THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young
Lower Court Case No. 2011-CP-00400

Unpublished Opinion No. 2015-UP-491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

Appellate Case No. 2016-000065

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 f/k/a Pratt-Thomas Gumb & Co., and Lynne L. Kerrison are

Petitioners.

PETITIONERS DIXON HUGHES AND LYNNE L. KERRISON'S BRIEF ON APPEAL

Frederick K. Sharpless, Esq.
Sharpless & Stavola, PA
P. O. Box 22106
Greensboro, NC 27420
(336) 333-6384

M. Dawes Cooke, Esq.
Barnwell Whaley Patterson & Helms, LLC
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700
ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

REGULATIONS

STATEMENT OF ISSUES ON APPEAL

I. 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?

II. 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?

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?

STATEMENT OF THE CASE

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 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 & Co, PA, 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 Mrs. 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). Jacquelin Stevenson was competent at the time Ms. Kerrison told Mr. Carter, the attorney for Jacquelin Stevenson, about the Stevenson Brothers' 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 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). 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's attorney, 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, PA, Douglas Capital Management, Inc., Dixon Hughes f/k/a Pratt-Thomas Gumb & Co., PA, and Lynne L. Kerrison. (Id.). The claims against Douglas Capital Management were later dismissed. 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 all of 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 no duty of care to Plaintiffs individually. 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 after giving notice of the co-trustees' defalcations to the attorney for her client, the sole lifetime beneficiary, Jacqueline Stevenson, Ms. Kerrison took "no further action" to stop the defalcations. Bennett, No. 2015-UP-491 at 4. The Court of Appeals also stated that Defendants "wrote the checks" for some withdrawals by the Stevenson Brothers. Id. 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.

Defendants timely filed a Petition for a Writ of Certiorari, which this Court granted by Order dated December 1, 2016. The Clerk did not thereafter notify the parties of specific questions to be considered pursuant to Rule 242(i). Therefore, Defendants below address each of the three issues raised in the Petition for a Writ of Certiorari.

STANDARD OF REVIEW

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002), citing Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id., citing Rule 56(c), SCRCP.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals should be reversed for three reasons. *First*, the Court of Appeals' decision dramatically departs from this Court's precedents delineating a CPA's liability to non-clients by providing for liability when an accountant simply did not warn a non-client of wrongful acts committed by the accountant's client. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997). *Second*, the decision imposes civil liability on a CPA for failure to warn non-clients of the wrongful acts of the accountant's tax clients. This is in direct conflict with, and preempted by, applicable law that criminalizes such disclosures. See 26 U.S.C. § 7216; see also S.C. Code Ann. § 40-2-190 and S.C. Code Ann. § 40-2-200. *Third*, because Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is entirely based on theories of fraud and deceit, the Court of Appeals' decision is in conflict with this Court's precedents that hold that the claim abated on the death of Jacquelin Stevenson. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002).

Unless corrected by this Court, the Court of Appeals' decision will have significant and far-reaching adverse effects for professionals and the clients who entrust them with their confidential information. 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, the sole lifetime beneficiary of both trusts, of the Stevenson Brothers' defalcations, should also have disclosed those transactions to Plaintiffs. Defendants learned of the co-trustees' transactions through documents provided to Defendants for the purpose of preparing their clients' tax returns. Plaintiffs' argument that Defendants should have disclosed that information to non-clients directly conflicts with federal and state laws that

criminalize such disclosures, as well as the accountant's duty of confidentiality. If not corrected by this Court, the Court of Appeals' decision will place CPAs in an untenable situation, forcing them to choose between criminal liability and professional misconduct for disclosing confidential client information to non-clients, and civil liability to non-clients for failing to disclose. The Court of Appeals' decision also dramatically expands the scope of professional liability to third parties, allowing a non-client to whom the CPA owed no duty to hold the professional liable not for what the professional did or did not do, but for what the client did. Other appellate courts have recognized the substantial harm such a rule would work to the professional-client relationship. Professionals will face a conflict between serving their clients and protecting their own interests, and clients will refuse to disclose damaging or problematic information to their professionals, thereby denying professionals the opportunity to counsel their clients against potential misconduct. These policy concerns have prompted appellate courts to hold that the "substantial assistance" element of an aiding and abetting claim is not satisfied by the provision of routine professional services to the person alleged to have breached a fiduciary duty and that the mere silence or inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a duty of disclosure directly to plaintiff. Should this Court apply these limitations on professionals' liability for the wrongful acts of their clients, Plaintiffs' sole remaining claim for aiding and abetting a breach of fiduciary duty must fail because the claim entirely arises from the provision of routine professional services and Defendants did not owe a duty directly to Plaintiffs.

ARGUMENT

I. 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 expands the potential third-party liability of a CPA to non-clients, in conflict with the precedents of this Court, and provides CPAs with no guidance regarding the scope and particulars of this new common law theory of liability. To address these concerns, other appellate courts have limited the scope of aiding and abetting claims seeking to hold professionals liable for the acts of their clients in order to safeguard the professional-client relationship. This Court should apply the same reasoning to this case, and if so applied, the claim for aiding and abetting must be dismissed.

A. The Court of Appeals' Decision Conflicts With Decisions of This Court By Subjecting Professional Accountants to Civil Liability For Failing to Disclose Client Information to Non-Clients.

The Court of Appeals' decision held that although Defendants owed no duty to Plaintiffs individually, Plaintiffs may individually pursue a claim for aiding and abetting a breach of fiduciary duty founded on the allegation that Defendants, in addition to giving notice to their client, Jacquelin Stevenson, of the Stevenson Brothers' transactions, also should have told Plaintiffs. This is contrary to the precedents of this Court, which hold that an accountant has no duty to disclose client information to non-clients, and the decision of the Court of Appeals should be reversed. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997).

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 Defendants that is founded on the allegation that Defendants should have disclosed the Stevenson Brothers' transactions to Plaintiffs. This is contrary to South Carolina law, which holds that an accountant has no duty to disclose client information to non-clients. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997).

In ML-Lee, an investment partnership that purchased a company sought to recover damages from the accounting firm that audited the company's financial statements on the grounds that the accounting firm failed to disclose to the investor that the company's inventory was overstated. ML-Lee, 327 S.C. at 240, 489 S.E.2d at 471. This Court reversed the Court of Appeals' decision that held the accounting firm owed a duty to disclose the inventory overstatement to the investor. ML-Lee, 327 S.C. at 241, 489 S.E.2d at 471. In adopting § 552 of the Restatement (2d) of Torts to govern CPA liability to non-clients, this Court noted that § 552 does not require a CPA to disclose information to non-clients. ML-Lee, 327 S.C. at 241, 489 S.E.2d at 471, n.3. Rather, § 552 requires a CPA to exercise reasonable care when communicating information to others for use in a business transaction.

> 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.

Id. (emphasis in original). This Court's holding in ML-Lee tracks the plain language of § 552, which by its terms applies to one who "supplies false information for the guidance of others in their business transaction."

Consistent with § 552 and this Court's holding in ML-Lee, the Court of Appeals has 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, 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.

Contrary to the holding in ML-Lee, the Court of Appeals' decision in this case would impose on an accountant a duty to disclose information to non-clients on pain of 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 S.C. Code Ann. § 40-2-190. The decision further contravenes settled 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), *cert. denied*, 298 S.C. 204, 379 S.E.2d 133 (1989), quoting Sharpe v. South

Carolina Dep't 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."). See also, Manning v. Dial, 271 S.C. 79, 83, 245 S.E.2d 120, 122 (1978), citing Gilbert v. Mid-South Machinery Company, Inc., 267 S.C. 211, 227 S.E.2d 189 (1976) ("Non-disclosure is fraudulent when there is a duty to speak."). The new common law duty of disclosure created by the Court of Appeals' decision contravenes the settled case law of this State, and the decision should be reversed.

Significantly, the Court of Appeals' decision offers accounting professionals no guidance on the scope and application of this new theory of accountant liability to non-clients. The 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 misdeeds, a CPA must somehow forestall future misdeeds 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 for this reason, the Court of Appeals' decision should be reversed.

B. Appellate Courts Have Limited the Scope of Aiding and Abetting Claims That Seek to Hold Professionals Liable For the Acts of Their Clients in Order to Safeguard the Professional-Client Relationship.

In considering aiding and abetting claims asserted against professionals by non-clients, appellate courts have noted the substantial harms that will follow if professionals are to be held

liable in damages for the torts of their clients. See, e.g., Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186 (Minn. 1999) ("Thus, applying aiding and abetting liability to professionals has the potential to undermine the trust to any professional-client relationship."); see also, DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir. 1990), cert. denied, 498 U.S. 941, 111 S.Ct. 347 (1990) (requiring professionals to disclose a client's misdeeds to third parties or else incur liability as an aider and abettor "would prevent the client from reposing in the accountant the trust that is essential to an accurate audit."). If professionals incur civil liability by providing routine professional services to clients who commit bad acts, "the professionals may face a conflict between serving their clients and protecting their own interests." Witzman, 601 N.W.2d at 186. In addition, if clients know their professionals will disclose damaging information to third parties, clients will not share such information with their professionals, which will in turn deny professionals the opportunity to counsel their clients against potential misconduct. Schatz v. Rosenberg, 943 F.2d 485, 493-94 (4th Cir. 1991), *cert. denied*, 503 U.S. 936, 112 S.Ct. 1475 (1992).

In order to safeguard these substantial public interests, appellate courts have limited the scope of aiding and abetting claims that seek to hold professionals liable for the acts of their clients.

1. Strict Enforcement of 'Substantial Assistance' Element to Exclude Routine Professional Services.

For instance, courts have strictly enforced the element that requires the aider and abettor give "substantial assistance" to the primary wrongdoer. See Witzman,[1] 601 N.W.2d at 188-89

[1] In Witzman, the Minnesota Supreme Court applied the elements of an aiding and abetting claim set forth in Restatement (Second) Torts § 876(b). Witzman, 601 N.W.2d at 187. This Court also has applied § 876(b) in claims for aiding and abetting breach of fiduciary duty. See Future Grp., II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996), citing Restatement (Second) Torts § 876(b). The Witzman court noted that much of the case law applying § 876(b), including Schatz, involved federal private actions arising under section 10(b) of the Securities and Exchange Act. The U.S. Supreme Court ultimately held that 10(b) does not permit a private cause of action for

("In addressing aiding and abetting liability in cases involving professionals, most courts have recognized that 'substantial assistance' means something more than the provision of routine professional services."). In Witzman, a sister (Witzman) who alleged that her brother (Wolfson) breached his fiduciary duties as trustee under three trusts asserted an aiding and abetting breach of fiduciary duty claim against the accounting firm that provided professional services to the brother and the trusts. Witzman, 601 N.W.2d at 182-83. Witzman alleged that the accounting firm assisted Wolfson's breach of fiduciary duties by "preparing financial statements, setting up draw accounts, recording conveyances and providing tax advice – without disclosing Wolfson's dealings to Witzman." Witzman, 601 N.W.2d at 188-89. The Minnesota Supreme Court held that these were "routine accounting duties" that cannot satisfy the substantial assistance element of an aiding and abetting breach of fiduciary claim:

> If we were to recognize that such routine services constitute substantial assistance, then it would be the rare accountant indeed who would be not be subject to automatic liability merely because his client happened to be a tortfeasor.

Witzman, 601 N.W.2d at 189.

Similarly, the Supreme Judicial Court of Massachusetts considered whether trust beneficiaries could assert an aiding and abetting breach of fiduciary duty claim against the trustees' attorneys for loss of value to the trust. Spinner v. Nutt, 417 Mass. 549, 556, 631 N.E.2d 542, 546 (1994).[2] As in the matter before this Court, in which Defendants are elliptically

---

aiding and abetting. Central Bank v. First Interstate Bank, 511 U.S. 164, 114 S.Ct. 1439, (1994). In Witzman, the Minnesota Supreme Court noted that, "Nevertheless, the reasoning and analysis employed by the lower federal courts regarding section 876(b) remains persuasive authority on the elements of common law aiding and abetting liability." Witzman, 601 N.W.2d at 187, n 2.

[2] This Court previously cited Spinner with approval in the context of an aiding and abetting breach of fiduciary duty claim. See Future Grp., II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996), citing Spinner v. Nutt, 417 Mass. 549, 631 N.E.2d 542 (1994).

alleged to have taken "no further action" to stop the trustees' defalcations, the plaintiffs in Spinner alleged that:

> the trustees breached their fiduciary duties to the beneficiaries and because the defendants knew of the breach and failed firmly to advise the trustees as to how best to protect the trust's assets, the defendants aided and abetted the trustees' breach.

Spinner, 417 Mass. at 556. Consistent with the holding of the Minnesota Supreme Court in Witzman, the Supreme Judicial Court of Massachusetts held that the allegation the trustees acted on the advice of the attorneys was insufficient to establish that the attorneys "actively participated" in the trustees' breaches of fiduciary duty. Id.

Finally, the U.S. Court of Appeals for the Fourth Circuit held that attorneys did not provide the "substantial assistance" required for an aiding and abetting claim when they drafted the closing documents by which their client purchased a company from sellers, who later alleged they had been defrauded. The Fourth Circuit rejected the argument that the attorneys could be liable as aiders and abettors merely for preparing and disseminating deal documents that contained material misrepresentations or omissions.

> Clearly, the fact that an attorney drafts a closing document does not automatically create a warranty that every statement and agreement made by the client is true. Any other result would make attorneys co-guarantors and co-signatories, along with their clients, in every securities transaction.

Schatz v. Rosenberg, 943 F.2d 485, 497 (4th Cir. 1991).

2. A Defendant Does Not Provide the 'Substantial Assistance' Required for an Aiding and Abetting Claim By Failing to Disclose Client Wrongdoing to a Non-Client, Unless the Defendant Owes a Duty of Disclosure Directly to the Non-Client.

Appellate courts also have held that allegations that a defendant knew of a client's wrongdoing and did not disclose the wrongdoing to non-clients fail to state an aiding and abetting claim unless the professionals owed a duty of disclosure directly to the non-client.

For instance, in Schatz, the Fourth Circuit rejected the plaintiffs' argument that the attorneys provided substantial assistance to their client by failing to disclose their client's misrepresentations to non-clients who purchased the client's business.

> Absent a duty to disclose, allegations that a defendant knew of the wrongdoing and did not act fail to state an aiding and abetting claim. See In re Gas Reclamation, Inc. Sec. Lit., 659 F.Supp. 493 (S.D.N.Y.1987) (allegations that defendant accounting firm knew of alleged fraud and failed to disclose it or otherwise stop scheme failed to state an aiding-abetting claim); Quintel Corp. v. Citibank, 589 F.Supp. 1235, 1245 (S.D.N.Y.1984) (allegations that attorney remained silent to aid his client's fraud did not adequately plead an aider and abettor claim because complaint never alleged that attorney "had a direct involvement in the transaction or deliberately covered up the fraud").

Schatz, 943 F.2d at 496–97. The Fourth Circuit cited extensive case law applying this rule to bar aiding and abetting claims founded on allegations that accountants should have told non-clients of their clients' misdeeds.

> The Seventh Circuit has also consistently applied this rule to accountants who do not disclose damaging financial information about a client to a potential third party investor or purchaser. *See, e.g.,* DiLeo v. Ernst & Young, 901 F.2d 624 (7th Cir.) (accountant under no legal duty to blow whistle on client upon discovery that client in financial trouble), *cert. denied,* 498 U.S. 941, 111 S.Ct. 347, 112 L.Ed.2d 312 (1990); Latigo Ventures v. Laventhol & Horwath, 876 F.2d 1322, 1327 (7th Cir.1989) (accountant has no duty to blow whistle on client in order to protect investors); LHLC Corp. v. Cluett, Peabody & Co., 842 F.2d 928, 933 (7th Cir.) (accountant under no duty to disclose client's fraud to potential investor), *cert. denied,* 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed.2d 329 (1988). Other federal courts have agreed with the Seventh Circuit. *See, e.g.,* Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 347 (10th Cir.1986) (absent fiduciary relationship, accountant had no duty to disclose information about corporation's financial condition during

> discussions with potential investor), *cert. denied,* 480 U.S. 947, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987); Leoni v. Rogers, 719 F.Supp. 555, 566 (E.D.Mich.1989) (accounting firm owed no duty of disclosure to potential investor of client as long as accountant had no fiduciary relationship with investor).

Schatz v. Rosenberg, 943 F.2d 485, 491 (4th Cir. 1991). Other courts have held that inaction or mere silence do not constitute the "substantial assistance" required for an aiding and abetting breach of fiduciary duty claim, absent a duty of disclosure running directly from the defendant to the plaintiff. See Kolbeck v. LIT Am., Inc., 939 F. Supp. 240, 247 (S.D.N.Y. 1996), *aff'd,* 152 F.3d 918 (2d Cir. 1998); see also, Baron v. Galasso, 83 A.D.3d 626, 629, 921 N.Y.S.2d 100 (2011) ("'Substantial assistance'" requires an affirmative act on the defendant's part; 'mere inaction' can constitute substantial assistance 'only if the defendant owes a fiduciary duty directly to the plaintiff').

3. Plaintiffs' Aiding and Abetting Breach of Fiduciary Duty Claim Involves Routine Professional Services, or At Most, Inaction, and Defendants Owed No Duty Directly to Plaintiffs.

The Court of Appeals' decision provides no guidance on the scope and application of the new common law theory of liability by which non-clients may hold a professional liable for failing to stop their clients from committing bad acts. Professionals are left to conjecture the circumstances in which this theory might apply, the class of non-clients who fall within its scope, and the character of action required of a professional who determines a client is committing bad acts that might harm non-clients. Should this Court apply the above limitations on such claims adopted by other appellate courts, Plaintiffs' sole remaining claim, for aiding and abetting a breach of fiduciary duty, must fail because it involves routine professional services of a kind provided by accountants throughout this State. If such services constitute "substantial assistance" as required for an aiding and abetting breach of fiduciary duty claim, "then it would be the rare accountant indeed who would not be subject to automatic liability merely because his

client happened to be a tortfeasor." See Witzman, 601 N.W.2d at 189. Plaintiffs' claim also must fail because, as noted in the Court of Appeals' decision, Defendants owed no duty or care or fiduciary duty directly to Plaintiffs, and in the absence of such a duty Defendants cannot be held liable for not telling non-clients of the misdeeds of their clients. See Schatz v. Rosenberg, 943 F.2d 485, 491 (4th Cir. 1991), citing Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490 (7th Circ.) ("Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose.").

The Court of Appeals' decision should be reversed because it dramatically expands the potential third-party liability of a CPA to non-clients, in conflict with the precedents of this Court, and provides CPAs with no guidance regarding the scope and particulars of this new common law theory of liability.

II. 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.

In their sole remaining claim, for aiding and abetting a breach of fiduciary duty, Plaintiffs complain that Defendants, upon learning of the defalcations of the trustees, did not disclose those transactions to Plaintiffs. See R. p. 0095, ¶¶ 52 Amended Complaint:

> Defendants Kerrison and Dixon-Hughes had actual knowledge of these breaches of fiduciary duty and knowingly participated in that breach of fiduciary duty by failing to disclose to Plaintiff Kathleen Turner who held power of attorney for her mother, or the other Plaintiffs as beneficiaries, of the improper self-dealing transactions.

Defendants learned of the transactions from documents provided to them for the purpose of preparing client tax returns. Imposing civil liability on a tax professional for failure to disclose tax return information to non-clients is fundamentally at odds with federal and state laws that

bar such disclosures. Accordingly, the Court of Appeals' decision should be reversed, and the trial court's decision reinstated.

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

Under federal law, a tax professional in every instance 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 comprehensive 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"). Federal regulations broadly define "tax return information" to encompass all information in any form that is furnished in connection with the preparation of a tax return. See 26 C.F.R. § 301.7216-1(b)(3) ("Definitions"). Federal regulations broadly define "disclosure" to mean "the act of making tax return information known to any person in any manner whatever." See 26 C.F.R. § 301.7216-1(b)(5) ("Definitions"). These expansive definitions evidence the sweeping scope of this general rule, which includes within its ambit every disclosure, to any person and in any manner, of any information furnished in connection with the preparation of a tax return, unless a federal statute or regulation expressly authorizes the disclosure.

The general rule barring disclosure of tax return information to non-clients applies in this case. Ms. Kerrison 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 this tax return information to Plaintiffs. By statute, Congress has permitted disclosure pursuant to another provision of the Internal Revenue Code or a court order, and a tax return preparer may use tax return information when preparing tax returns "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.

Regulations adopted by the Internal Revenue Service create several discrete exceptions to the general rule barring disclosure under 26 U.S.C. § 7216. Plaintiffs have incorrectly contended that the "related-taxpayers" regulation at 26 C.F.R. § 301.7216-2(e)(1)-(2) authorized Defendants to tell Plaintiffs of the trustees' defalcations because the definition of "related taxpayer" includes a "trust or estate and beneficiary." The regulation states:

> **(e) Disclosure or use of information in the case of related taxpayers. (1)** In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax return preparer obtained from a first taxpayer if—
>
> > **(i)** The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;
> >
> > **(ii)** The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and
> >
> > **(iii)** The first taxpayer has not expressly prohibited the disclosure or use.

> **(2)** For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to another taxpayer if they have any one of the following relationships: Husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

26 C.F.R. § 301.7216-2. The narrow scope of the exception, and its inapplicability in this matter, are apparent from the plain language of the regulation. It applies only when one taxpayer provides tax return information to a tax professional, *who then uses the information to prepare the tax return of a second, related taxpayer*. (emphasis added). It does not permit disclosure of information, nor its use, for any other purpose. Defendants did not use tax return information evidencing the Stevenson Brothers' defalcations to prepare tax returns for Plaintiffs, and absent such evidence the related-taxpayer regulation is inapplicable.

For all of the above reasons, federal law barred Defendants from telling Plaintiffs of the trustees' defalcations.

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.

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 client tax returns. 26 U.S.C. § 7216 and the federal regulations applying that statute make it a crime for Defendants to disclose that information to third parties. The Court of Appeals' decision would require a CPA to disclose the information to third parties on penalty of civil liability. 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 an all-encompassing rule prohibiting any disclosure to "any person in any manner whatever" 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 vague 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.

C. The Duty Imposed by the Court of Appeals' Decision 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 also conflicts with the statutory duty of confidentiality imposed by the General Assembly.

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.

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. (R. p. 0095, ¶¶ 52 Amended Complaint). Defendants knew of these transactions from information communicated to them for the purpose of preparing their clients' 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 contravenes this statutory duty

by imposing on accountants an entirely undefined duty to disclose client misdeeds to non-clients. The decision should be reversed, and the trial court's decision reinstated.

For these reasons, 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 law. The decision should be reversed and the order of the trial court reinstated.

III. THE COURT OF APPEALS ERRED, 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.

The essence of Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is that the Defendants failed to disclose the fraudulent actions of Thomas and Daniel Stevenson. Because the claim rests on a theory of fraud and deceit, it did not survive the death of Jacquelin Stevenson under the general survivability statute. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 97 (2002). (Regardless of how a particular claim is labeled, allegations of fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death).

S.C. Code Ann. §15-5-90 ("Survival of Right of Action") provides that actions based on injuries to an individual shall survive the death of that person. 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. Indeed, the label that a plaintiff gives a particular claim is

irrelevant where the essence of the defendant's acts giving rise to the claim amounts to fraudulent and/or deceptive conduct. Ferguson, 349 S.C. at 565, 564 S.E.2d at 97.

Because the actions in this case are based on the alleged fraudulent conduct of Thomas and Daniel Stevenson towards Jacquelin Stevenson, the sole lifetime beneficiary under both trusts, they do not survive the death of Jacquelin Stevenson. Plaintiffs' claim entirely derives from the allegation that during Thomas C. Stevenson, III and Daniel R. Stevenson, II's terms as co-trustees, both improperly took money from the Marital Trust, QTIP Trust and the Estate of Jacquelin K. Stevenson. (Amended Complaint, ¶ 19). Plaintiffs' allegation that Defendants failed to disclose the fraudulent actions of Thomas and Daniel Stevenson is, by its very nature, a claim of fraud for failure to disclose the fraud of another.

In Brailsford, the Court of Appeals determined that an action by the widow of a trust beneficiary, both individually and in her capacity as personal representative of the estate, against trustees for various instances of fraudulent conduct did not survive the death of her husband. Brailsford, 380 S.C. at 449-50, 669 S.E.2d at 345-46. The court reasoned that the widow's causes of action were "essentially a cause of action for fraud simply disguised under a different title." Id. In Brailsford, the Court of Appeals relied on the case of Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564-565, S.E.2d 94, 97 (2002), in which this Court found that because the essence of the alleged misconduct amounted to misleading the deceased by either intentional deception or gross negligence, such actions fit within the ambit of fraud or deceptive conduct and, regardless of the label given, did not survive the deceased.

The reasoning behind disallowing suits based on theories of fraud to survive an individual is that evidence of the state of mind of the victim is crucial to determining whether a fraud was perpetrated. In Faircloth v. Finesod, 938 F.2d 513 (4th Cir. 1991), finding that civil

conspiracy claims did not survive the death of the victim, the Fourth Circuit upheld the constitutionality of S.C. Code Ann. § 15-5-90 and the recognized exception for fraud. The Court acknowledged that a rational basis for the fraud exception to the survivability statute is "that fraud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital." Id.; see also Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941); Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002); Pamplico Bank and Trust Co. v. Prosser, 259 S.C. 621, 193 S.E.2d 539 (1972); Cline v. S. Ry. Co., 113 S.C. 440, 102 S.E. 641 (1920). Because the issue of Jacquelin Stevenson's state of mind, potential consent and ratification and knowledge are crucial to the issue of whether a duty was breached and a fraud committed, either by trustees Thomas and Daniel Stevenson or Defendant Lynne Kerrison, Plaintiffs' claims did not survive Jacquelin K. Stevenson's death. The Court of Appeals' decision noted that Defendants fully disclosed the trustee transactions to the attorney for Mrs. Stevenson while Mrs. Stevenson remained competent, thereby giving their client valid notice of the transactions at a time when she was the sole lifetime beneficiary under both trusts and held a power of appointment for one of the trusts. Bennett v. Carter, No. 2015-UP-491, p. 4 (S.C. Ct. App. Oct. 14, 2015). Evidence regarding the state of mind of the late Jacquelin Stevenson now is unavailable, including the extent of her knowledge about these transactions and whether she ratified or even authorized the transactions. See Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991) (in adopting the general survival statute, the South Carolina General Assembly "could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.").

Because Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is based on theories of fraud and deceit, the claim abated on the death of Mrs. Stevenson, and the decision of the Court of Appeals should be reversed.

CONCLUSION

The decision of the Court of Appeals should be reversed, and the decision of the trial court reinstated, for the reasons stated above.

Frederick K. Sharpless
Sharpless & Stavola, PA
P. O. Box 22106
Greensboro, NC 27420
(336) 333-6384

M. Dawes Cooke, Jr.
Barnwell Whaley Patterson & Helms, LLC
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700
Attorneys for Petitioners

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

Appellate Case No. 2016-000065

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.

PROOF OF SERVICE

I certify that on this 18th day of January 2017, I have served on the Respondents' counsel a copy of the attached Brief on Appeal filed by Petitioners by causing a copy of the same to be placed in the U.S. Mail, first-class postage paid, addressed to:

A. Camden Lewis, Esquire
Keith M. Babcock, Esquire
James M. Griffin, Esquire
Ariail E. King, Esquire
Lewis Babcock & Griffin, LLP
P.O. Box 11208
Columbia, SC 29211

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: _____

M. Dawes Cooke, Jr., Esquire
Jeremy E. Bowers, Esquire
288 Meeting Street, Suite #200 (29401)
Post Office Drawer H
Charleston, SOUTH CAROLINA 29402
PHONE: (843) 577 - 7700
ATTORNEYS FOR THE PETITIONERS