

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Aiken County
Court of Common Pleas

RECEIVED

MAY 17 2012

Doyet A. Early III, Circuit Court Judge
S.C. Supreme Court

Case No. 2003-CP-02-604

S.C. Ct. App. Op. No. 4880, filed August 31, 2011
Withdrawn, Substituted and Refiled January 4, 2012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-Petitioners.

In the Matter of: The Estate of Clara Gordon Burch

**PETITIONERS/RESPONDENTS' REPLY TO RETURN TO PETITION
FOR WRIT OF CERTIORARI BY JACQUELINE F. BUSBEE, AS PR
OF THE ESTATE OF GEORGE E. BURCH**

Thomas H. Pope III
POPE AND HUDGENS, P.A.
PO BOX 190
Newberry, SC 29108
P: 803-276-2532; F: 803-276-8684
thpope@popeandhudgens.com
Attorneys for Petitioners-Respondents
Charles E. Gordon and Barbara
Gordon, as PRs of the Estate of
Clara Gordon Burch

TABLE OF CONTENTS

QUESTIONS PRESENTED..... 1

INTRODUCTION..... 2

ARGUMENT..... 3

I. THE SUBSTITUTED OPINION OF THE COURT OF APPEALS ERRED IN DIRECTING THE LOWER COURT ON REMAND TO DETERMINE “WHETHER” INTEREST SHOULD BE AWARDED ON THE \$193,303. SINCE INTEREST SHOULD BE AWARDED AS A MATTER OF LAW, THIS PORTION OF THE OPINION SHOULD BE REVERSED..... 3

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT’S GRANTING DIRECTED VERDICT IN FAVOR OF BUSBEE ON THE CAUSE OF ACTION FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY..... 5

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT’S GRANTING DIRECTED VERDICT IN FAVOR OF DEFENDANTS ON THE CAUSE OF ACTION FOR FRAUD/FRAUD BENEFIT UNDER §62-1-106..... 8

CONCLUSION 9

QUESTIONS PRESENTED

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

2. Did the Court of Appeals err in affirming the lower court's granting directed verdict in favor of Respondent Busbee, individually and as personal representative, on the cause of action for aiding and abetting breach of fiduciary duty?

3. Did the Court of Appeals err in affirming the lower court's granting directed verdict in favor of Respondent, individually and as personal representative, on the cause of action for fraud/fraud benefit under S.C. Code §62-10106?

INTRODUCTION

Petitioners/Respondents (Plaintiffs) rely on their previous filings in this case in addition to the matters set forth herein. This Reply will address only certain points in the Return not already set forth in the Plaintiffs' Petition for Writ of Certiorari.

In its Opinion of January 4, 2012, the Court of Appeals correctly reversed the lower court's denial of plaintiffs' motion for directed verdict and remanded the case for entry of judgment in plaintiffs' favor for \$193,303. Plaintiffs pled for prejudgment interest in their Amended Complaint. However, the Opinion directed the lower court on remand to determine "whether and in what amount" such prejudgment interest should be awarded. The Opinion should be modified to direct the lower court on remand to calculate the amount of said prejudgment interest.

The Court of Appeals also erred in affirming the lower court's granting directed verdicts in favor of Defendant Busbee (individually and as PR) on the cause of action for aiding and abetting fiduciary duty. There was at a minimum a scintilla of evidence to defeat the motion. There was evidence that Busbee in her own handwriting wrote "Estate of Clara Burch" on a document showing ownership of a Wachovia C.D. to be Clara's, yet Busbee participated in allowing her client, George Burch, to transfer that asset to himself.

The Court of Appeals also erred in affirming the lower court's granting directed verdict in favor of Defendants Busbee, Laure Burch, and Dennis Burch on the cause of action for fraud/fraud benefit under §62-1-106, which allowed plaintiffs, as persons injured by fraudulent probate court filings, to recover against "any person...benefitting from the fraud, whether innocent or not." Thus, even if innocent, these defendants have benefitted from the Estate of George Burch holding assets which belong to Clara's estate.

ARGUMENT

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

The amended complaint asked for prejudgment interest. (R., p. 117). Instead of remanding this matter to the lower court for a determination and calculation of the exact amount of interest, the Court of Appeals remanded it for a determination of “whether and in what amount interest will be due to the plaintiffs on these sums.” (Opinion, p.6). This was error, as all the improper transfers by George Burch to himself were in liquidated amounts and for “sums certain.” On remand, the lower court should be instructed to calculate the amount of prejudgment and post judgment interest on the \$193,303 of improper transfers, from the date(s) when they were made.

The applicable statute regarding both prejudgment and post judgment interest or prejudgment interest is S.C. Code §34-31-20(a) (2005) which provides in part as follows:

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

The language of this statutory provision is mandatory.

When a plea for prejudgment interest is made, as plaintiffs did in this case, such interest is recoverable on sums certain from the date it is due. The improper transfers by George to himself from Clara’s funds were made on specific dates in specific amounts as follows:

- a. \$79,495.11 and \$4,778.46 withdrawn on 4/13/2000;
- b. \$20,026.41 withdrawn on 4/17/2000;
- c. \$39,552.98, \$6,235.99, and \$9,904.21 withdrawn on 4/17/2000;

d. \$33,309.87 withdrawn on 9/21/2000.

(Opinion, p.6); (R., pp.1334).

The above funds were payable and due to Clara or her estate on the date(s) they were taken. Prejudgment interest is allowed on an obligation to pay money “from the time when, either by agreement or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty.” Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993). These sums were in fixed amounts at the date(s) of each transfer.

The Return of defendants purports to contest this point, but it cites no case which supports their objection.¹ It also does not contest the fact that the measure of recovery here was fixed at the time the claim arose – i.e., at the time of each improper transfer.

The Return of defendants George Burch Estate overlooks the case of Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006), in which this Court wrote:

“The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993); Ancrum v. Slone, 29 S.C.L. (2 Speers) 594 (1844). Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.”

Id. at pp. 258-259.

In this case, the amount(s) due is undisputed. The date(s) of each transfer/conversion by George is undisputed. The measure of damages is fixed. The lower court should be directed to determine and calculate the amount of interest owed, both prejudgment or post judgment.

¹ Defendants cite only Future Group II v. NationsBank, 478 S.E.2d 45 (Ct.App. 1996) to support their objection. However, in that case the amount owed was not demandable from the bank prior to entry of judgment. In the instant case, as determined by the Court of Appeals, the funds of Clara which George obtained were as a matter of law demandable from him on the date of each transfer.

This issue should be addressed by this Honorable Court at this time because this case was filed in 20003. This is the second appeal. To avoid a third appeal, this Court should modify the Opinion of the Court of Appeals to provide that, on remand, the lower court should be directed to determine the amount of prejudgment and post judgment interest to be awarded on the \$193,303 specified in that Opinion. In the alternative, this Court should make this determination.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S GRANTING DIRECTED VERDICT IN FAVOR OF BUSBEE ON THE CAUSE OF ACTION FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY.

There is at least a scintilla of evidence that Busbee, individually and as PR, aided and abetted George Burch in breaching his fiduciary duty. This evidence was discussed in Plaintiffs' Petition for Writ of Certiorari and will be briefly summarized hereinbelow.

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

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

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

Defendants assert that Busbee did not sign the Inventory of Clara's estate which omitted the Wachovia CD, but that rather George did. This argument ignores that as his attorney, Busbee had specific knowledge, confirmed by her handwritten note ("Estate of Clara Burch") (R., pp. 1752-1753) that this CD was owned by Clara. Yet, she turned a "blind eye," and assisted George, by failing to list it as an asset in Clara's Estate and by including it in George's estate.

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

In addition to Busbee's knowledge of the Wachovia account at the time she was attorney for Clara's estate and was personal representative of George's estate, she had duties to place these funds in Clara's estate. Busbee reasonably should have known of the other acts of wrongdoing by George even before his death. Plaintiffs' expert witness, James Hardin, stated that it was a breach of the standard of care for Busbee not to look at the bank statements for the

last month of Clara's life. (R., p. 510). He stated further that, if she had seen those statements, she would have known that over \$210,000 was transferred by George out of Clara's accounts to himself in the last 10 days of Clara's life. (R., pp. 510-511). There is sufficient evidence that Busbee substantially assisted George, the primary violator, in the commission of a wrongful act. Busbee's placement of the \$33,000 in the Wachovia CD as an asset on the Estate of George Burch's inventory, when it should have been listed on Clara's estate inventory, was substantial assistance to George in breach of his fiduciary duties. Mr. Hardin testified that the fiduciary of Clara's estate had a duty to retrieve the assets in George's estate. (R., p. 547). Because Busbee was PR of the estate that was inappropriately holding Clara's assets, she would "be, in effect, making a claim against herself..." (R., p. 547).

Busbee also participated in George's wrongful acts by filing on February 6, 2003, after George's death, the third supplemental inventory and appraisal of the Estate of Clara Burch dated and signed by George on October 1, 2002. (R., pp. 1458-1464). This filing did not list the Wachovia account or any other of Clara's assets which had been converted by George. At the time that Busbee filed this document after George's death, she was not only PR of George's estate, but she was also the fiduciary of Clara's estate under S.C. Code §62-3-609. She entered Clara's safe deposit box after George's death without notifying Charles Gordon, PR for Clara's estate. Busbee did not use what she found to help Clara's estate but to protect George, who had breached his fiduciary duties as POA for Clara and as her PR.

These actions by Busbee constituted sufficient evidence to make her an aider and abettor. In affirming the lower court's granting a directed verdict on this cause of action, the Court of Appeals overlooked this evidence. The cause of action for aiding and abetting should have gone to the jury. The Court of Appeals erred in affirming the directed verdict in favor of Respondent

Jacqueline Busbee on the cause of action for aiding and abetting breach of fiduciary duty and in denying appellants' motion for new trial.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S GRANTING DIRECTED VERDICT IN FAVOR OF DEFENDANTS ON THE CAUSE OF ACTION FOR FRAUD/FRAUD BENEFIT UNDER §62-1-106.

There is at least a scintilla of evidence that Busbee knew that her filing of incorrect inventories of the Estate of Clara Burch was a "false filing" for which she should be responsible. She knew that the Wachovia CD belonged to Clara, yet failed to include it on her estate inventory. Under S.C. Code §62-1-106, a person who is injured by a false or fraudulent filing may recover "from any person...benefitting from the fraud, whether innocent or not, but only to the extent of any benefit received."

Even if they are innocent, Dennis and Laurie Burch are the beneficiaries of George's estate, and they benefit by having this CD included in his estate. Busbee is subject to being paid a commission from the estate, and she benefits as well.

Defendants argue in their Return (p.22) that Busbee had no way of knowing that Clara owned the CD because the local bank witness was confused about its ownership and had initially, mistakenly thought the CD was owned by Clara's IRA, which was incorrect. The truth is this: in April 2001, Busbee was well aware that Clara was the owner of the Wachovia CD (R., pp. 1752- 17543). Yet, she made the false filing which did not include this asset, to plaintiffs' detriment and to the benefit of Dennis Burch, Laurie Burch and herself.

The plaintiffs incorporate the previous arguments made in their Petition. It was error for the Court of Appeals to affirm the ruling of the lower court granting directed verdict on the cause of action under S.C. Code §61-1-106.

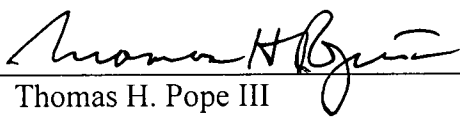
CONCLUSION

For the reasons set forth herein, this Honorable Court should grant the Petition for Writ of Certiorari and rule as follows:

- (a) reversing the Opinion of the Court of Appeals regarding interest and directing the lower court on remand to determine the amount of interest to be awarded the judgment in favor of plaintiffs against the Estate of George Burch in the amount of \$193,303 for breach of fiduciary duty;
- (b) reversing the Opinion of the Court of Appeals affirming the granting of directed verdict on the cause of action for aiding and abetting breach of fiduciary duty as to Defendant Busbee, individually and as PR; and,
- (c) reversing the Opinion of the Court of Appeals affirming the granting of directed verdict on the cause of action for fraud/fraud benefit as to Defendants Busbee, Laurie Burch and Dennis Burch.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: 
Thomas H. Pope III
PO Box 190
1508 College Street
Newberry, SC 29108
P: 803-276-2532; F: 803-276-8684
thpope@popeandhudgens.com

Attorneys for Petitioners-Respondents
Charles E. Gordon and Barbara Gordon,
as PRs of the Estate of Clara Gordon Burch

May 17, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2003 CP 02-604

S.C. Ct. App. Op. No. 4880, filed August 31, 2011
Withdrawn, Substituted and Refiled January 4, 2012

RECEIVED

MAY 17 2012

S.C. Supreme Court

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

v.

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

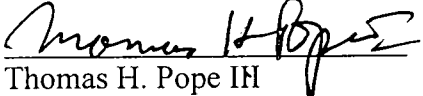
PROOF OF SERVICE

The undersigned hereby certifies that he has served Petitioners/Respondents' Reply to Return to Petition for Writ of Certiorari by Jacqueline F. Busbee, as PR of the Estate of George E. Burch dated May 17, 2012 on Respondents by depositing a copy same in the United States Mail, postage prepaid, properly addressed to each of the following counsel on May 17, 2012:

B. Michael Brackett, Esquire
Moses Koon & Brackett, PC
PO Box 100261
Columbia, SC 29202
Attorneys for Jacqueline F. Busbee
as PR of the Estate of George E. Burch

William D. Britt, Jr., Esquire
Warren C. Powell, Jr., Esquire
Bruner, Powell, Robbins, Wall
and Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110
Attorneys for Respondent
Jacqueline F. Busbee, Individually

Carlos W. Gibbons, Jr., Esquire
Ashley & Gibbons, PA
712 Calhoun Street, Suite B
Columbia, SC 29201
Attorneys for Respondents Dennis E. Burch
and Laurie E. Burch


Thomas H. Pope III

May 17, 2012

JOSEPH W. HUDGENS
THOMAS H. POPE III
W. CHAD JENKINS

KYLE B. PARKER

**DOPE
&
HUDGENS**
ATTORNEYS. P.A.

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

THOMAS H. POPE
(1913-1999)
ROBERT D. SCHUMPERT
(1927-1994)

May 17, 2012

RECEIVED

MAY 17 2012

S.C. Supreme Court

HAND-DELIVERED

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29221

RE: Charles E. Gordon and Barbara Gordon, as Personal Representatives, Petitioners v. Jacqueline F. Busbee, Individually and as Personal Representative of the Estate of George E. Burch, et al., Respondents – Case No. 2003-CP-02-0640 (Case Tracking No. 200894366)

Dear Mr. Shearouse:

I enclose herein for filing the original and six (6) copies of Petitioners/Respondents' Reply to Petition for a Writ of Certiorari by Jacqueline F. Busbee, as PR of the Estate of George E. Burch, together with my certificate of service of same on all counsel of record in this case.

Also included is an extra copy of this letter and the Return which I would appreciate your clocking in and returning to me via the courier.

With kind regards.

Sincerely,

POPE AND HUDGENS, P.A.



Thomas H. Pope III

THP,III/lg
Enclosures

cc: B. Michael Brackett, Esquire, w/encls.
Carlos W. Gibbons, Esquire, w/encls.
William D. Britt, Jr., Esquire, w/encls.
Warren C. Powell, Jr., Esquire, w/encls.
The Honorable Jenny Abbott Kitchings, Clerk, SC Court of Appeals, w/encls.
Mr. & Mrs. Charles Gordon, w/encls.