

THE STATE OF SOUTH CAROLINA

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In the Supreme Court

S.C. Supreme Court

Appeal from Aiken County  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Withdrawn, Substituted & Refiled January 4, 2012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

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

Respondent/Petitioner.

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

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## TABLE OF CONTENTS

	<b>Page</b>
Statement of the Issues Presented for Review .....	1
Statement of the Case.....	2
Statement of the Facts.....	6
Summary of Argument .....	10
Argument .....	12
RESPONDENTS/PETITIONERS WOULD SUBMIT THAT THE ISSUES AS STATED BY THE PLAINTIFFS/PETITIONERS DO NOT PRESENT SPECIAL OR IMPORTANT REASONS TO GRANT A WRIT OF CERTIORARI TO REVIEW.....	12
<i>Directed Verdict Standard</i> .....	12
I. The Court of Appeals correctly affirmed the trial court’s grant of a directed verdict to Jacqueline Busbee on the cause of action for aiding and abetting George’s breach of his fiduciary duty.....	13
A. George made the alleged improper transfers before he died and Ms. Busbee became his PR. ....	14
B. The Plaintiffs presented no evidence that Ms. Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them. ....	15
II. The Court of Appeals correctly affirmed the trial court’s grant of a directed verdict to Jacqueline Busbee, Laurie Burch and Dennis Burch on the cause of action for fraud benefit under Probate Code § 62-1-106.....	18
A. The Plaintiffs presented no evidence that Dennis Burch committed any sort of fraud and he has not received any benefit/funds from his father’s estate. ....	19
B. The Plaintiffs presented no evidence that Laurie Burch committed any fraud, and to the extent that she received a benefit by the loans from George, her obligation to repay awaits a final determination of what is left in George’s estate when all this litigation is over. ....	20

C. The Plaintiffs presented no evidence that Ms. Busbee knew any representations in the inventory and appraisements signed by George Burch were false at the time she filed them with the probate court and there is no evidence that she benefitted from the alleged fraud.....21

III. The Court of Appeals correctly remanded to the trial court to determine whether and in what amount interest will be due to the plaintiffs. ....23

CONCLUSION.....24

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991) .....	12
Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Delaware Nat. Ass'n, 2011 WL 864421 (D. Del. , filed Mar. 9, 2011) .....	17
Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 608 S.E.2d 573 (2005) .....	12
Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).....	20
Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985) .....	5, 11, 13, 24
Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).....	13, 23
Law v. S.C. Dept. of Corr., 368 S.C. 424, 629 S.E.2d 642 (2006).....	12
Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (Ct. App. 1994).....	12
S. Welding Works, Inc. v. K & S Const. Co., 286 S.C. 158, 332 S.E.2d 102 (Ct. App. 1985) .....	23
State v. Legette, 285 S.C. 465, 330 S.E.2d 293 (1985) .....	17
State v. Williams, 189 S.C. 19, 199 S.E. 906 (1938).....	17
Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) .....	13, 16, 17
Whelan v. Welch, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991).....	12
<b>STATUTES AND RULES</b>	
S.C. Code Ann. § 34-31-20.....	23
S.C. Code Ann. § 62-1-106.....	18
Rule 208(b)(1)(D), SCACR.....	20

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Respondents/Petitioners would submit that the issues as stated by the Plaintiffs/Petitioners do not present special or important reasons to grant a writ of certiorari, in that:

- I. Did the Court of Appeals correctly affirm the trial court's grant of a directed verdict to Jacqueline Busbee on the cause of action for aiding and abetting George's breach of his fiduciary duty for the reasons that:
  - A. George made the alleged improper transfers before he died and Ms. Busbee became his PR; and
  - B. The Plaintiffs presented no evidence that Ms. Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them?
- II. Did the Court of Appeals correctly affirm the trial court's grant of a directed verdict to Jacqueline Busbee, Laurie Burch and Dennis Burch on the cause of action for fraud benefit under Probate Code § 61-1-106 for the reasons that:
  - A. The Plaintiffs presented no evidence that Dennis Burch committed any sort of fraud and he has not received any benefit/funds from his father's estate.
  - B. The Plaintiffs presented no evidence that Laurie Burch committed any fraud, and to the extent that she received a benefit by the loans from George, her obligation to repay awaits a final determination of what is left in George's estate when all this litigation is over.
  - C. The Plaintiffs presented no evidence that Ms. Busbee knew any representations in the inventory and appraisements signed by George Burch were false at the time she filed them with the probate court and there is no evidence that she benefitted from the alleged fraud?
- III. Did the Court of Appeals correctly remand to the trial court to determine whether and in what amount interest will be due to the plaintiffs?

## 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>1</sup> commenced an action in Probate Court against George's estate, 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

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<sup>1</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.)

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.) 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 verdicts. At the close of Plaintiffs' case in chief, various directed verdict motions were made by the Defendants. The trial judge directed verdict in favor of Dennis Burch and Laurie Burch on all causes of action, subject to the possibility that Laurie may be called on to repay \$170,000 to George's estate depending on the verdict with respect to the surviving causes of action. (R. p. 897, l. 11-21.) As to Jackie Busbee, individually and as attorney, the

trial court directed verdicts as to aiding and abetting, fraud, conspiracy, conversion, and intentional interference with inheritance rights, but denied the motion as to negligence and professional malpractice. (R.p. 897, l. 10 to p. 898, l. 9). The trial court granted directed verdicts to Ms. Busbee in her capacity as PR of George' estate, on 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.)<sup>2</sup>

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

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

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<sup>2</sup>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).

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, 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 in addition to recovering the transfers made by George before Clara's death, the Plaintiffs were also entitled to recover the funds George had transferred after Clara's death<sup>3</sup>; and the Court also clarified that the remand allows the trial court to determine

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<sup>3</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.]

“whether and in what amount interest will be due to the Plaintiffs on these sums.” [Rev. App. 83.]

## STATEMENT OF THE FACTS

In a separate petition for Writ of Certiorari, the Petitioner Estate of George Burch set forth the relevant evidence regarding the transfers at issue in its Petition, which is incorporated herein. The Plaintiffs’ petition focuses on the claims against Jacqueline Busbee, George’s attorney and the Personal Representative of his estate, and George’s children, Laurie and Dennis. The pertinent facts regarding their involvement are recounted below.<sup>4</sup>

George E. Burch and Clara G. Burch were married in 1984. Clara was approaching 75 years of age, and George was just two months shy of being 70. Clara had been married previously, but she had no children. George had two children from his prior marriage – Defendants Laurie Burch and Dennis Burch. They had been married for 17 years when Clara died on April 19, 2000.

Clara had executed her Last Will and Testament on January 22, 1985, naming George as her Personal Representative. Ms. Busbee did not prepare the will.

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 did not participate in the execution of the power of attorney (R.p. 978, l. 11-19); rather, she gave George

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<sup>4</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. Further, these Defendants do not concede any facts as recited by the Plaintiffs in their Statement. In particular, many of the facts regarding the marriage of Clara and George and their personal finances simply are irrelevant to the issues as raised in their petition.

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).

George later had Ms. Busbee prepare a Last Will and Testament for himself, which he executed on June 5, 1996. Under the terms of his Will, George named Ms. Busbee as his Personal Representative. On the same day, George also executed a power of attorney naming Ms. Busbee as attorney-in-fact. Ms. Busbee never exercised the power of attorney given to her by George. (R.p. 979, l. 14 - 981, l. 7).

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). George transferred one account, a Wachovia CD in Clara's name, to himself on September 21, 2000, after Clara's death. The details of those transfers are recounted in the Estate's separate petition.

On July 6, 2000, George was appointed as Personal Representative of the Estate of Clara Gordon Burch. George, as Personal Representative of Clara's estate, retained Ms. Busbee as his attorney in his capacity as personal representative. (R.p. 982, l. 1 - 983, l. 5). Ms. Busbee advised George that it was his responsibility as Personal Representative of the Estate of Clara G. Burch to account for the assets of Clara. (R.p. 1020, l. 12-21). Ms. Busbee also instructed him that if there was a safe deposit box, he needed to visit the box to determine if there were any assets in the box. (R.p. 998, l. 20 - 999, l. 5; 1021, l. 13-22). Ms. Busbee accepted as true George's report of Clara's assets

and did not investigate her client's representations by personally going into the safe deposit box. (R.p. 1021, l. 18 - 1022, l. 7).

Although Ms. Busbee provided certain advice and assisted with filing probate forms with the court, she did not fill-out or sign any of the inventories or interim accountings filed with the Aiken County Probate Court in the Estate of Clara Burch. (R.pp. 1638-1657.) They were filled-out and signed by George as Personal Representative of the Estate of Clara Burch. (R.p. 2543, 2548, 2560, 2566; R.p. 962, l. 17-24).

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.) This Wachovia CD was not included by George on several inventories and appraisements, which he completed and signed, and which were filed by Ms. Busbee.

George died on January 18, 2003. (R. Vol. IV, p. 2577 and 2587). At the time of his death, \$144,000 had been disbursed to her beneficiaries, but Clara's estate had not been closed. George had signed a third supplemental inventory and appraisal (which did not include the Wachovia CD) in October 2002; however, it was not filed before his death. Ms. Busbee submitted it for filing on February 6, 2003. (R.pp. 1059, 1458-1464).

On January 22, 2003, Ms. Busbee and the Burch children, Laurie and Dennis, went to Security Federal Bank to ascertain if George's original will was in the safe deposit box. (R.p. 300, l. 21 - 301, l. 4 and p. 316, l. 20 - 317, l. 18). The bank officials checked the box for the will, but did not find it and nothing was removed from the box. Ms. Busbee and Laurie and Dennis were not even allowed to look through the contents of

the box. (R.p. 986, l. 6 - 987, l. 20) R.p. 321, l. 8 - 322, l. 5).

On January 28, 2003, Ms. Busbee was appointed Personal Representative of George's estate. Thirty (30) days later, on February 27, 2003, Plaintiff Charles Gordon, Clara's nephew, was appointed successor personal representative of her estate. (R.p. 988, l. 10-15).

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 to 319, l. 20; R.p. 989, l. 5 to 990, l. 14).

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 to 1111, l. 15). The initial Inventory and Appraisal filed in George's Estate disclosed the existence of these transactions and expressed uncertainty as to whether the transactions were loans or gifts. (R.p. 2577 and 2587, Schedule G). At trial, Laurie Burch testified that any balance due to her father was to be considered as an advance on her distribution from the estate. (R.p. 1111, l. 22 - 1112, l. 17).

Ms. Busbee received none of the funds transferred by George from Clara's accounts. (R. Vol. II, p. 949, l. 7-19 and p. 960, l. 9-19).

Although Ms. Busbee was never appointed as PR for Clara's estate, Plaintiffs claimed that she was responsible for maintaining the assets of Clara's estate during the interim of time between his death on January 18, 2003, and Mr. Gordon's appointment as successor PR on February 27, 2003. However, the Plaintiffs' had no evidence that any of the assets of Clara's estate were lost or wasted during that time period. (R.p. 409, l. 16 -

p. 410, l. 13.).

Similarly, the Plaintiffs presented no evidence that any assets of George's estate have been lost or wasted while Ms. Busbee has served as personal representative. (R.p. 415, l. 14 - 416, l. 2).

### **Summary of Argument**

The Plaintiffs have filed a petition for a writ of certiorari seeking review of the rulings of the Court of Appeals: (1) affirming the directed verdict in favor of Ms. Busbee on the cause of action for aiding and abetting breach of fiduciary duty; (2) affirming the directed verdict in favor of Jackie Busbee and Laurie Burch and Dennis Burch, on the cause of action for fraud under Section 62-1-106; and (3) the scope of the remand on the issue of prejudgment interest. In large part, the issues as presented challenge the Court of Appeals' review of the trial evidence, or in this case the lack thereof, in determining that the trial court correctly directed verdicts for the Defendants on these claims. The Defendants submit that the petition should be denied because there are no special or important reasons to grant a writ of certiorari -- no novel questions of law, no dissent, no conflict with a prior decision of the Supreme Court, no substantial constitutional issues involved, and no federal question. Rule 242(b), SCACR.

As to the cause of action for aiding and abetting the breach of fiduciary duty by George, Ms. Busbee maintains that George did not commit any such breach as separately addressed in his Estate's petition for a writ of certiorari. In addition, Ms. Busbee would submit that the claim was, and could only be, asserted against her individually, inasmuch as the alleged improper transfers occurred during George's lifetime prior to her appointment as PR of his estate. As found by the Court of Appeals, and addressed in the

Return separately filed by Ms. Busbee in her individual capacity, the Plaintiffs presented no evidence that Ms. Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them. (Rev. App. 83.)

As to the fraud/fraud benefit claim under § 62-1-106, the Court of Appeals agreed with the trial court that the Plaintiffs presented no evidence that Dennis Burch committed any sort of fraud and he has not received any benefit/funds from his father's estate; all he did was accompany Ms. Busbee and Laurie to the bank when the bank officials looked in the safety deposit box for the will. Likewise, there is no evidence that Laurie Burch committed any fraud, and to the extent that she received a benefit by the loans from George, her obligation to repay awaits a final determination of what is left in George's estate when all this litigation is over. As to Ms. Busbee, there is no evidence that she knew any representations in the inventory and appraisements were false at the time she filed them with the probate court and there is no evidence that she benefitted from the alleged fraud.

Finally, as to the issue of the prejudgment interest, the Court of Appeals correctly remanded the issue to the trial court because the entitlement to prejudgment interest will be contested.

A separate petition for a writ of certiorari is being made by George's Estate which does present special and important reasons to grant review of the Court of Appeals' decision because it expands the Fender Rule and applies it retroactively to set aside the jury's verdict and directs a verdict in favor of the Clara's Estate on the transfers George made in April 2000.

## ARGUMENT

**RESPONDENTS/PETITIONERS WOULD SUBMIT THAT THE ISSUES AS STATED BY THE PLAINTIFFS/PETITIONERS DO NOT PRESENT SPECIAL OR IMPORTANT REASONS TO GRANT A WRIT OF CERTIORARI TO REVIEW.**

### *Directed Verdict Standard*

When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. Law v. S.C. Dept. of Corr., 368 S.C. 424, 629 S.E.2d 642 (2006). The appellate court will reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision 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). On appeal from an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in a light most favorable to the party against whom the directed verdict was granted. If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Whelan v. Welch, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991). This does not mean that the trial court should ignore facts unfavorable to the opposing party. Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (Ct. App. 1994). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor. Id. A failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991).

**I. The Court of Appeals correctly affirmed the trial court's grant of a directed verdict to Jacqueline Busbee on the cause of action for aiding and abetting George's breach of his fiduciary duty.**

In Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444, 448 (Ct. App. 2008), the Court of Appeals stated the elements for a cause of action of aiding and abetting a breach of fiduciary duty:

- (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). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Id.*

First, as to element one – the predicate breach, the Plaintiffs alleged that George breached his fiduciary duties in connection with the transfers. However, the jury returned a verdict for the Estate of George Burch finding that there was no such breach. To the extent that the Court of Appeals has reversed the jury's verdict on those transactions, the Estate is separately seeking review.

The Estate maintains that 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.

The Defendants maintain upon reinstatement of the jury's verdict that the transfers were not improper, Plaintiffs' claim necessarily fails. Notwithstanding the erroneous ruling on the transfers, the Court of Appeals correctly held that the claim for aiding and abetting fails because the Plaintiffs did not present any evidence that Ms. Busbee had knowledge of any transfers made by George.

**A. George made the alleged improper transfers before he died and Ms. Busbee became his PR.**

There is some confusion about the nature of the aiding and abetting claim against Ms. Busbee in regards to whether it is directed against her in her individual capacity or as PR of George's estate and which transfers she is alleged to have aided and abetted. The cause of action for aiding and abetting was directed solely to Busbee, individually. (Amended Complaint - Second Cause of Action; R.p. 112). The allegations of the second cause of action for aiding and abetting speak to conduct preceding George's death and Ms. Busbee's appointment as personal representative. Accordingly, Ms. Busbee, as personal representative, could not have aided and abetted George in the alleged wrongful conversion of Clara's funds because Ms. Busbee did not assume the office of personal representative until after George died. She, as personal representative, could not have aided and abetted someone who was already dead. Busbee's alleged individual liability, if any, for aiding and abetting George is addressed in her separate Respondent's Return.

**B. The Plaintiffs presented no evidence that Ms. Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them.**

There also is some confusion about the nature of the aiding and abetting claim against Ms. Busbee in regards to which transfers she is alleged to have aided and abetted. As noted above, there were a series of transfers challenged. One group occurred shortly prior to Clara's death, and a single transfer of the Wachovia CD was made by George after Clara's death, on September 21, 2000. In their petition, the Plaintiffs assert that Ms. Busbee had knowledge of the transfer of the Wachovia CD by virtue of receiving a fax from the bank on April 12, 2001, which showed that the CD was in Clara's name and the amount of the balance at her death. [Plaintiff's petition, p. 12-13.] They also assert that Ms. Busbee learned about the other earlier transfers in January 2003, from documents she received from Laurie Burch.

Again, Ms. Busbee was not PR of George's estate at the time of any of the transfers. Nor was she his PR when he transferred the Wachovia CD. Further, arguments about receipt of documents after the transfers is not evidence, and does not support any reasonable inference, that Ms. Busbee knowing *participated* in the transfers.

To the extent that the Plaintiffs claim that Ms. Busbee should have listed the Wachovia CD in Clara's estate, they ignore the evidence that George, as PR of Clara's estate, signed the inventory and appraisements. Further, there also is no legal or evidentiary support for any claim that Ms. Busbee's involvement in the probate estate filings can support a claim for aiding and abetting any alleged breach by George in connection with the transfers.

Similarly, the Plaintiffs' arguments about the testimony of their expert, James Hardin, does not support any claim for aiding and abetting George's supposedly improper transfers. The Plaintiffs called Mr. Hardin, as an expert witness on the duties of probate counsel and personal representatives in estate administration. (R.p. 500, l. 16-19). His opinions addressed the standard of care of a lawyer in assisting in the administration of the estate, and he opined that she breached the standard in assisting George with the administration of Clara's estate by failing to ascertain the assets in Clara's estate. (R.p. 502, 510.) Those opinions are not relevant to the aiding and abetting claim.

Plaintiffs also try to build a claim of aiding and abetting on Ms. Busbee's actions in assisting George with the probate of Clara's estate by filing the third supplemental I&A after his death, relying on the decision in Vortex and Professor John Freeman's testimony. Again, Ms. Busbee did not complete or sign the I&A, George did; Ms. Busbee only filed it. In any event, there is nothing in the Court's decision in Vortex or Freeman's testimony to support the Plaintiffs' claim for aiding and abetting.

In Vortex, the Court of Appeals held that the trial court did not err in denying a directed verdict motion because there was evidence that the Defendant knowingly encouraged the wrongdoer to breach his fiduciary duty. 662 S.E.2d at 449. There is no such evidence that Ms. Busbee encouraged George; rather, the evidence is that she did not know when he made the transfers; and she certainly was not yet his PR. As to Freeman's testimony in Vortex, he was allowed to offer an opinion on the acts that constituted the primary breaches of fiduciary duty. 662 S.E.2d at 450. In this case, Freeman acknowledged that he was not an expert in probate law (R.p. 820); however, he

was qualified as an expert in the field of lawyer's duties and professional responsibilities. (R.p. 821.) While he was critical of Ms. Busbee's actions in drafting Clara's Power of Attorney (R.p. 823), and supposed conflicts of interest (R.p. 827), his opinion that Ms. Busbee had an obligation to Clara's estate is not relevant to the aiding and abetting claim. To the extent that Freeman was allowed to testify as to the standard of care of attorneys with regard to aiding and abetting, he vaguely stated that Ms. Busbee assisted George in covering up his allegedly improper transfers. However, none of the transfers were **known** to be improper until the Court of Appeals ruled, which decision is separately challenged. Most notably, the jury determined that Ms. Busbee did not commit legal practice or breach any fiduciary duty, which findings are not now challenged. Further, the requisite element is "knowing participation," and nothing in Vortex supports a claim for aiding and abetting based on what Ms. Busbee might have learned or did long after the fact of the transfers. See Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v. Wachovia Bank of Delaware Nat. Ass'n, 2011 WL 864421 (D. Del. , filed Mar. 9, 2011)(recognizing "the distinction long-recognized in criminal law between aiding and abetting, which requires concurrency of the underlying crime and the assistance, and accessory after the fact, which does not..."). Compare State v. Legette, 285 S.C. 465, 467, 330 S.E.2d 293, 295 (1985) (accessory after the fact requires proof of assisting escape from detection or avoiding arrest) with State v. Williams, 189 S.C. 19, 199 S.E. 906, 908 (1938) ("The law is that when two or more persons aid, encourage, and abet each other in the commission of a crime, all being present, all are principals and equally guilty.")

**II. The Court of Appeals correctly affirmed the trial court's grant of a directed verdict to Jacqueline Busbee, Laurie Burch and Dennis Burch on the cause of action for fraud benefit under Probate Code § 62-1-106.**

Section 62-1-106 of the South Carolina Probate Code provides:

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. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

S.C. Code Ann. § 62-1-106. There are no reported decisions from our appellate courts involving this code section.

The Plaintiffs argue that the evidence established a false filing in the Probate Court by Ms. Busbee, individually and as PR, which damaged Clara's estate and benefitted George's estate and Laurie and Dennis, as his beneficiaries, and Ms. Busbee herself. However, the Court of Appeals and the trial court correctly found that the Plaintiffs presented no evidence that Dennis Burch committed any sort of fraud in connection with the transfers and he had not received any benefit/funds from his father's estate; all he did was accompany Ms. Busbee and Laurie to the bank when the bank officials looked in the safety deposit box for the will. Likewise, there is no evidence that Laurie Burch committed any fraud, and to the extent that she received a benefit by the loans from George, her obligation to repay awaits a final determination of what is left in George's estate when all this litigation is over. As to Ms. Busbee, there is no evidence that she knew any representations in the inventory and appraisements were false at the

time she filed them with the probate court and there is no evidence that she benefitted from the alleged fraud.

**A. The Plaintiffs presented no evidence that Dennis Burch committed any sort of fraud and he has not received any benefit/funds from his father's estate.**

The Plaintiffs do not cite any evidence that Dennis Burch committed any fraud and they concede that he has not received any funds from George's estate.<sup>5</sup> (Petition, p. 19; R.p. 890, ll. 2-4.) In addition, by Plaintiffs' admission during argument on the directed verdict motions, they were not seeking to prove fraud benefit Dennis; rather, the only cause of action applicable to Dennis was conversion:

Mr. Pope: Your Honor, the only cause of action applicable to him [Dennis Burch] is the conversion. (R.p. 888, l. 16 -21).

The record reflects that Dennis was only in Wagener, SC a total of thirty-six (36) hours for his father's funeral. He had never met Ms. Busbee before their visit and never saw her afterward. (R.p. 456, l. 16-21). He accompanied his sister and Jackie Busbee to the bank to see if a more recent will for his father could be found, and they were allowed by to gain admission to the safety deposit box. However, it is irrefutable that the bank personnel did not allow them to look in the box and nothing was removed from the box at that time. (R.p. 321, l. 8 - 322, l. 11; R.p. 718, l. 3-10). This was the extent of Dennis' involvement in this case and even Appellant's witness, Mr. Hardin, conceded that under these facts Dennis had not done anything wrong. (R.p. 715, l. 5 - 716, l. 16). Dennis was

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<sup>5</sup> Defendant submits that this issue is presented in such a conclusory manner as to render it abandoned. See Rule 208(b)(1)(D), SCACR; Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004).

unaware of any transfers by George, never received any loans from George, (R.p. 490, l. 3-7; R.p. 495, l. 3-6).

Accordingly, the trial court properly granted a directed verdict in his favor on the fraud benefit claim. The Court should note that the trial court also granted a directed verdict in favor of Dennis on the conversion cause of action and the Plaintiffs did not raise any challenge to that ruling on appeal. See Appellants' Brief, p. vi - Statement of the Issues on Appeal.<sup>6</sup>

**B. The Plaintiffs presented no evidence that Laurie Burch committed any fraud, and to the extent that she received a benefit by the loans from George, her obligation to repay awaits a final determination of what is left in George's estate when all this litigation is over.**

As to the cause of action against Laurie Burch, the Plaintiffs' argument consists of only one sentence: "Laurie clearly either participated in or benefitted from George's takings, or both." Defendant submits that this issue is presented in such a conclusory manner as to render it abandoned. See Rule 208(b)(1)(D), SCACR; Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004). In any event, the record is void of any statements by Laurie which could constitute a fraud in connection with the probate proceedings.

First, there is no evidence that Laurie participated in the transfers made by George. And, while the Plaintiffs have previously made a laundry list of miscellaneous events, involving various persons at various times, and through a creative process of

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<sup>6</sup>"Did the lower court err in granting directed verdict on the cause of action for conversion as to Respondent Busbee, individually and as PR?" It is also notable that the Plaintiffs do not seek review of the Court of Appeals' decision affirming the trial court on this issue as raised against Ms. Busbee.

spinning a tale, tried to convert the list into a theory of fraud, the list of events does not satisfy the specific requirements for fraud benefit.

At trial during the colloquy on the directed verdict motions, Plaintiffs' attorney was asked by the trial court to identify evidence in the record that would leave Laurie in the case. (R.p. 890, l. 14-18). The response was that Laurie had received loans from George (R. Vol. II, p. 890, l. 19-22). When asked to link the loans to a particular cause of action, the Plaintiffs could not do so but instead moved on the say that Laurie had destroyed records. (R.p. 890, l. 23 - 891, l. 7). When the trial court asked them to identify evidence that the alleged destruction of records had proximately caused them any loss, Plaintiffs' counsel could not do so, but instead moved on to raise the subject of the aiding and abetting, breach of fiduciary duties and conspiracy causes of action against Respondent Busbee. (R.p. 891, l. 8-22).

This colloquy, as well as the conclusory argument presented in their current petition, demonstrates that the Plaintiffs simply cannot identify evidence to support their claim against Laurie Burch, and the trial court properly granted a directed verdict which the Court of Appeals' correctly affirmed. Ultimately, to the extent that Laurie received a benefit by the loans from George, her obligation to repay awaits a final determination of what is left in George's estate when all this litigation is over.

**C. The Plaintiffs presented no evidence that Ms. Busbee knew any representations in the inventory and appraisements signed by George Burch were false at the time she filed them with the probate court and there is no evidence that she benefitted from the alleged fraud.**

The Plaintiffs argue that the trial court should not have granted a directed verdict to Ms. Busbee, individually and as Personal Representative, on the fraud benefit cause of

action; however, the trial court correctly ruled that the evidence cannot sustain any claim against her.

The fraud benefit claims against Ms. Busbee, individually, are separately addressed in her Return. As to the claims against Ms. Busbee as George's PR, the theory is that she had actual knowledge that George had closed the Wachovia CD and fraudulently did nothing to disclose it or recover it when acting as PR of George's Estate. They point to the evidence that Ms. Busbee received a fax from Wachovia on April 13, 2001, which contained information about the date of death value for Wachovia CD. (Plaintiffs' Exhibit no. 89, R. p. 1752-1754.) Again, it must be noted that when she received the fax, George was still alive and she was acting as his attorney, in his capacity as Personal Representative of Clara's estate.

The Plaintiffs' theory is that this fax established that the particular Wachovia CD was Clara's and that George had no right or claim to it, and that consequently, Ms. Busbee, when appointed as Personal Representative of George's estate almost two years later, was supposed to know that George had wrongfully closed the Wachovia CD sometime between the date of the fax and the date of George's death. And, that she committed fraud by not listing in his inventory and appraisal. However, the Plaintiffs' theory fails because the local Wachovia bank official testified that he thought that the CD was owned by Clara as an IRA, and no beneficiary was named, so that George was entitled to the funds. (Jeremy Hall, R.p. 736-737.) It was not until later during the trial that the bank official obtained information from the main bank in Charlotte that the CD was not an IRA. (R.p. 1146.) Thus, there was no way that Ms. Busbee could have known any different.

Finally, the Plaintiffs can identify no evidence that any the assets of George's Estate have been lost, misappropriated, wasted or anything of that nature. (R.p. 415, l. 14 - 416, l. 2). Those assets still are being held in George's estate pending a final disposition on all appeals, to transfer funds to Clara's estate if any are determined due.

**III. The Court of Appeals correctly remanded to the trial court to determine whether and in what amount interest will be due to the plaintiffs.**

Under S.C. Code Ann. § 34-31-20:

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

“Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain or capable of being reduced to certainty.” S. Welding Works, Inc. v. K & S Const. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985).

The Plaintiffs claim that they are entitled to prejudgment interest and that that the trial court need only “do the math” to calculate the amount due. However, the Defendants will contest their entitlement to prejudgment interest. For example, in Future Group, II v. Nationsbank, 324 S.E.2d at 101, the appellate court affirmed a judgment for the plaintiff setting aside certain guarantees and credit line debts as fraudulent conveyances; however, the court held that the plaintiff was not entitled to prejudgment interest, stating:

Prejudgment interest is allowed on obligations to pay money from the time when payment is demandable, either by agreement of the parties or by operation of law, if the sum is certain or capable of being reduced to certainty. Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993). Here, the sum owed to 5R's, while capable of being reduced to certainty, was not demandable *from Bank* by operation of law or agreement at any time

before entry of judgment. Accordingly, prejudgment interest should not be awarded.

To the extent that the Plaintiffs' challenge to the transfers George made are in the nature of setting aside the transfers as unauthorized, an issue will be presented regarding whether the Plaintiffs will be entitled to prejudgment interest if the transfers are determined finally to have been improper. Accordingly, the Court of Appeals correctly remanded for the trial court to determine whether the Plaintiffs are entitled to any prejudgment, and if so, how much.

### CONCLUSION

For those reasons stated above, this Court should deny the Plaintiffs' petition, and affirm the directed verdict in favor of these Defendants on the claims for aiding and abetting and fraud benefit under Section 62-1-106. However, as separately requested, the Court should grant review of the Court of Appeals' ruling on George's transfers and improper application of the Fender Rule, and thereupon, affirm the judgment directed in favor of the Defendants on all claims.

Respectfully submitted,



5/3/12

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Attorney for Respondents  
Dennis E. Burch and Laurie E. Burch**

May 4<sup>th</sup>, 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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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 **Return to Petition for a Writ of Certiorari** on behalf of Jacqueline F. Busbee, as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 4<sup>th</sup> day of May, 2012, at the following addresses:

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Warren C. Powell, Jr., Esquire  
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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  
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May 4, 2012

**VIA HAND DELIVERY**

**RECEIVED**

MAY -4 2012

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

**S.C. Supreme Court**

RE: Charles E. Gordon and Barbara Gordon, as Personal Representatives  
v. Jacqueline F. Busbee, Individually and as Personal Representative  
of the Estate of George E. Burch, et al.  
2003-CP-02-0604  
Our File No. 10682.1

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Return to Petition for a Writ of Certiorari on behalf of Jacqueline F. Busbee, as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch.

By copy of this letter, copies of the enclosed Return are being served on the other parties and attorneys of record as reflected on the enclosed Certificate of Service.

Thank you for your courtesy and assistance.

Very truly yours,

  
B. Michael Brackett

BMB/lta  
Enclosures

Page 2

May 4, 2012

cc. Carlos W. Gibbons, Jr., Esquire  
Warren C. Powell, Jr., Esquire  
Deborah H. Sheffield, Esquire  
Thomas H. Pope, III, Esquire  
The Honorable Tanya Gee, Clerk, South Carolina Court of Appeals  
Jacqueline F. Busbee, Esquire  
(All with enclosures)