

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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OCT 17 2012

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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Unpublished Opinion No. 2012-UP-420  
Case No. 2009-CP-10-2846

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Errol Washington as Personal Representative of the  
Estate of Danny Washington, ..... Petitioner,

v.

Alice R. Stewart, Leroy Stewart, Alvin E. Burch, Sr., a/k/a Alvin E. Birch,  
Rudell S. Burch, Sterling Lending Group, Inc., a South Carolina  
Corporation, Regent Bank, and Wachovia Bank, N.A., ..... Defendants,

Of Whom Alice R. Stewart, Leroy Stewart, Alvin E. Burch, a/k/a  
Alvin E. Birch, Rudell S. Burch and Wachovia Bank, N.A., are the ..... Respondents.

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PETITION FOR A WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 13, 2012.

### QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that where bank personnel assist the personal representative of an estate in opening an estate account, and then the same bank personnel assist the personal representative in opening a personal account, and then the same bank personnel assist the personal representative in transferring substantially all of the estate funds from the estate account to the personal account within several days after the funding of the estate account, the bank owes no duty to the beneficiaries of the estate?
2. Did the Court of Appeals err in holding that, where bank personnel assist a personal representative in opening an estate account, and then the same bank personnel assist the personal representative in opening a personal account, and then the same bank personnel assist the personal representative in transferring substantially all of the estate funds from the estate account to the personal account several days after the funding of the estate account, there is not a scintilla of evidence that the bank knowingly participated in a breach of fiduciary duty by the personal representative?

### STATEMENT OF THE CASE

The effect of the decision of the Court of Appeals is to exempt banks from the general duty of care owed by all other members of society to avoid inflicting reasonably foreseeable injury on third parties. The Court of Appeals used the principles that the

relationship between a bank and its customers is that of debtor and creditor, and that a bank owes no fiduciary duty to its customer, to find that Wachovia could owe no duty Petitioner—even though Petitioner was a third party, and not a customer or depositor of Wachovia subject to those principles, and even though there was remarkable evidence of culpability on the part of Wachovia.

Alice Stewart was appointed the personal representative of the State of Danny Washington. The estate's assets consisted of funds in the amount of \$304,775.18, which had been held by a conservator for Danny Washington up until his death.

On July 25, 2007, Stewart went to the North Rivers bank of Wachovia, and with the assistance of the branch personnel, opened an estate account. On August 1, 2007, Stewart had the conservator transfer the \$304,775.18 in estate assets to this new estate account. (R. p. 19, ¶ 17). The title of the estate account was "The Estate of Danny Washington Alice R. Stewart PR." The estate's federal tax ID number was assigned to the estate account. (R. p. 91, ¶ 18)

The next day—on August 2, 2007—Stewart again went to the North Rivers Branch of Wachovia and, with the assistance of the personnel at that branch, she wire transferred \$17,000 from the estate account to her personal account at Bank of America. (R. p. 92, ¶ 25).

The next day Stewart again went to the North Rivers Branch of Wachovia and, with the assistance of the personnel at that branch, opened a personal CD in her name individually. Her personal social security number was linked to that account. (R. p. 91, ¶ 18).

During that same visit to the North Rivers branch, and immediately after opening her personal CD account, Stewart, with the assistance of Wachovia personnel, had Wachovia manually transfer \$260,000 in estate funds from the estate account to her new personal CD account. This transfer was done by way of a “counter withdrawal.” (R. p. 20, ¶¶ 22 & 25; p. 97).

When the beneficiaries of the estate discovered that within two days of depositing the estate’s assets in estate account, Stewart had, with the assistance of Wachovia, in face-to-face transactions, transferred \$277,000, or 91% of the Estate’s funds, from the estate account to her personal accounts (R. pp. 91-92, ¶¶ 18 & 25), they had Stewart removed as personal representative. Petitioner Errol Washington was appointed as the replacement personal representative.

He commenced the action below, against Alice Stewart, Wachovia, and others. Only the claims against Wachovia were involved in the appeal below and only the claims against Wachovia are at issue in this Petition.

The claims asserted by Petitioner against Wachovia Bank, N.A. included claims for aiding and abetting Stewart in her breach of fiduciary duty and for negligence. (R. pp. 22-25, ¶¶ 36-41 & ¶¶ 48-63). The trial court granted Wachovia summary judgment as to all of these claims. The Court of Appeals affirmed the trial court’s grant of summary judgment, and denied the petition for rehearing submitted by Petitioner.

## ARGUMENT

I. Wachovia owed a duty to Petitioner and the beneficiaries.

*A. The rules governing the bank-depositor relationship do not apply, because petitioner was not the depositor.*

The Court of Appeals held that Wachovia could owe no duty is to the beneficiaries of the estate because a bank-depositor relationship is that of creditor and debtor, rather than a fiduciary relationship. But Petitioner, and the beneficiaries of the estate whom he represents, were not Wachovia's customers nor were they depositors, and thus the rules governing bank-depositor and bank-customer relations do not apply.

Because they were true third parties, the question of whether Wachovia owed them a duty should be analyzed under the traditional foreseeability tests, and not under principles governing the relationship of a bank and its depositors and customers.

*B. Whether Wachovia owed a fiduciary duty to Petitioner and the estate beneficiaries has nothing to do with this case.*

In finding for Wachovia, the Court of Appeals relied upon the fact that Wachovia owed no fiduciary duty to Petitioner and the estate beneficiaries. But Petitioner never argued that Wachovia owed a fiduciary duty to petitioner, and does not seek to establish any such fiduciary duty. Rather, Petitioner argues that Wachovia was aware that Stewart owed a fiduciary duty to Petitioner and the beneficiaries, and that, on the facts of this case, Wachovia owed an duty of care to Petitioner and the beneficiaries.

C. *There was ample evidence that Wachovia knew that Stewart owed a fiduciary duty to petitioner and the represented beneficiaries.*

The title of the estate account showed that Stewart was the personal representative for the estate. As a personal representative, Stewart owed a fiduciary duty to the beneficiaries under S.C. Code Ann. § 62-3-703(a), which provides that "A personal representative is a fiduciary who shall observe the standard of care applicable to trustees ...."

All citizens are charged with knowledge of existing law. E.g., Labruce v. North Charleston, 268 S.C. 465, 234 S.E.2d 866 (1977). Therefore, Wachovia was charged with knowledge that Stewart owed a fiduciary duty to petitioner.

D. *There is no dispute that Stewart breached her fiduciary duty.*

There is no dispute that Stewart breached her fiduciary duty. The trial court so found, and this finding has not been challenged. (R. p. 8).

E. *There was ample evidence that Wachovia knew or should have known that Stewart breached her fiduciary duty.*

Wachovia knew or should have known that the transfer which it facilitated of \$260,000 in estate funds by Stewart to her personal CD account constituted a breach of her fiduciary duty. The estate account had been opened by the Wachovia North Rivers branch, using the estate's federal tax ID number. The opening of Stewart's personal Certificate of Deposit was done by the same personnel at the same branch, using Stewart's social security number.

The transfer of \$260,000 in estate funds to the personal CD account was done by same personnel who opened the personal CD account during the same, single visit to the North Rivers branch during which Stewart opened that personal CD account.

These facts, plus the simple fact that Stewart had, with in-person assistance of Wachovia, transferred 91% of the estate account to her personal accounts within two days of the initial deposit of the estate funds, and within approximately one week of the opening of the estate account, should have alerted Wachovia that something was amiss, and as a result imposed a duty on Wachovia to make inquiry into the transactions.

All of these transactions required the direct, personal assistance of Wachovia personnel—none of the transfers were by check, by computer, or by telephone; each was a face-to-face transaction at the same branch.

Further, a limited number of Wachovia personnel at the same branch conducted these transactions. Thus, these personnel had knowledge of both the fiduciary account and the personal accounts, and the transfers in question. This is not a case of disparate employees of a vast corporate enterprise having fragments of information.

*E. The Court of appeals failed to apply the common law rule that, where the circumstances are such that the bank is on notice that the transferor is a fiduciary, and may be making a conveyance of fiduciary funds for his own personal advantage, the bank has a duty of inquiry.*

At common law, the general rule is that a bank has no duty to inquire whether a fiduciary is applying the funds of a trust account properly. The Court of Appeals noted that the "mere movement of funds does not create actual knowledge of the breach of fiduciary duty."

The common law is also clear, however, that where the circumstances are such that the bank is on notice that the transferor is a fiduciary, and may be making a conveyance of fiduciary funds for his own personal advantage, the bank has a duty of inquiry into the propriety of the transaction.

This seminal case in this regard is Bischoff v. Yorkville Bank, 112 N.E. 759 (N.Y. 1916), a New York case which has been followed by the Supreme Court of South Carolina. In Bischoff, a personal representative diverted funds from an estate account to pay his personal indebtedness to the depositary bank. The Bank was held liable for the diversion as a result of the payment by the representative of his personal debt to the Bank with estate funds.

The South Carolina Supreme Court followed Bischoff in two early cases, Charleston Paint Co. v. Exchange Banking & Trust Co. 129 S.C. 290, 123 S.E. 830 (1924), and Spartanburg Cnty. v. Arthur, 169 S.C. 456, 169 S.E. 235 (1933).

In Charleston Paint, the Court held that a bank is liable when, with knowledge of the existence of a trust, it “has knowledge *actual or constructive* that a fraud is being or is about to be perpetrated by the fiduciary and assists the fiduciary in making the misappropriation”:

A bank receiving trust funds under such circumstances is liable to the true owner for the defalcation of the trustee, if *any* of the following conditions existed: (1) That the bank violated the terms of the deposit contract. (2) That the bank appropriated the fund, either with or without the fiduciary’s consent, to the payment of the latter’s debt to the bank. (3) That the bank assisted the fiduciary to accomplish the misappropriation, having knowledge, *actual or constructive*, that the fraud was being, or about to be, perpetrated by the fiduciary.”

Charleston Paint at 294-5, 123 S.E. at 831 (emphasis added).

*F. Legislative changes to this common law rule were not adopted in South Carolina.*

The common law rule set forth above—imposing a duty of inquiry on a depositary bank under appropriate circumstances—was later limited in many states by adoption of

the Uniform Fiduciaries Act. That Act provided that the mere deposit by a fiduciary of funds into the fiduciary's personal account was, absent more, not notice of a possible breach of fiduciary duty. Uniform Fiduciaries Act, §109, 7A Uniform Laws Annotated. South Carolina, however, never adopted the Uniform Fiduciaries Act, and thus the limitations in that Act do not apply, and cases applying the Uniform Fiduciaries Act do not apply. Rather, the original common law rule, imposing on the bank a duty of inquiry, still applies.

The common law rule was also somewhat limited by the adoption of Articles 3 and 4 of the Uniform Commercial Code, which provide protection to banks acting in good faith with respect to the handling of checks payable to and drawn by fiduciaries. These limitations recognize the reality that, given the complexity and volume of modern commerce, it is not reasonable to expect banks to physically examine all checks and deposits made by fiduciaries.

Those protective limitations in Articles 3 and 4 of the Uniform Commercial Code, however, apply only to checks and similar items; they do not apply to other money transfers, such as wire transfers, manual transfers, cash withdrawals, and cash deposits. Thus, the UCC limitations do not apply to the transfers made by Stewart in this case, which were all made by manual transfers. As a result, the law applicable to this case is the original common law discussed above, which imposes a duty of inquiry on Wachovia.

G. *The decision of the Court of Appeals conflicts with its decision in Cody P. v. Bank of America.*

In Cody P. v. Bank of America, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011), the Court of Appeals affirmed a finding that Bank of America was negligent in assisting

a conservator in transferring funds from a properly labeled conservator account into a separate, personal account controlled by the conservator. The court order creating the conservatorship in that case required that there be a court order prior to any withdrawals from the conservatorship account. Bank of America was found to be negligent in assisting the conservator in transferring the funds to another account controlled by her, in contravention of this order.

Although there was no special order restricting the disbursement of funds in the estate account here, there is, as noted above, a statute of general applicability and of which Wachovia is deemed to have knowledge, imposing on Stewart a fiduciary duty with respect to estate's funds, and thus prohibiting the transfer by Stewart of those funds to her personal advantage.

The heart of the holding in the Cody P. case is this: a depository institution has a duty to beneficiaries of a fiduciary account not close its eyes and ignore duties imposed on a depositor acting in a fiduciary or representative capacity. Specifically, a depository institution may not assist the fiduciary or representative in looting the deposit account through transactions that on their face show likely violations of the depositor's duties. That is precisely the duty that Wachovia had, and violated, in this case.

*I. The decision of the Court of Appeals will allow for subversion of the provisions of the South Carolina Probate Code.*

Financial institutions play an important role in making the Probate Code and similar fiduciary statutes work. If financial institutions are able to close their eyes to transactions by fiduciaries under circumstances that would cause a reasonable person to make inquiry, then the integrity of the Probate Code and similar statutes will be damaged. Cf. Henry Lowenstein and Andy E. Hendrick, The Price of One Hour—Defending

Conservatorship Integrity: Cody P. v. Bank of America, 25 Quinn. Prob. Law Jour. 287 (2012).

II. There was overwhelming evidence that the Wachovia knowingly participated in the breach by Stewart of her fiduciary duties.

The Court of Appeals held that there was no evidence that Wachovia knowingly participated in the breach by Stewart of her fiduciary duties. But in determining whether triable issues of fact exist for purposes of summary judgment, the evidence and all inferences which can be reasonably drawn from the evidence must be construed in the light most favorable to the non-moving party. E.g., Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Appellant, as the non-moving party, is only required to submit a “mere scintilla of evidence” in order to withstand summary judgment. Hancock v. Mid-South Mgmt. Co. Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009).

The extraordinary facts here show the requisite knowing participation by Wachovia. Those fact include the following:

- Wachovia personnel had face-to-face involvement opening the estate account.
- Those Wachovia personnel knew or should have known it was a fiduciary account, because of the account’s title and its use of the estate’s tax ID number.
- The same Wachovia personnel had face-to-face involvement opening Stewart’s personal CD account.
- The same Wachovia personnel knew or should have known this personal CD account was a personal account because of the account’s title (which

omitted any reference to a representative capacity) and the account's use of Stewart's social security numbers as its tax ID number.

- The same Wachovia personnel, despite the knowledge described above, made manual transfers of funds out of the estate account to the personal accounts of Stewart.

It is difficult to imagine what further Wachovia could have done to "knowingly participate" in the breaches of fiduciary duty by Stewart.

### CONCLUSION

The Court should not sanction the use of the rules governing bank-customer and bank-depositor relationships to exempt financial institutions from the generally applicable duty of citizens to avoid reasonably foreseeable injuries to non-customer and non-depositor third parties. The Court should reverse the decision of the Court of Appeals, reverse the order of the Circuit Court granting summary judgment to Wachovia, and remand this case to the Circuit Court for trial.

Respectfully submitted,



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October 15, 2012

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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Unpublished Opinion No. 2012-UP-420

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Of Whom Alice R. Stewart, Leroy Stewart, Alvin E. Burch, a/k/a  
Alvin E. Birch, Rudell S. Burch and Wachovia Bank, N.A., are the .....Respondents.

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PROOF OF SERVICE

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I certify that I have served the Petition for Writ of Certiorari on opposing counsel by depositing a copy of it in the United States Mail, postage prepaid, on October 15, 2012, addressed to opposing counsel their office as set forth below:

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October 15, 2012

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OCT 17 2012

S.C. Supreme Court

First Class Mail

Honorable Daniel E. Shearouse  
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Re: Petition for Certiorari  
Errol Washington, as Personal Representative of the Estate of Danny Washington v.  
Alice R. Stewart, et al., Unpublished Opinion No. 2012-2012-UP-420

Dear Mr. Shearouse:

Please find enclosed the following:

1. Original and seven copies of the Petition for Writ of Certiorari submitted on behalf of Errol Washington, as Personal Representative of the Estate of Danny Washington;
2. An original and one copy of a Proof of Service on opposing counsel;
3. Two copies of the Appendix; and
4. A check for the filing fee in the amount of \$100.00.

Please stamp a copy of the Petition and the Proof of service, and return them in the envelope provided.

By copy of this letter to all counsel of record, I am serving those counsel with copies of the Petition and Proof of Service.

Yours very truly,

  
Mark S. Sharpe

MSS/krs  
Enclosure

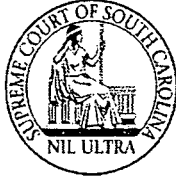
cc: Edward P. Guerard, Jr., Esq.  
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S.C. Supreme Court

OCT 17 2012

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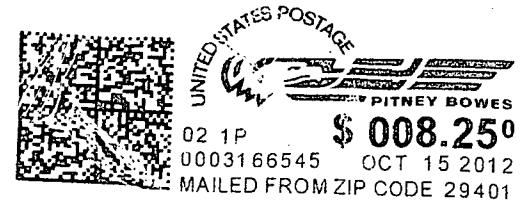
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