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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2015-UP-491
Filed October 14, 2015

Jacquelin S. Bennett, Genevieve S. Felder and Kathleen S. Turner, individually, as Co-Trustees and beneficiaries of the Marital Trust and the Qualified Terminable Interest Trust created by the Thomas Stevenson Will, and Jacquelin S. Bennett, and Kathleen S. Turner, as Co-Personal Representatives on behalf of the Estate of Jacquelin K. Stevenson

Respondents,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison

Defendants,

Of Whom

Dixon-Hughes and Lynne L. Kerrison are

Petitioners

PETITION FOR A WRIT OF CERTIORARI AND MEMORANDUM OF LAW AND AUTHORITIES

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Appellants,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison

Defendants,

Of Whom

Dixon-Hughes and Lynne L. Kerrison are

Petitioners/Respondents.

RESPONDENT'S PETITION FOR A WRIT OF CERTIORARI AND MEMORANDUM OF LAW AND AUTHORITIES

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Counsel for Petitioners certifies that, pursuant to Rule 242(d), SCACR, the Petitioners moved for rehearing and that the Court of Appeals denied the motion by Order dated December 16, 2015.

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in requiring a CPA to disclose tax return information to third parties, which conflicts with, and is preempted by, applicable law that prohibits such disclosure?

II. Did the Court of Appeals err, in conflict with decisions of this Court, by holding that a CPA with knowledge of a client's misdeeds may be held liable to non-clients to whom the CPA owed no duty of care for failing to warn the non-clients of the client's misdeeds?

III. Did the Court of Appeals err, in conflict with decisions of this Court, by failing to hold that any claim for aiding and abetting a breach of fiduciary duty abated on the death of Jacquelin Stevenson?

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

Petitioners Lynne Kerrison and Dixon-Hughes, Pratt-Thomas Gumb & Co., PA ("Defendants"), pursuant to Rule 242, SCACR, submit this Petition for Writ of Certiorari and Memorandum of Law and Authorities in support of the Petition. The Court of Appeals' decision imposes on certified public accountants a duty to warn non-clients whose interests will be adversely affected of the wrongful acts of the accountant's clients. Such a duty finds no support in the jurisprudence of this state and directly conflicts with federal and state law that makes it a crime for a CPA to disclose client information to non-clients, similarly prohibits disclosure. The decision places CPAs in an untenable situation, forcing them to choose between civil criminal liability for disclosing confidential client information to non-clients and civil liability to non-clients for failing to disclose. The Court of Appeals' decision fails even to acknowledge these conflicting duties, and so CPAs are left to speculate on the nature of the information that triggers this new duty of disclosure, the class of non-clients to whom this new duty is owed, and what a CPA must do to satisfy the duty. Absent review and correction by this Court, the Court of Appeals' decision will have significant and far-reaching adverse effects for accountants and the clients who entrust them with their confidential information. The Court of Appeals' decision further departs from this Court's precedent by dramatically expanding the circumstances in which a CPA may be held liable to non-clients, allowing a professional to be found liable to a non-client, not for what the professional did or did not do, but for what the client did. In addition, although Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is entirely based on theories of fraud and deceit, the Court of Appeals failed to apply this Court's precedents that dictate a finding that the claim abated on the death of Jacquelin Stevenson.

STATEMENT OF THE CASE[1]

Defendant Lynne Kerrison is a certified public accountant who worked with the public accounting firm of Pratt-Thomas Gumb & Co., PA. (R. p. 0978, July 13, 2011, Dep. of Lynn Kerrison, p. 96, lines 2-10). She later became a member of Dixon Hughes, PLLC.

In 1997, Ms. Kerrison began preparing the personal income tax returns of Mrs. Jacquelin Stevenson. (R. p. 980, July 13, 2011 Dep. of Lynne Kerrison, p. 98, lines 1-13). Jacquelin Stevenson was the sole lifetime beneficiary of two testamentary trusts created by the will of her husband, Mr. Thomas Stevenson, Jr., who died in June of 1988: the "Jacquelin K. Stevenson Marital Trust" (the "Marital Trust") and a "Qualified Terminable Interest Property Trust" (the "QTIP Trust") (collectively, the "Trusts"). (R. p. 0090-91, ¶¶ 11-16 Amended Complaint; R. pp. 0843-0867, Turner Deposition, Exhibit 5, Will). The residual beneficiaries of the QTIP Trust were Mr. Stevenson's children: Thomas Stevenson, III, Daniel Stevenson, II, Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder. (R. pp. 0843-0867, Turner Deposition, Exhibit 5, Will). The residual beneficiaries of the Marital Trust were the same people but subject to a power of appointment held by Jacquelin Stevenson. (Id.). Neither trust instrument provided any means by which trust assets could be distributed to any of the residual beneficiaries during the lifetime of Jacquelin K. Stevenson. (Id.).

By 1999, the only co-trustees of the two trusts were Thomas Stevenson, III, and Daniel Stevenson, II (collectively, the "Stevenson Brothers"). (R. p. 0091, ¶ 15, Amended Complaint). The Stevenson Brothers, as trustees, engaged Ms Kerrison and Pratt-Thomas Gumb

[1] The Court of Appeals reversed the trial court's grant of summary judgment on Plaintiffs' claim for aiding and abetting a breach of fiduciary duty but affirmed the trial court's grant of summary judgment in favor of Defendants on all other claims. Consistent with Rule 242, SCACR, the facts set forth in this Statement of the Case are those material to the consideration of issues presented by the claim for aiding and abetting a breach of fiduciary duty.

& Co, P.A., to prepare tax returns for the Trusts. (R. pp. 0980-0981, July 13, 2011 Dep. of Lynne Kerrison, pp. 98-99; R. pp. 0994, July 13, 2011 Dep. of Lynne Kerrison, pp. 112-13).

An employee of Jacquelin Stevenson, Pat Neapolitan, provided Ms. Kerrison with the information needed to complete Ms. Stevenson's tax returns and, until her death, those of the trusts. (R. p. 912, July 13, 2011 Dep. of Lynne Kerrison, p. 30, lines 7-11). Ms. Kerrison testified that in 2001, "when I was preparing the tax work for Mrs. Stevenson, the bookkeeper for Mrs. Stevenson, Pat, sent over the records for us to prepare the tax return with. And that's where I saw some loans to Dan." (Id.). Ms. Kerrison questioned how the checks written from the trusts to Daniel Stevenson, II, should be characterized, and she contacted Ms. Neapolitan. (R. pp. 0912, 0998, 1003-04, July 13, 2011 Dep. of Lynne Kerrison, pp. 30, 116, 121-22). As the bookkeeper for Jacquelin Stevenson, Ms. Neapolitan was the person who had prepared the checks and kept a ledger of the transactions. (R. p. 0919, July 13, 2011 Dep. of Lynne Kerrison, p. 37, lines 12-16). When contacted by Ms. Kerrison, Ms. Neapolitan expressed no concerns about the checks. (R. p. 1005, July 13, 2011 Dep. of Lynne Kerrison, p. 123, lines 2-6; R. p. 0999, July 13, 2011 Dep. Of Lynne Kerrison, p. 117, lines 9-19).

Despite the assurances from Ms. Neapolitan, Ms. Kerrison contacted Jacquelin Stevenson's attorney, Heyward Carter, Jr., to tell him about the transactions. (R. p. 0922, July 13, 2011 Dep. of Lynne Kerrison, p. 40; R. p. 1523, July 14, 2011 Dep. of Heyward Carter, p. 38). Ms. Kerrison testified that, "He was my contact for Mrs. Stevenson. And I wanted him to know." (R. p. 922, July 13, 2011 Dep. of Lynne Kerrison, p. 40, Lines 5-19). On October 23, 2001, Ms. Kerrison met with Mr. Carter and the Stevenson Brothers to discuss the questioned transactions. (R. pp. 1027-28, July 13, 2011 Dep. of Lynne Kerrison, pp. 146-47, lines 24-3; R. p. 1531, July 14, 2011 Dep. of Heyward Carter, p. 46, Lines 23-25). The Court of Appeals held

that Ms. Kerrison gave effective notice to Jacquelin Stevenson when Ms. Kerrison brought these transactions to the attention of Mrs. Stevenson's attorney, Mr. Carter. See Bennett v. Carter, No. 2015-UP-491, p. 6 (S.C. Ct. App. Oct. 14, 2015):

> The record contains no evidence Carter advanced any interest of his own by not telling Appellants directly about Thomas's and Daniel's withdrawals from the trusts. He was always acting in what he believed was Mother's best interest. Only Mother was his client, and she was competent at the time Kerrison told Carter about Thomas's and Daniel's withdrawals.

Jacquelin Stevenson had three other children, Kathleen S. Turner, Jacquelin S. Bennett, and Genevieve S. Felder (collectively, the "Stevenson Sisters"). At the time of the October 2001 meeting, in which Ms. Kerrison told Jacquelin Stevenson's attorney about the relevant transactions, all of the children were residuary beneficiaries of the QTIP Trust and contingent residuary beneficiaries of the Marital Trust. (R. p. 0090-91, ¶¶ 11-16, Amended Complaint; R. p. 0099, ¶¶ 11-16, Answer to Amended Complaint; R. pp. 0843-0867, Turner Deposition, Exhibit 5, Will). Ms. Kerrison never had any dealings at all with any of the Stevenson Sisters about Jacquelin Stevenson's or the trusts' financial matters. (R. p. 0181-0183, 0185-1086, 0189-0190, 0193-0195, 0197-0199, 0202-0204, 0206-0208, Kathleen Turner's Responses to Lynne Kerrison's First Request for Admissions, 54-59, 68-73, 83-89, 100-107, 117-123, 134-140, 151-158).

On January 4, 2001, Jacquelin Stevenson executed a non-durable power of attorney in favor of Kathleen S. Turner and Daniel Stevenson, II. (R. pp. 0835-0842, Power of Attorney dated 1/4/01). On February 18, 2003, Mrs. Stevenson executed a second, durable, Power of Attorney in favor of Kathleen S. Turner and Daniel Stevenson, II. (R. pp. 0868-0875, Turner Deposition, Exh. 6, Power of Attorney dated 2/18/03). Also, for a period of time

after the death of Ms. Neapolitan, Defendants had custody of the physical checkbook for one or both trusts but at no time did Defendants ever have the authority to sign the checks. (R. p. 0957, July 13, 2011 Dep. of Lynne Kerrison, p. 75). Rather, the Stevenson Brothers, who were at all times the co-trustees, and whose withdrawals from the trusts continued after Ms. Kerrison gave notice to their mother, had sole check-signing authority. (Id.).

On September 17, 2007, Jacquelin Stevenson passed away. (R. p. 0876, Turner Deposition, Exh. 22). In January 2008, just four months after Mrs. Stevenson's death, the Stevenson Sisters brought suit against the Stevenson Brothers. (R. p. 1687, Deposition of Thomas C. Stevenson, III, p. 111, Lines 19-24). That lawsuit resulted in a settlement with Thomas C. Stevenson, III, and a judgment against Daniel R. Stevenson, II. Plaintiffs recovered substantial money and property and caused the Stevenson Brothers to forfeit any interest in either trust or their mother's estate. (R. pp. 0180B-0181, 0266-0267, 0225-0226, Responses 45-52 to Requests for Admission to, respectively, Turner, Felder, and Bennett, and Exhibits A-E thereto).

This lawsuit was filed on April 24, 2009, by:

(1) The Stevenson Sisters individually and as trustees and beneficiaries of the Marital and QTIP trusts created by the will of their father; and

(2) Kathleen S. Turner and Jacquelin Bennett as personal representatives of the estate of their mother, Jacquelin K. Stevenson.

(R. p. 0031).

The defendants were Heyward Carter, Jr., Evans Carter Kunes & Bennett, P.A., Douglas Capital Management, Inc., Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., P.A., and Lynne L.

Kerrison.[2] (Id.). On December 14, 2011, Plaintiffs moved to amend their complaint to include a claim for aiding and abetting a breach of fiduciary duty. The court allowed the amendment by order dated May 17, 2012, and it was filed May 31, 2012. (R. p. 0088-0096).

Following discovery, all defendants moved for summary judgment. (R. pp. 0108-0110). Claims against the attorney, Heyward Carter, Jr., and his law firm were resolved. (R. p. 1855, Tr. Lines 10-11). An order was entered on July 3, 2013, granting Ms. Kerrison's and Dixon Hughes' motion for summary judgment. (R. p. 0001-0022) A later motion to alter or amend the order was denied. (R. pp. 0027-0030). Plaintiffs' appeal followed.

On October 14, 2015, the South Carolina Court of Appeals issued an Order affirming the trial court's grant of summary judgment to defendants on Plaintiffs' claims other than for aiding and abetting a breach of fiduciary duty and reversing the trial court's grant of summary judgment on the claim for aiding and abetting a breach of fiduciary duty. The Court of Appeals held that Plaintiffs were not clients of Defendants, and Defendants owed to Plaintiffs individually no duty of care. Bennett v. Carter, No. 2015-UP-491, p. 5 (S.C. Ct. App. Oct. 14, 2015). However, in reversing the grant of summary judgment in favor of Defendants on the claim for aiding and abetting a breach of fiduciary duty, the Court of Appeals stated that the Stevenson Brothers as trustees owed fiduciary duties to trust beneficiaries; Ms. Kerrison learned of defalcations by the trustees; she notified the attorney for her client, the sole lifetime beneficiary, Katherine Stevenson; and when defalcations continued, Ms. Kerrison took "no further action" to stop the defalcations.[3] Bennett, No. 2015-UP-491 at 4.

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[2] The claims against Douglas Capital Management were later dismissed.

[3] The Court of Appeals also stated that Defendants "wrote the checks" for some withdrawals by the Stevenson Brothers. As stated above, for a period of time after the death of Ms. Neapolitan, Defendants had custody of the physical checkbook for one or both trusts but at no time did Defendants ever have the authority to sign the checks.

On October 29, 2015, defendants filed a Petition for Rehearing. By Order dated December 16, 2015, the Court of Appeals denied the Petition for Rehearing.

STANDARD OF REVIEW

Whether to issue a writ of certiorari to review a final decision of the Court of Appeals is within the discretion of the Supreme Court. Rule 242, SCACR(a). A writ of certiorari will be granted only where there are special and important reasons. Rule 242, SCACR(b). While neither controlling nor fully measuring this Court's discretion or power to grant review in general, Rule 242 states that the character of reasons which will be considered include where there are novel questions of law, where the decision of the Court of Appeals is in conflict with a prior decision of this Court, and where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Id.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN REQUIRING A CPA TO DISCLOSE TAX RETURN INFORMATION TO THIRD PARTIES, WHICH CONFLICTS WITH, AND IS PREEMPTED BY, APPLICABLE LAW THAT PROHIBITS SUCH DISCLOSURE.

Absent review and correction by this Court, the Court of Appeals' decision imposes on CPAs an undefined (and in all likelihood, undefinable) duty to warn non-clients of the wrongful acts of their clients. The decision is fundamentally at odds with federal and state laws that criminalize disclosure in these circumstances. Even if it were possible to reconcile these conflicting legal duties, the Court of Appeals' decision makes no effort to do so. CPAs are entirely left to speculate on the particulars of this new duty, including the character of the acts giving rise to the duty and the class of non-clients to whom the duty is owed. Creating such confusion and uncertainty in the public accounting profession is contrary to the public

policy of this state, which subjects the profession to comprehensive regulation. See S.C. Code Ann. § 40-2-5 ("It is the policy of this State ... that the conduct of persons licensed as having special competence in accountancy be regulated in all aspects of their professional work"). This Court should issue a writ of certiorari to review and correct these errors of law in the Court of Appeals' decision.

A. Federal Law Bars Disclosure of Tax Return Information in the Circumstances Presented Here.

Federal law creates a comprehensive scheme governing disclosure of tax return information: in every instance, a tax professional is forbidden to disclose tax return information to third parties unless a federal statute or regulation expressly authorizes the disclosure. 26 U.S.C. § 7216; 26 C.F.R. § 301.7216–2(a). The decision of the Court of Appeals cannot be reconciled with this regulatory scheme.

As a general rule, it is a federal crime for a tax professional to disclose tax return information to third parties. See 26 U.S.C. § 7216(a) *("General rule")*. For purposes of 26 U.S.C. § 7216, federal regulations broadly define "tax return information" to encompass all information in any form that is furnished in connection with the preparation of the tax return of a taxpayer. See 26 C.F.R. § 301.7216-1(b)(3) *("Definitions")*.

The general rule barring disclosure of tax return information to non-clients applies in this case. Ms. Kerrison first learned of the Stevenson Brothers' trust transactions when she reviewed records that Jacquelin Stevenson's bookkeeper, Pat Neapolitan, furnished for the preparation of the tax return of Jacquelin Stevenson. (R. p. 912, July 13, 2011 Dep. of Lynne Kerrison, p. 30, Lines 6-11). Records furnished for the preparation of a tax return are the classic example of "tax

return information," and as such cannot be disclosed to third parties absent express authority in federal statute or regulation.

No federal statute or regulation authorized Ms. Kerrison to disclose the tax return information to Plaintiffs. Congress provided that disclosure is permitted pursuant to another provision of the Internal Revenue Code, in response to a court order, or for use in preparing state and local tax returns or declarations of estimated tax "of the person to whom the information relates." 26 U.S.C. § 7216(b) *("Exceptions").* None of these exceptions would authorize Ms. Kerrison to tell Plaintiffs of tax return information furnished by Ms. Neapolitan for the preparation of the tax return of the trusts and Jacquelin Stevenson, nor of any information furnished by the trustees for preparation of the tax returns for the trusts.

Federal regulations create additional exceptions to the general rule that a tax professional may not disclose tax return information to third parties. See 26 C.F.R. § 301.7216–2. None of these exceptions would permit Ms. Kerrison to disclose the trustees' or Jacquelin Stevenson's tax return information to Plaintiffs, and so the general rule at 26 U.S.C. § 7216 barred disclosure.

B. Holding Defendants Liable Under State Tort Law for Failing to Disclose Tax Return Information to Third Parties Conflicts With, and is Therefore Preempted By, Federal Law that Criminalizes Such Conduct.

This Court should issue a writ of certiorari to review and correct the Court of Appeals' decision because it erroneously imposes a duty that conflicts with, and so is preempted by, applicable federal law. Any common-law duty to disclose taxpayer information to third parties is preempted by 26 U.S.C. § 7216 and the federal regulations applying that statute.

A state law that conflicts with federal law is "without effect." Priester v. Cromer, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012), citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). "Federal regulations have no less pre-emptive

effect than federal statutes." Priester, 401 S.C. at 43-44, 736 S.E.2d at 252, citing Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Preemption is implied when compliance with both federal and state regulations is impossible or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id., citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Any common-law duty to disclose taxpayer information to third parties is preempted by federal law because compliance with both federal law and state duties in tort is impossible. Information regarding the Stevenson Brothers' trust transactions was provided to Defendants for the purpose of preparing the tax returns of the trusts and Jacquelin Stevenson. 26 U.S.C. § 7216 and the federal regulations applying that statute prohibit Defendants from disclosing that information to third parties. Because it would be impossible for a tax professional to comply with both federal law and the duty imposed by the Court of Appeals' decision, tax return preparers would be placed in the untenable position of having to choose between facing civil liability under state law for nondisclosure or criminal liability under federal law for disclosure. In such circumstances, federal law preempts the contrary state law provision. Priester v. Cromer, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (citation omitted).

Any common-law duty to disclose taxpayer information to third parties is preempted by federal law because such a duty defeats the objectives of Congress. 26 U.S.C. § 7216 and related regulations evidence a clear intent to bar disclosure to third parties in all but a few narrowly circumscribed circumstances. This intent is evidenced by the structure of the statute and related regulations, which impose a broad rule barring disclosure of tax return information "for any purpose other than to prepare, or assist in preparing" the return for which the

information was provided, and then carve out narrow, discrete exceptions to this general rule. See 26 U.S.C. § 7216; 26 C.F.R. § 301.7216-2. A nebulous common-law duty to disclose taxpayer information to third parties would contravene this comprehensive statutory scheme and so defeat the objectives of Congress.

The disclosures that Plaintiffs seek to mandate are exactly the disclosures that 26 U.S.C. § 7216 prohibits, and any common-law duty to disclose taxpayer information to third parties is preempted by this statute and related federal regulations. This Court should issue a writ of certiorari to review and correct the Court of Appeals' decision because it erroneously imposes a state tort law duty that conflicts with, and so is preempted by, applicable federal law.

C. The Duty Imposed by the Decision of the Court of Appeals Conflicts With the Statutory Duty of Confidentiality in S.C. Code Ann. § 40-2-190.

The common-law duty to warn non-clients of a client's misdeeds created by the Court of Appeals' decision conflicts with the statutory duty of confidentiality imposed by the General Assembly. See S.C. Code Ann. § 40-2-190. Further, because the Court of Appeals' decision does not acknowledge these conflicting duties, accountants and their clients are given no direction regarding when disclosure is compelled and when it is forbidden. Such uncertainty serves no useful purpose and does great mischief, and this Court should issue a writ of certiorari to remove the confusion and uncertainty created by the Court of Appeals' decision.

S.C. Code Ann. § 40-2-190(A) prohibits a CPA from disclosing confidential client information to third parties except in specified circumstances, none of which are present here. See S.C. Code Ann. § 40-2-190(A) (emphasis added) (stating that, "This information is confidential."). It is a crime for a CPA to knowingly violate S.C. Code Ann. § 40-2-190. S.C. Code Ann. § 40-2-200.

S.C. Code Ann. § 40-2-190 bars disclosure of client information in the circumstances of this case. The bedrock allegation underlying Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is that Defendants, in addition to notifying their client Jacquelin Stevenson of the Stevenson Brothers' defalcations, should also have disclosed those transactions to Plaintiffs. Defendants knew of these transactions from information communicated to them by their clients for use in preparing Jacquelin Stevenson's tax returns and the trusts' tax returns. Such information falls squarely within the scope of S.C. Code Ann. § 40-2-190, none of the statutory exceptions apply, and so the statute prohibits Defendants from disclosing the information to third parties.

The Court of Appeals' decision conflicts with this statutory duty by imposing on accountants an entirely undefined duty to disclose client misdeeds to non-clients. These conflicting state law duties, one compelling disclosure and the other forbidding it, create substantial uncertainty regarding the confidentiality of information that clients communicate to their accountants. That confusion has far-reaching implications for accountants and their clients, particularly where the Court of Appeals' decision provides no direction regarding the scope of this new duty to disclose client misdeeds to non-clients. Consistent with the clearly expressed intent of the General Assembly that client communications be kept confidential absent a statutory exception, this Court should issue a writ of certiorari to resolve the confusion arising from the conflicting duties created by the Court of Appeals' decision.

II. THE COURT OF APPEALS ERRED, IN CONFLICT WITH DECISIONS OF THIS COURT, IN HOLDING THAT A CPA WITH KNOWLEDGE OF A CLIENT'S MISDEEDS MAY BE HELD LIABLE TO NON-CLIENTS TO WHOM THE CPA OWED NO DUTY OF CARE FOR FAILING TO WARN THE NON-CLIENTS OF THE CLIENT'S MISDEEDS.

The Court of Appeals' decision dramatically departs from this Court's precedents

delineating CPA liability to non-clients by providing for liability where a CPA does not warn a non-client of wrongful acts committed by a client of the CPA. The decision essentially treats a CPA as a fidelity bond issuer for the client, allowing a non-client to hold the professional liable not for what the professional did or did not do, but for what the client did. Professionals should not be responsible in damages for the misdeeds of their clients, and this Court should issue a writ of certiorari to correct these errors of law.

It is important to note that the Court of Appeals held that Defendants owed no duty of care to Plaintiffs. Bennett v. Carter, No. 2015-UP-491, p. 3 (S.C. Ct. App. Oct. 14, 2015). There existed no fiduciary relationship between Defendants and Plaintiffs. Id. Nor did Defendants owe Plaintiffs any duty whose breach would support a claim for professional negligence. Id. In fact, the Court of Appeals noted that Plaintiffs "fail to develop or support with authority any argument on a duty owed to Appellants individually as Appellants were not Respondents' clients." Id. Rather, Defendants' clients were Jacquelin Stevenson and the Stevenson Brothers as trustees. Id.

Yet even in the complete absence of any duty owed by Defendants to Plaintiffs individually, the Court of Appeals held that Plaintiffs may individually pursue a claim for aiding and abetting a breach of fiduciary duty against the Defendants in connection with the misdeeds of the Stevenson Brothers. This is contrary to South Carolina law, which holds that an accountant has no duty to disclose client information to non-clients. See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (reversing the Court of Appeals' ruling that a certified public accountant who audited the financial statements of a company owed a duty to disclose to a non-client investor that the company was overstating its inventory). As this Court noted in adopting § 552 of the Restatement (2d) of Torts:

> Under § 552, an accountant has a duty to exercise reasonable care

> or competence in obtaining or communicating information. This section imposes no duty to *disclose* information.

ML-Lee, 327 S.C. at 241, n.3, 489 S.E.2d 471 (emphasis in original). Similarly, the Court of Appeals held that a former school bookkeeper wrongfully accused of stealing money from her employer could not pursue an action against the accounting firm that the school hired to investigate the missing money. Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 137 S.E.2d 512 (Ct. App. 2012). The Court of Appeals noted that an accountant may owe a duty to a third party where the non-client has justifiably relied on the accountant's misrepresentation. Johnson, 401 S.C. at 506-07, 137 S.E.2d at 515. But it was undisputed that the bookkeeper had not relied on any misrepresentation by the accountant, and the Court of Appeals declined to expand the potential third-party liability of an accountant beyond the limitations contained in § 552, Restatement (2d). Johnson, 401 S.C. at 506, 137 S.E.2d at 515. This is consistent with South Carolina law that holds a party ordinarily has no duty to act in the absence of an affirmative legal duty, and such a legal duty "exists only if created by statute, contract, relationship, status, property or some other special circumstance." Johnson, 401 S.C. at 504, 137 S.E.2d at 513-14; see also, Rayfield v. S. Carolina Dep't of Corr., 297 S.C. 95, 100-01, 374 S.E.2d 910, 913 (Ct. App. 1988), quoting Sharpe v. South Carolina Dept. of Mental Health, 292 S.C. 11, 354 S.E.2d 778 (Ct.App.1987) (Bell, J., concurring) (under the common law, the general rule is that "a person has no duty to protect another from harm inflicted by a third person.").

Contrary to settled South Carolina law, the Court of Appeals held that although Defendants gave effective notice of the Stevenson Brothers' trust transactions to their client, Jacquelin Stevenson, and although Defendants owed no legal duty to Plaintiffs individually, Plaintiffs may individually assert a claim for aiding and abetting a breach of fiduciary duty because Defendants failed to tell Plaintiffs, who again are non-clients to whom Defendants owed

no duty of care, of their brothers' misdeeds. This holding not only represents a radical departure from South Carolina law governing potential third-party liability of a CPA to non-clients, it places CPAs in an impossible position. Implicit in the theory of recovery is that a CPA must review all confidential information received in the preparation of tax returns for indications that the client is harming some third party, identify any and all third parties whom the confidential information may indicate are being harmed, and disclose the confidential information received from the client to the third parties or find some other way of thwarting the client, or else face potential civil liability. No statute or common law in South Carolina supports this proposition, and it directly conflicts with an accountant's duty under South Carolina law to safeguard a client's confidential information. See, e.g., S.C. Code Ann. § 40-2-190.

Particularly disturbing is the nebulous nature of this new theory of accountant liability to non-clients, as the Court of Appeals' decision does not address the circumstances in which this duty arises, the non-clients to whom the duty is owed, and perhaps most importantly, the character of action by which a CPA might satisfy the duty. It is not at all clear from the Court of Appeals' decision what Defendants were supposed to do upon learning of these defalcations. See, e.g., Bennett v. Carter, No. 2015-UP-491, p. 4 (S.C. Ct. App. Oct. 14, 2015) (faulting Ms. Kerrison for "taking no further action" when the defalcations continued after she gave notice to the attorney for her client, Jacquelin Stevenson). The clear import of the decision is that upon learning of a client's defalcations, a CPA must forestall any future defalcations by the client, and failure to do so subjects the CPA to liability for the client's wrongdoing. This is an astonishing expansion of CPA liability to non-clients in contravention of this Court's decisions delineating such liability, and this Court should issue a writ of certiorari to review and correct these errors of law in the Court of Appeals' decision.

III. THE COURT OF APPEALS ERRED, IN CONFLICT WITH DECISIONS OF THIS COURT, BY FAILING TO FIND THAT ANY CLAIM FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY ABATED ON THE DEATH OF JACQUELIN STEVENSON.

Any claim for aiding and abetting a breach of fiduciary is based on theories of fraud and deceit committed by the Stevenson Brothers, and therefore did not survive the death of Jacquelin Stevenson.[4] The precedents of this Court make clear that any such claim abated on the death of Jacquelin Stevenson, and this Court should issue a writ of certiorari to review and correct the Court of Appeals' decision.

The general survival statute "has a wide ambit that includes all causes of action not covered by specific exceptions. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96-97 (2002), citing S.C. Code. Ann. § 15-5-90. However, this Court has created certain exceptions to the survival statute, including actions for fraud and deceit. Ferguson, 349 S.C. at 564, 564 S.E.2d at 97, citing Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941). "The fraud exception to survivability is not limited only to a cause of action titled 'fraud.'" Brailsford v. Brailsford, 380 S.C. 443, 450, 669 S.E.2d 342, 345 (Ct. App. 2008), citing Ferguson, 349 S.C. at 564-65, 564 S.E.2d at 97. Rather, the fraud exception reaches all actions based on theories of fraud and deceit, including intentional deception and intentional failure to disclose a material fact. Id.

The essence of Plaintiff's claim against Defendants for aiding and abetting a breach of fiduciary duty is that they failed to disclose the fraudulent and deceptive actions of the Stevenson Brothers. See, e.g., Reply Brief of Appellants, p. 8 ("Accountant Kerrison hid the

[4] In granting summary judgment in favor of Defendants, the trial court did not cite this argument as a basis of its decision. However, Rule 220(c), SCACR, provides that an appellate court may affirm any ruling upon any grounds appearing in the Record on Appeal. Although grounds appear in the Record on Appeal, and the parties raised this issue in their briefs, and again in the petition for rehearing, the Court of Appeals did not address the survival/abatement issue.

facts from Mrs. Stevenson and Kathleen and cooperated with Attorney Carter in helping Tom and Dan to cover up their thefts and in preparing promissory notes that attempted to legitimize the thefts as loans."). Regardless of the label given the cause of action, by its very nature this is a claim for failure to disclose the fraud of another. See Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) (A "nondisclosure is fraudulent when there is a duty to speak."). Because this is an action based on theories of fraud and deceit, in the guise of an action for aiding and abetting a breach of fiduciary duty, it did not survive the death of Jacquelin Stevenson. See, e.g., Ferguson, 349 S.C. at 561-62, 564 S.E.2d at 95-96 ("Although Mr. Ferguson's cause of action arose directly under the Dealers Act, his action was based upon a theory of fraud and deceit."); see also, Brailsford v. Brailsford, 380 S.C. at 450, 669 S.E.2d at 345 (action by the widow of a trust beneficiary, brought individually and as personal representative of the estate, against trustees for various instances of fraudulent conduct did not survive the death of the husband).

Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is entirely based on theories of fraud and deceit and therefore did not survive the death of Jacquelin Stevenson. This Court should issue a writ of certiorari to review and correct this error of law in the Court of Appeals' decision.

CONCLUSION

The bedrock allegation underlying Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is that Defendants, in addition to notifying their client Jacquelin Stevenson of the Stevenson Brothers' defalcations, should also have disclosed those transactions to Plaintiffs. By imposing a duty of disclosure in these circumstances, the Court of Appeals' decision conflicts with applicable law that criminalizes such disclosure. CPAs have no way

of knowing when disclosure is prohibited and when it is compelled and, if it is compelled, the non-clients to whom this new duty of disclosure is owed. Absent review and correction by this Court, the Court of Appeals' decision will have significant and far-reaching adverse effects for accountants, as well as for the clients who entrust them with their confidential information. Defendants ask this Court to grant their Petition for Writ of Certiorari to review the Court of Appeals' order reversing the trial court's grant of summary judgment in favor of Defendants on Plaintiffs' claim for aiding and abetting breach of fiduciary duty and grant such other relief to which Defendants may be entitled.

Respectfully submitted,

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Charleston, SC

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2015-UP-491
Filed October 14, 2015

Jacquelin S. Bennett, Genevieve S. Felder and Kathleen S. Turner, individually, as Co-Trustees and beneficiaries of the Marital Trust and the Qualified Terminable Interest Trust created by the Thomas Stevenson Will, and Jacquelin S. Bennett, and Kathleen S. Turner, as Co-Personal Representatives on behalf of the Estate of Jacquelin K. Stevenson

Appellants,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and Lynne L. Kerrison

Defendants,

Of Whom

Dixon-Hughes and Lynne L. Kerrison are

Petitioners/Respondents.

PROOF OF SERVICE OF PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

I certify that I have served the Respondents' Petition for a Writ of Certiorari and Memorandum of Law and Authorities as well as a copy of the Appendix to the Petition for a Writ of Certiorari on Appellants by depositing a copy of same in the United States Mail, postage prepaid, on January 15, 2016, addressed as follows:

Mr. A. Camden Lewis
Mr. Keith M. Babcock
Mr. James M. Griffin
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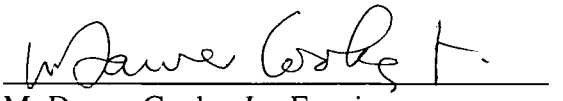

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