury could reasonably conclude that Jacqueline Busbee, individually, "knowingly participated" in any breach of fiduciary duty by George Burch?

- II. Did the Court of Appeals correctly affirm the trial court's directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for fraud/fraud benefit under S.C. Code Ann. § 62-1-106 when the Gordons:
 - A. Failed to present clear and convincing evidence of any material representations of fact made to the Gordons by Jacqueline Busbee, individually, that she knew to be false;
 - B. Failed to present clear and convincing evidence that the Gordons or the Probate Court relied to their detriment upon any representation made by Jacqueline Busbee, individually;
 - C. Failed to present clear and convincing evidence that the Gordons sustained any damage proximately caused by any such representation of Jacqueline Busbee, individually; and
 - D. Failed to present clear and convincing evidence of any benefit by Jacqueline Busbee from any fraud?

STATEMENT OF THE CASE

At its core, the present action involves a dispute between the heirs of the Estate of George Burch and the heirs of the Estate of Clara Burch over the propriety of transfers by George Burch from joint accounts and accounts allegedly owned solely by his wife, Clara Burch. Instead, the Petitioners/Respondents Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch (the "Gordons"), have postured the case as one involving deception, fraud, and conspiracy – themes that were soundly rejected by the trial court, the jury and the Court of Appeals. Consistent with

¹ The Gordons' third question presented for review does not pertain to Jacqueline F. Busbee, individually and is, therefore, addressed separately by the other Respondents/Petitioners in their Return.

those themes, the Gordons include in their Petition facts and assertions that are either unsupported by the record, are immaterial to the consideration of the questions presented, and/or which constitute pure misstatements, hyperbole or arguments of counsel.² The sheer number of such misstatements prevents them from all being addressed here. Respondent Jacqueline F. Busbee, individually (“Ms. Busbee”), takes exception to the Gordons’ recitation of facts and will address in the following those most material to the questions related to her.

George Burch and Clara Burch were happily married for almost sixteen (16) years. They married late in life – George was almost seventy (70) and Clara was about seventy-five (75). (R. p. 405, l. 23—p. 406, l 3; R. p. 375, ll. 12-13). It was Clara’s fourth marriage and George’s second. (R. p. 375, ll. 5-11). Although married three times prior, Clara had no children. (R. p. 370, ll. 16-17). George had two children from his first marriage – Respondents/Petitioners Laurie and Dennis Burch. (R. p. 375, ll. 10-11).

George and Clara lived together in the little town of Wagener, South Carolina, for over ten (10) years until October 13, 1994, when Clara began residing in a retirement home. (R. p. 378, ll. 19-24). Shortly after their marriage, Clara signed her Last Will and Testament, leaving George a life estate in the marital home and naming him personal representative of her estate. (R. p. 99, ¶ 15; R. p. 1748). Aiken attorney Arthur Rich prepared her Will. (Petition, p. 6 (citing R. p. 1751)).

Approximately five months after Clara moved into the retirement home, George asked Ms. Busbee, a sole practitioner in Wagener, to draft a power of attorney for Clara’s

² The “[f]ailure of a petitioner to present with *accuracy*, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.” Rule 242(d), SCACR (emphasis added).

signature, making him attorney-in-fact, to assist him in taking care of his wife. (R. p. 977, l. 21—p. 978, l. 2).³

Ms. Busbee drafted the power of attorney, which did not contain a gifting provision. (R. p. 1745). Ms. Busbee then instructed George to have two (2) witnesses sign the power of attorney who could verify that Clara was competent and knew what she was signing. (R. p. 978, ll. 3-10).

Clara signed the power of attorney on February 27, 1995, witnessed by two (2) employees of the retirement home. (R. p. 1745; R. p. 912, l. 25—p. 913, l. 9; R. p. 928, ll. 15-23). One of the retirement home employees, Amanda Hammond, testified that she would not have signed as a witness if there had been any indication to her that Clara did not understand the document. (R. p. 914, l. 5—p. 916, l. 22). The Gordons' own expert, John Freeman, confirmed that there is no evidence in the record that at the time Clara signed the power of attorney Ms. Busbee knew Clara was incompetent. (R. p. 872, ll. 12-16).

Approximately one-and-a-half years later, George retained Ms. Busbee again, this time to prepare for him a Last Will and Testament and a power of attorney, both of which he signed on June 5, 1996. (R. p. 979, ll. 14-21). Although Ms. Busbee encouraged George to name one of his children as attorney-in-fact, their residences at the time made such an appointment impractical – Laurie lived in Maryland and Dennis in Brazil. (R. p. 980, ll. 3-23). Consequently, the power of attorney named Ms. Busbee as attorney-in-

³ The Gordons assert that as soon as Clara entered the nursing home she was totally incompetent and that at the time she prepared the power of attorney Ms. Busbee knew Clara's competency would be an issue. (Petition, p. 6). While these asserted facts are immaterial to consideration of the questions relating to Ms. Busbee, individually, they imply that Ms. Busbee knew Clara was incompetent and conspired with George to raid Clara's accounts – an implication rejected by the jury and for which there is absolutely no evidence. The established facts reveal a much more ordinary and benevolent transaction.

fact; however, she never exercised the power of attorney given to her by George. (R. p. 980, l. 24—p. 981, l. 7).

Clara died on April 19, 2000. (R. p. 982, ll. 1-15). Shortly before her death, George transferred funds from accounts held in the joint names of Clara and George and from accounts solely in Clara's name. (R. p. 1334-1354 & 1359-1360). Some of those funds were deposited in accounts held jointly by Clara and George and others into accounts in George's name only. (Id.). Following Clara's death, George transferred funds on September 21, 2000, from a Wachovia CD in Clara's name to himself. (R. p. 737, l. 16—p. 738, l. 5).

George was appointed as personal representative of Clara's estate on July 6, 2000. (R. p. 982, ll. 1-9). In his role as personal representative, George retained Ms. Busbee to "assist him as he needed in his administration of the estate." (R. p. 982, ll. 10-15). However, George indicated that he wanted to handle as much of it as he could because that is what he had promised Clara. (R. p. 982, ll. 16-25).

Ms. Busbee advised George that it was his responsibility as personal representative to account for Clara's assets. (R. p. 1020, ll. 12-21). Further, if there was a safe deposit box, Ms. Busbee instructed him to go and see if there were any assets contained in the box. (R. p. 998, ll. 20-25). Ms. Busbee also counseled George that he should open an estate account, although George never did. (R. p. 1023, l. 22—p. 1024, l. 5).

Consistent with George's wishes that he handle as much of Clara's estate as he could, Ms. Busbee provided George certain advice and assisted with filing documents, but she did not fill out or sign any of the inventories and appraisements or interim

accountings filed with the Aiken County Probate Court. (R. pp. 1638-1657). All of those documents were completed and signed by George as Personal Representative of the Estate of Clara Burch. (R. pp. 2543, 2548, 2560, 2566; R. p. 962, ll. 17-24). George reported no assets in the safe deposit box. (R. p. 999, ll. 1-5).⁴ Ms. Busbee accepted as true George's report of Clara's assets and did not investigate her client's representations. (R. p. 1021, l. 18—p. 1025, l. 22).

On April 13, 2001, Wachovia Bank sent a fax to Ms. Busbee's office with information about the ownership of a CD in Clara's name and the date of death balance. (R. pp. 1752-1753). When George, as personal representative, filled out and signed several inventories for the Estate of Clara Burch, he did not include the Wachovia account. (R. pp. 1638-1657).

Between April 18, 1996 and April 19, 2000, and between July 26, 2000 through September 12, 2002, George made loans to his daughter Laurie, some of which Laurie has repaid. (R. p. 1106, l. 14—p. 1111, l. 15). The initial inventory filed in the Estate of George Burch disclosed the existence of these transactions and expressed uncertainty as to whether the transactions were loans or gifts. (R. p. 2580). At trial, Laurie Burch testified that any balance due to her father was to be considered an advance on her distribution from the estate. (R. p. 1111, l. 22—p. 1112, l. 17).

On January 18, 2003, George passed away. (R. p. 2577 & 2587). At the time of George's death, \$144,000 had been disbursed to Clara's beneficiaries, but her estate had not been closed. George had signed a third supplemental inventory in October 2002;

⁴ The Gordons imply that the safe deposit box contained numerous assets of Clara. (Petition, p. 7, fn. 4). However, the only items in the box that should have been included on Clara's estate inventory, but were not, were some coins. (R. p. 1000, ll. 2-10).

however, it was not filed before his death. Ms. Busbee submitted it for filing on February 6, 2003. (R. pp. 1059, 1458-1464).⁵

On January 22, 2003, Ms. Busbee and Laurie and Dennis visited Security Federal Bank to ascertain if George's original Will was in the safe deposit box. (R. p. 300, l. 21–p. 301, l. 4; p. 316, l. 20–p. 317, l. 18). The Gordons suggest the visit to the safe deposit box was clandestine and unauthorized. (Petition, p. 9).⁶ To the contrary, Security Federal had two ownership documents for the safe deposit box – one showing that it was owned solely by Clara and a second, more recent contract, showing George as a co-renter. (R. p. 301, l. 21–p. 302, l. 11). On the day in question, Dennis presented himself to the bank, indicated that he was George's son, and as his next of kin asked for access to the safety deposit box to look for his father's Will. (R. p. 320, l. 24–p. 322, l. 11). As the son of a deceased co-renter, Security Federal granted Dennis access to the box per its policy (Id.); however, neither Ms. Busbee, Dennis nor Laurie was allowed to look through the contents of the box. A Security Federal employee checked the box for the Will, which was not found. Nothing from the box was removed. (R. p. 986, l. 6–p. 987, l. 20; p. 321, l. 8–p. 322, l. 5).

On January 28, 2003, Ms. Busbee was appointed Personal Representative of George's estate. (R. p. 988, ll. 10–12). Thirty (30) days later, on February 27, 2003, Charles Gordon was appointed successor Personal Representative of Clara's estate. (R.

⁵ The Gordons repeatedly assert that the filing in Clara's estate of the third supplemental inventory after George died constitutes evidence of aiding and abetting and fraud. (See, e.g., Petition, p. 14 & 18). However, Ms. Busbee was under an obligation to file the document or else be accused of concealing a document. (R. p. 1059, ll. 2-9).

⁶ The Gordons allege, "With Charles in town, but without telling him, Laurie took Clara's safe deposit key to Busbee [and] [o]n Dennis Burch's *unauthorized* signature, Busbee, Laurie, and Dennis gained access to Clara's safe deposit box at Security Federal." (R. p. 9) (citations omitted) (emphasis added).

p. 988, ll. 13-15). Ms. Busbee did not oppose Mr. Gordon's appointment, and, in fact, wrote a letter to the Probate Court consenting to the same. (R. p. 988, ll. 16-25).⁷

On March 4, 2003, Security Federal employees inventoried the safe deposit box. A list of the contents was created by the bank's employees. (R. p. 317, l. 19–p. 319, l. 20; p. 989, l. 5–p. 990, l. 14).

On March 30, 2003, at the request of the Gordons' attorney Adele Pope, Ms. Busbee personally delivered to Adele Pope's office in Columbia her entire legal file and all the paper contents of the safe deposit box at Security Federal, as well as the notarized list of the contents of the safe deposit box. (R. p. 990, l. 17–p. 996, l. 3). Ms. Pope initially refused to accept the rolls of coins in the box, but later agreed. (R. p. 992, ll. 20–21; R. p. 1001, ll. 21–24).

Again at the request of Adele Pope, from April 1, 2003 through April 12, 2003, Ms. Busbee requested financial records be copied from financial institutions on Clara's and George's accounts and had those records delivered to Ms. Pope's office. (R. p. 992, l. 22–p. 996, l. 3).

⁷ Without citing to any legal authority, the Gordons offer as fact that upon Ms. Busbee's appointment as Personal Representative of George's estate, she became "statutory PR for Clara's estate" pursuant to section 62-3-609 of the South Carolina Probate Code, creating fiduciary duties. (Petition pp. 1 & 9, *inter alia*). A plain reading of the statute reveals that no fiduciary relationship is created. Rather, the personal representative of the decedent becomes an interim caretaker of the estate being administered by the decedent with duties to protect the estate and to account for and deliver the estate assets to the successor personal representative. S.C. Code § 62-3-609 (Supp. 2009).

When asked directly whether any of the assets in Clara Burch's estate were lost or turned up missing between the date of George's death and the appointment of Charles Gordon, Barbara Gordon candidly admitted, "I don't know of anything." (R. p. 409, line 21–p. 410, line 13). With respect to the assets in George Burch's estate, Mrs. Gordon was asked if she had any evidence that, between the time of George's death and the time of trial of the present action in October 2007, any assets in George's estate had been "lost, misappropriated, wasted, anything of that nature?" Her answer: "I don't know of anything." (R. p. 415, lines 14–20). By the Gordons' own testimony, Ms. Busbee fulfilled her obligations as interim caretaker under section 62-3-109 of the Probate Code.

On April 15, 2003, Charles Gordon, as successor Personal Representative represented by Adele Pope, filed suit against Ms. Busbee and the other named Respondents. (R. p. 60). Mr. Gordon's wife, Barbara, was later named as an additional plaintiff. (R. p. 49).

During Ms. Busbee's representation of George as Personal Representative of Clara's estate she occasionally referred to herself in her written communications as Attorney for the Personal Representative of the Estate of Clara G. Burch and as Attorney for the Estate of Clara G. Burch. (R. p. 996, l. 18–p. 997, l. 6).⁸

Ms. Busbee received none of the funds transferred by George, was not a signatory on any account in the name of Clara Burch or her estate, and the account statements did not come regularly to her office. (R. p. 949, ll. 7–19; p. 960, ll. 9–19).

No assets of the Clara Burch estate were shown to have been lost or wasted during the period January 18, 2003 to February 27, 2003. (R. p. 409, l. 16–p. 410, l. 13).

No assets of the George Burch estate were shown to have been lost or wasted following Ms. Busbee's appointment as personal representative. (R. p. 415, l. 14–p. 416, l. 2).

⁸ The Gordons take the position that Ms. Busbee was not only attorney for George, in his capacity as personal representative, but that she also served as attorney for Clara's estate – a non-legal entity. (Petition, p. 1). The establishment of an attorney-client relationship involving an attorney representing a personal representative, and the determination of duties owed out of that relationship, is governed by section 62-1-109 of the South Carolina Code. Section 62-1-109 provides that “[u]nless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.” There being no written employment agreement between Ms. Busbee and the Gordons or any of Clara's heirs, she could not have, and did not, represent them. (R. p. 996, line 11–17).

ARGUMENT

I. The questions presented for review by the Gordons do not involve any special or important reasons to grant a writ of certiorari.

Writs of certiorari are governed by Rule 242 of the South Carolina Appellate Court Rules. While neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, the following factors weigh in favor of the granting of a writ of certiorari:

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved; and
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. Ms. Busbee submits that the Petition raises no new questions of law, no substantial constitutional issues and no federal questions. Further, the Court of Appeals' decision was unanimous and presents no conflict with a prior decision of the Supreme Court. The Gordons' Petition should, therefore, be denied.

II. The Court of Appeals correctly affirmed the trial court's directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for aiding and abetting a breach of fiduciary duty by George Burch.

"The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008), rehearing denied (2008) (citing Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996)). Because "[t]he gravamen of the claim is the defendant's knowing participation in the fiduciary's breach," Future Group II, 324 S.C. at 99, 478 S.E.2d at 50 (citations

omitted), actual knowledge of a duty and its subsequent breach are required. *Id.* at 205, 662 S.E.2d at 449 (“[T]here is evidence CSMG had actual knowledge Ware owed a fiduciary duty to Vortex . . . and knowingly encouraged Ware to breach that duty”)

A. The Gordons failed to put forth any evidence from which a jury could reasonably conclude that Jacqueline Busbee knew of any improper transfers by George or knowingly participated in any breach of fiduciary duty.

The Wachovia CD is the linchpin of the Gordons’ Petition as relates to Ms. Busbee, individually. More specifically, the Gordons argue that because Wachovia faxed information to Ms. Busbee regarding a CD in Clara’s name with a date of death balance, the absence of that account on any inventories in Clara’s estate is evidence that Ms. Busbee knowingly participated in George’s alleged breach of fiduciary duties as well as perpetuated a fraud on the Probate Court. (Petition, pp. 12-13 & 18). The Gordons’ own testimony, as well as the testimony of their experts, reveals that there is absolutely no evidence of active participation in any fraud or breach of fiduciary duty by Ms. Busbee.

Charles Gordon testified that Ms. Busbee made no representations to him regarding Clara’s assets, and he had no evidence that Ms. Busbee knew anything about the transfers from the subject bank accounts. (R. p. 959, l. 16–p. 961, l. 11; R. p. 963, l. 16–p. 971, l. 11). He also admitted Ms. Busbee had not signed any of the Probate Court filings having to do with the Estate of Clara Burch. (R. p. 961, l. 12–p. 963, l. 15). Therefore, any representations contained in the inventories would be representations made by George, not Ms. Busbee. The Gordons’ expert John Freeman concurred that no evidence existed that Ms. Busbee was aware that George had made transfers from the subject accounts. (R. p. 844, l. 20–p. 845, l. 5). The Gordons’ second expert, Jim Hardin, likewise testified that during the period of time George made transfers there is no

evidence that Ms. Busbee knew any transfers were being made. (R. p. 637, l. 21—p. 638, l. 1).

What the Gordons would like the Court to do is extrapolate from the Wachovia fax and believe that Ms. Busbee had, in fact, investigated the Wachovia CD, determined that it belonged to Clara, concluded that George had improperly transferred the money, and assisted him in covering up his misdeed by filing inventories that did not report it. Unfortunately for the Gordons' case, the only evidence is that Ms. Busbee received the fax and nothing more. The remaining necessary steps never happened. In fact, in a moment of candor, the Gordons admit in their Petition that Ms. Busbee "did not investigate the circumstances of this transfer of Clara's [Wachovia] CD by George to himself." (Petition, p. 18).

Had Ms. Busbee investigated the Wachovia CD, the only reasonable conclusion from the evidence is that nothing at all would have changed. The information from Wachovia included the notation "CDA IRA." (R. p. 1753). Jeremy Hall, a Wachovia Bank Financial Specialist in the local Aiken branch, testified that the notation signified that the certificate was owned by an I.R.A., that the I.R.A. had no beneficiary named, and that upon Clara Burch's death, the money would have gone to George Burch. (R. p. 735, l. 24—p. 737, l. 4). Thus, had Ms. Busbee inquired about the Wachovia certificate, Mr. Hall would have confirmed that the money in the Wachovia certificate belonged to George Burch and was properly excluded from the inventories filed in the Estate of Clara Burch.

Jeremy Hall's original testimony was based upon the information available to him at the local Aiken branch of Wachovia. At the request of the Gordons, Mr. Hall obtained

from unknown personnel at the main branch in Charlotte information that contradicted the local branch's information. He was called a second time to testify:

Q: [To Jeremy Hall] Mr. Hall, I think you've already stated that your testimony last week was an honest mistake, and we understand that.

A: Yes, sir.

Q: And until today, you didn't have the information that you have just testified to that [the Wachovia certificate] was, in fact, not an I.R.A.; correct?

A: Yes, sir.

Q: And you had to in fact get information from the home office in Charlotte to discover that.

A: Yes, sir.

Q: So, anything that was in your bank in Aiken did not answer that question for us so that you could come and tell us what the actual facts are; correct?

A: Right. There is nothing in our – nothing on my system that I could find that would answer that question. (R. p. 1146, ll. 5–20).

The Gordons can offer no evidence that had Ms. Busbee inquired of the local Aiken branch of Wachovia she would have received information different than the results of Mr. Hall's first review.

The Gordons try to salvage their case by arguing that Ms. Busbee substantially assisted George in breaching his fiduciary duties when she placed the Wachovia CD as an asset on an inventory for George's estate. (Petition, p. 14). The Gordons then point to a standard for aiding and abetting pronounced by their expert, John Freeman, over objection by Ms. Busbee, that a lawyer is liable for aiding and abetting if he either knowingly or recklessly assists a wrongdoer or if he assists in covering up. (Petition, p. 15). To substantiate their assertion, the Gordons point out that the Court of Appeals in

Vortex Sports & Entertainment, Inc. v. Ware, 278 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), placed significance on the testimony of Mr. Freeman. Contrary to the standard espoused by Freeman and put forth by the Gordons, the Court of Appeals in Vortex affirmed the denial of the motion for directed verdict based on a standard of “actual knowledge” and “knowing participation,” concluding that the defendant not only knew that a fiduciary duty existed but knowingly encouraged its breach. Vortex, 378 S.C. at 205, 662 S.E.2d at 449 (“Vortex presented evidence that CSMG *knew* Ware was one of several partners and the attorney for Vortex, not simply an employee . . . [and that] CSMG *knew* Ware had certain financial obligations to Vortex, even if he was no longer an employee. Therefore, there is evidence CSMG *had actual knowledge* Ware owed a fiduciary duty to Vortex [and that] CSMG *knowingly encouraged* Ware to breach that duty”) (emphasis added). Unlike Vortex, in the present case John Freeman and the Gordons’ other expert, Jim Hardin, testified that Jacqueline Busbee had no actual knowledge of any transfers made by George Burch. (R. p. 637, ll. 21-p. 638; p. 844, ll. 20-24). Furthermore, what the Gordons fail to explain is that this allegedly fraudulent filing was dated June 7, 2004 – over a year *after* the Gordons filed suit and accused Ms. Busbee of aiding and abetting, a year-and-a-half after George’s death, and almost four years after the money was transferred. (Compare R. p. 1648 with R. p. 60 & R. p. 737, l. 16—p. 738, l. 5). The law of aiding and abetting in South Carolina requires “knowing participation” in the breach. One cannot aid and abet a dead man.

The evidence in the record regarding the Wachovia certificate is far from nefarious. Considering that the Gordons and their experts agree that Jacqueline Busbee had **no actual knowledge** of the transfers of George Burch, the only reasonable inference

that could be drawn from the evidence is that Ms. Busbee could have known no more about the Wachovia certificate than was originally testified to by Jeremy Hall, the bank's employee. Upon receipt of that information, Ms. Busbee's inquiry ends. In light of Mr. Hall's testimony, it is pure speculation to argue that the absence of the Wachovia certificate on the inventories transforms the omission from an honest mistake to "knowing participation" in aiding and abetting a breach of fiduciary duty. The standard for directed verdict does not authorize submission of speculative, theoretical, or hypothetical views to the jury. Proctor v. Dep't of Health & Env'tl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct.App.2006). Therefore, the Court of Appeals properly concluded that "[t]he Gordons presented no evidence Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them." Gordon v. Busbee, Op. No. 4880, 2012 WL 89641, *5 (S.C. Ct. App. Jan. 4, 2012).

III. The Court of Appeals correctly affirmed the trial court's directing a verdict in favor of Jacqueline Busbee, individually, on the cause of action for fraud and "fraud benefit" under S.C. Code Ann. § 62-1-106.

The Gordons' cause of action for fraud/fraud benefit arises from section 62-1-106 of the South Carolina Probate Code. Akin to relief from final judgment in instances of extrinsic fraud, section 62-1-106 is intended to provide a remedy outside the Probate Code to those injured by a fraud on the probate court where "the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court." Ebeling v. Voltz, 454 So.2d 783 (Fla. Dist. Ct. App. 1984) (quoting DeWitt v. Duce, 408 So.2d 216, 219 (Fla. 1981) and stating that "an attack to probate is not impermissible where fraud or other circumstances prevented contestants from having

their day in court”). Derived almost verbatim from section 1-106 of the Uniform Probate Code, section 62-1-106 reads, in pertinent part:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received.

S.C. Code Ann. § 62-1-106 (Supp. 2009).

“Fraud” within the meaning of section 62-1-106 is common-law fraud. 31 Am. Jur. 2d Executors & Administrators § 136 (2011); Eoff v. Forrest, 789 P.2d 1262, 1266 (N.M. 1990). To prove common-law fraud, the plaintiff must present clear, cogent and convincing evidence of each element.⁹ Robertson v. First Union Nat. Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002). The failure to prove any element of fraud is fatal to the action. Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (S.C. 2007) (citation omitted).

A. The Gordons failed to present clear and convincing evidence of any material representations of fact made to them by Jacqueline F. Busbee, individually, that she knew to be false.

The first flaw in the Gordons’ cause of action for “fraud benefit” involves the lack of any material representation by Ms. Busbee that she knew to be false. The Gordons admitted that their entire case against Busbee for fraud involved only filings with the probate court and no verbal representations. (R. p. 965, ll. 1–20; p. 966, ll. 2–9; p. 966, l.

⁹ To establish a cause of action for common law fraud, the Gordons must prove the following nine elements: “(1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury.” Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (S.C. 2007) (citing Kahn Const. Co. v. S.C. Nat’l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980)).

20–p.967, l. 4; p. 969, ll. 4–25; p. 970, ll. 17–24; p. 971, ll. 7–11). However, Charles Gordon admitted that he had no document filed in Clara’s estate in which Busbee represented anything to the Gordons – those documents were signed by George. (R. p. 961, l. 12–p. 962, l. 3). Further, the Gordons and both their experts concluded that Busbee had no actual knowledge of any transfers being made by George Burch. (R. p. 949, ll. 7-19; p. 960, ll. 9-19; p. 637, l. 21-p. 638, l. 1; p. 844, ll. 20-24).

Nevertheless, the Gordons again rely upon the Wachovia CD, its exclusion from any filings in Clara’s estate, and its inclusion in filings in George’s estate in support of their “fraud benefit” claim. (Petition, p. 18). However, the Gordons cannot present any evidence – clear, convincing or otherwise – that Ms. Busbee knew the Wachovia CD belonged solely to Clara, knew that it had been misappropriated by George, and knew that the probate court filings were in error. In fact, the Gordons admit in their own Petition that Ms. Busbee “did not investigate the circumstances of this transfer of Clara’s CD by George to himself.” (Petition, p. 18). Had Ms. Busbee inquired about the Wachovia CD, the best information available to her would have been that the money belonged to George. Jeremy Hall, a Wachovia Financial Specialist in the local Aiken branch, testified that the CD was owned by an IRA, that the IRA had no beneficiary named, and that upon Clara’s death the money would have gone to George. (R. p. 735, l. 24–p. 737, l. 4). Consequently, the exclusion of Wachovia funds from filings in Clara’s estate and the inclusion of Wachovia funds in filings in George’s estate do not constitute evidence that Ms. Busbee made any representations she knew to be false.

B. The Gordons failed to present clear and convincing evidence that they or the Probate Court relied to their detriment on any representation made by Jacqueline Busbee, individually.

The second, and perhaps most glaring, failure in the Gordons' cause of action for "fraud benefit" is the complete lack of any evidence at all of reliance. Whether that reliance is by the Gordons or, as contemplated by section 62-1-106, the Probate Court itself, see Eoff v. Forrest, 789 P.2d 1262, 1267, n. 2 (N.M. 1990), no where in their Petition do the Gordons even assert that they relied upon anything.

The simple fact of the matter is that reliance in this instance would be a legal impossibility. Section 62-1-106 is intended as a remedy outside the Probate Code. As the commentators to section 1-106 of the Uniform Probate Code more thoroughly explain:

This [section 1-106] is an overriding provision that provides an exception to the procedures and limitations provided in the [Probate] Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period . . . has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Unif. Probate Code § 1-106, cmt. Had the Estate of Clara Burch been closed in reliance on a fraudulent filing, her heirs could have looked to section 62-1-106 for a remedy; however, the Gordons filed suit prior to the close of Clara's estate. Once filed, the lawsuit effectively stayed the closing of the estates of George and Clara in order that the

court could determine the ownership of the assets in controversy. Ironically, the Gordons' lawsuit prevented any possibility of detrimental reliance as contemplated in section 62-1-106.¹⁰

C. The Gordons failed to present clear and convincing evidence that they sustained any damage proximately caused by reliance on any representation of Jacqueline Busbee, individually.

In addition to a lack of any evidence of a false, material representation or detrimental reliance, the Gordons cannot show that any action or inaction, representation or misrepresentation, of Ms. Busbee resulted in any damage to the Gordons.

The money involved in the present action, including the damages claimed by the Gordons, can be broken down into three groups: Group I, Group II, and Group III. Group I money consists of the money that was transferred by George Burch up and until the time of Clara Burch's death. (R. p. 398, ll. 2-6; p. 399, ll. 17-24). Group II money consists of the money that George Burch reported in the court filings for the Estate of Clara Burch. (R. p. 400, ll. 3-10). Group III money consists of the money that was in George Burch's name when he died. (R. p. 401, ll. 19-22).

It is undisputed that the Gordons and the heirs and beneficiaries of Clara Burch received all of Group II money. (R. p. 400, ll. 3-10; p. 400, l. 24-p. 401, l. 18). In fact, Barbara Gordon agreed under oath that no Group II money was lost and that it all went where it should have. (R. p. 403, ll. 13-21). It is also undisputed that Group III money has *not* been distributed, but is being held in trust until a final determination in the present action is made. (R. p. 402, ll. 7-24). Consequently, all of the Gordons' alleged

¹⁰ In addition, one of the filings cited by the Gordons in support of their "fraud benefit" claim includes the filing Ms. Busbee made in George's estate as P.R. that listed funds from the Wachovia account. That filing was dated June 7, 2004 – over a year *after* the Gordons filed suit. (Compare R. p. 1648 with R. p. 60). There can be no reliance after suit for fraud is filed. Indeed, the Gordons must recognize as much for they never assert any reliance on their part.

losses involve Group I money, which, in reality, is being held as part of the Group III funds. (R. p. 402, l. 25–p. 403, l. 4).

As testified to by Charles Gordon, the cause of action for fraud is based entirely on the filings in the probate court for the Estate of Clara Burch. (R. p. 965, ll. 1–20; p. 966, ll. 2–9; p. 966, l. 20–p.967, l. 4; p. 969, ll. 4–25; p. 970, ll. 17–24; p. 971, ll. 7–11). Those filings necessarily involve Group II money – the money that George Burch reported in the inventories for the Estate of Clara Burch. If, as Barbara Gordon testified, all Group II money was correctly distributed to the heirs and beneficiaries of Clara Burch’s estate, then the Gordons have **lost nothing** as a result of any representations made in the court filings. All other monies are being held in trust pending the outcome of the case. Consequently, the Gordons have failed to prove any damage proximately resulting from any reliance upon representations made in the probate court.

D. The Gordons failed to present clear and convincing evidence of any benefit received by Jacqueline F. Busbee from any fraud.

The “fraud benefit” statute allows injured parties to obtain appropriate relief “against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, *but only to the extent of any benefit received.*” S.C. Code Ann. § 62-1-106 (Supp. 2009) (emphasis added).

The Gordons assert in their Petition that Ms. Busbee received a benefit through “increased attorneys’ fee/commission.” (Petition, p. 18). As detailed below, not only has Ms. Busbee not received any commissions to date, but it is a legal impossibility for her to receive increased commissions from money improperly included in George’s estate.

If all the money held in George Burch’s name when he died, including those claimed by the Gordons, remains in the Estate of George Burch for distribution to his

heirs, and none of that money is ordered returned to the Estate of Clara Burch, Jacqueline Busbee's commission could potentially be greater. For that to happen, however, the following must occur: a final order in the present action determining that said funds should remain assets of the Estate of George Burch. Necessarily, that order must exonerate the Respondents/Petitioners from all alleged wrongdoing, including fraud. If the court decides there has been no fraud committed, then any benefits received by Ms. Busbee would be a result of something other than fraud. The cause of action for section 62-1-106 "fraud benefit" must, therefore, fail.

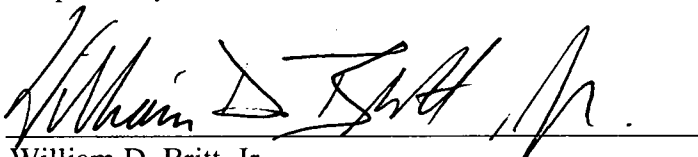
On the other hand, if a final order concludes that fraud has been committed in the administration of the Estate of Clara Burch by one or more of the Respondents/Petitioners, then money currently held in George's estate will be returned to Clara's estate. As a result, Ms. Busbee's commission as personal representative will be decreased or eliminated, and, therefore, Ms. Busbee will have received no benefit, and the cause of action for "fraud benefit" will likewise fail. In either event, the inability to prove a benefit to Ms. Busbee as a result of fraud on the probate court precludes recovery by the Gordons. The trial court correctly directed a verdict in favor of Jacqueline Busbee on the cause of action for "fraud benefit," the Court of Appeals correctly affirmed it, and this Supreme Court should deny the Petition for Writ of Certiorari as a result.

CONCLUSION

For the reasons appearing above, the Court of Appeals correctly affirmed the trial court's granting a directed verdict in favor of Jacqueline Busbee, individually, on the causes of action for aiding and abetting a breach of fiduciary duty and fraud/"fraud benefit." The Petition raises no new questions of law, no substantial constitutional issues

and no federal questions. Further, the Court of Appeals' decision was unanimous and presents no conflict with a prior decision of the Supreme Court. The Gordons' Petition should, therefore, be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William D. Britt, Jr.", written over a horizontal line.

William D. Britt, Jr.

Warren C. Powell, Jr.

BRUNER, POWELL, WALL & MULLINS, LLC

P.O. Box 61110

Columbia, South Carolina 29260-1110

(803) 252-7693

Attorneys for Respondent Jacqueline F. Busbee,
Individually

May 4, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

RECEIVED

MAY - 4 2012

S.C. Supreme Court

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

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..... Respondents/Petitioners.

In the Matter of: The Estate of Clara Gordon Burch

PROOF OF SERVICE

I, Kim Warnock, a legal assistant in the firm of Bruner, Powell, Wall & Mullins,
LLC, hereby certify that on May 4, 2012, I served a copy of the Return to Petition for
Writ of Certiorari of Respondent Jacqueline F. Busbee, Individually on all counsel of
record via United States Mail, postage pre-paid, and addressed as follows:

Thomas H. Pope, III
POPE & HUDGENS, PA
P.O. Box 190
1508 College St.
Newberry, SC 29108

Carlos W. Gibbons, Jr.
ASHLEY & GIBBONS, PA
712 Calhoun St., Suite B
Columbia, SC 29201

B. Michael Brackett
MOSES KOON & BRACKETT, PC
P.O. Box 100261
Columbia, SC 29202

Columbia, South Carolina
May 4, 2012



Kim Warnock
Legal Assistant

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW

1735 ST. JULIAN PLACE, SUITE 200

POST OFFICE BOX 61110

COLUMBIA, SOUTH CAROLINA 29260-1110

TELEPHONE 803-252-7693

FAX 888-726-9015

WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.
WARREN C. POWELL, JR., P.A.*
HENRY P. WALL
E. WADE MULLINS, III, P.A.
BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.

JOEY R. FLOYD, P.A.
WILLIAM D. BRITT, JR., P.A.

BENJAMIN C. BRUNER
MATTHEW H. STABLER

AUTHOR'S E-MAIL: WBRITT@brunerpowell.com

* Also Admitted in District of Columbia

May 4, 2012

VIA HAND DELIVERY

Ms. Linda Allen
SC Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

MAY - 4 2012


S.C. Supreme Court

Re: *Gordon, Charles v. Busbee, Jacqueline*
Case Tracking No. 2012-206628

Dear Ms. Allen:

Enclosed please find the original and eight copies of the *Return to Petition for Writ of Certiorari of Respondent Jacqueline F. Busbee, Individually*, and *Proof of Service*, in the above-referenced matter. Please file the original and six copies with your office and return two clocked copies via our courier. By copy of this letter I am serving all counsel with said *Return* as evidenced by the Proof of Service herein.

Sincerely,



William D. Britt, Jr.

WDB/kw

Enclosures

cc: Warren C. Powell, Jr., Esq. (via email only)
Thomas H. Pope III, Esq. (via U.S. mail)
Carlos Gibbons, Esq. (via U.S. mail)
Michael Brackett, Esq. (via U.S. mail)
Jacqueline F. Busbee, Esq. (via email)
Jennifer Mansfield (via email)