

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-10-400
Unpublished Opinion NO. 2015-UP-491

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,

RECEIVED
FEB 14 2017
SC Court of Appeals

RECEIVED
FEB 15 2017
S.C. SUPREME COURT

Respondents,

v.

T. 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.

Defendants,

Of Whom

Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A.; and
Lynne L. Kerrison are

Petitioners.

BRIEF OF RESPONDENTS

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-10-400
Unpublished Opinion NO. 2015-UP-491

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.; Douglas Capital Management, Inc.; 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., P.A.; and
Lynne L. Kerrison are

Petitioners.

BRIEF OF RESPONDENTS

A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS BABCOCK LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
Telephone: 803-771-8000
Facsimile: 803-733-3541

ATTORNEYS FOR RESPONDENTS

Table of Contents

Table of Authorities.....ii

Counter-Statement of the Facts 1

 I. Introduction 1

 II. Chronology of Events.....3

Argument 8

 I. The Accountants, who admittedly knew the activities of the Brothers were illegal and who helped the Brothers, clearly “knowingly participated” in the breach of fiduciary duties by the Brothers.....8

 A. The Accountants provided the method by which the Brothers stole from the Trusts and assisted in covering up the thefts..... 8

 B. The Accountants’ five-year failure to inform Respondents of the thefts from the Trusts, coupled with the Accountants’ actions furthering the thefts from the Trusts, is also proof that they knowingly participated in the Brothers’ breach of fiduciary duty.....15

 II. The Accountants were not barred by federal law from disclosing the breach of fiduciary duty.....19

 III. The cause of action for aiding and abetting a breach of fiduciary duty survives Mrs. Stevenson’s death..... 22

Conclusion.....24

Certificate of Counsel.....26

Table of Authorities

Cases

<i>Barker v Henderson, Franklin, Starnes & Holt</i> , 797 F.2d 490 (7th Cir. 1986)	18, 19
<i>B & B Liquors, Inc. v O'Neil</i> , 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004),.....	8
<i>Brailsford v Brailsford</i> , 380 S.C. 443, 669 S.E.2d 342 (S.C. Ct. App. 2008).....	24
<i>Caprer v Nussbaum</i> , 36 A.D.3d 176, 825 N.Y.S.2d 55 (2006).....	9
<i>Cent Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994)	18
<i>Chapin v. University of Massachusetts</i> , 977 F.Supp. 72 (D.Mass.1997)	16
<i>Cippollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992)	20
<i>DiLeo v Ernst & Young</i> , 901 F.2d 624 (7th Cir. 1990)	18
<i>Envtl Equip & Serv Co v. Wachovia Bank, N.A.</i> , 741 F. Supp. 2d 705 (E.D. Pa. 2010).....	10
<i>Estate of Cornell v Johnson</i> , 367 P.3d 173 (Idaho 2016)	22
<i>Faircloth v. Finesod</i> , 938 F.2d 513 (4 th Cir. 1991)	22
<i>Ferguson v Charleston Lincoln Mercury</i> , 349 S.C. 558, 564 S.E.2d 94 (2002)	22
<i>Future Group, II v Nationsbank</i> , 324 S.C. 89, 478 S.E.2d 45(1996)	8, 9
<i>Green v. Jonhop, Inc.</i> , 358 F. Supp. 413 (D. Or. 1973)	16
<i>Hancock v. Mid-S. Mgmt. Co</i> , 381 S.C. 326, 673 S.E.2d 801 (2009)	8
<i>Kerbs v. Fall River Indus , Inc</i> , 502 F.2d 731 (10th Cir. 1974)	16
<i>Latigo Ventures v. Laventhol & Horwath</i> , 876 F.2d 1322 (7th Cir. 1989)	18
<i>Lawyers Title Ins Corp. v United Am. Bank of Memphis</i> , 21 F. Supp. 2d 785 (W.D. Tenn. 1998)	10, 12
<i>LHLC Corp. v. Cluett, Peabody & Co.</i> , 842 F.2d 928 (7th Cir. 1988)	18

Malloy v Thompson, 409 S.C. 557, 762 S.E.2d 690 (2014)21

Mattison v Palmetto State Life Ins. Co , 197 S.C. 256, 15 S.E.2d 117 (1941)24

Medical Univ. of South Carolina v Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004)..... 8

Metge v Baehler, 762 F.2d 621, 624–25 (8th Cir. 1985) 16

Mitsui & Co (USA), Inc v. Puerto Rico Water Res Auth., 79 F.R.D. 72
(D.C. Puerto Rico 1978).....20

Muller v Bank of Am , N A , 12 P.3d 899 (Kan. App. 2000) 17

Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005)..... 8

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505(2006).....8

Quintel Corp., N.V. v Citibank, N A , 589 F. Supp. 1235 (S.D.N.Y. 1984) 16

Rife v Hitachi Constr Mach. Co , Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) 8

Smith v Smitty Mcgee's, Inc , 24 Del. J. Corp. L. 297 (1998)..... 10

State v Campbell, 756 N.W.2d 263 (Minn. Ct. App. 2008) 17

Windon Thrd Oil & Gas Drilling P'ship v. Fed. Deposit Ins Corp , 805 F.2d 342
(10th Cir. 1986) 18

Witzman v Lehrman, Lehrman & Flom, 601 N.W.2d 179 (Minn. 1999)..... 13, 14, 15

Woodward v. Metro Bank of Dallas, 522 F.2d 84 (5th Cir.1975)..... 15

Statutes and Regulations

3 *Am Jur 2d Agency* § 21..... 17

26 U.S.C.A. § 7216..... 19, 20

26 C.F.R. § 301.7216-2.....20

S.C. Code Ann. § 15-5-9024

S.C. Code Ann. § 40-2-19021, 22

S.C. Code Ann. § 62-7-80123

S.C. Code Ann. § 62-7-80223

S.C. Code Ann. § 62-7-81323

Court Rules

Rule 56, SCRCP 8

Other Authorities

The Restatement (Second) of Torts, §876(b)9, 10

Lewinbuk, Katerina P. “Let’s Sue all the Lawyers: The Rise of Claims Against
Lawyers Aiding and Abetting a Client’s Breach of Fiduciary Duty.” 40 *Ariz.St.L.J.*
135, 141.(Spring 2008).....9, 10

Counter-Statement of the Facts

I. Introduction

This case arises out of family trusts, for which two brothers, Thomas C. Stevenson, III (Tom) and Daniel R. Stevenson, II (Dan)(collectively “the Brothers”), were both trustees and beneficiaries. Their sisters, Respondents Jacquelin S. Bennett (Jacquelin), Genevieve S. Felder (Genevieve) and Kathleen S. Turner (Kathleen), were also beneficiaries of the Trusts; Kathleen Turner also held a power of attorney for her mother, Jacquelin Stevenson (Mrs. Stevenson), who was also a beneficiary of the Trusts. The value of the Trusts was over \$5 million at the time in 1991 when Mrs. Stevenson began her estate planning. (R.p. 1484; 1239:15-1240:24).

Respondents sued the Brothers on January 22, 2008. In discovery, Respondents learned about the professional negligence of the following attorneys and accountants: T. Heyward Carter, Jr. and Evans, Carter, Kunes & Bennett, P.A., the attorneys for Mrs. Stevenson (“the Attorneys”), and Lynn Kerrison and Dixon-Hughes f/k/a Pratt-Thomas Gumb & Co., P.A., the accountants for the Trusts and Mrs. Stevenson, as well as for Dan and one of his companies (“the Accountants”) (collectively “the Professionals”). The Professionals learned that the Brothers had been taking money from the Trusts in violation of their fiduciary duties as trustees and the Professionals kept that secret for five years; even worse, they assisted the illegal activities of the Brothers in taking money from the Trusts. Even though the Accountants learned in 2001 that the Brothers had been improperly withdrawing monies from the Trusts, the Accountants allowed the thefts to continue and even facilitated the scheme by writing checks on demand, later creating fake promissory notes in an attempt to legitimize the thefts. The Accountants recognized that Brothers were breaching their duties and knew that they needed to inform Respondents. Instead of doing so, they delayed notification for five years, while continuing to act in ways to further

the depletion of the Trusts. The actions of the Professionals resulted in losses to the Respondents of almost five million (\$5,000,000) dollars. (R.p. 364).

Upon discovering the Accountants' improper acts, Respondents brought this action for professional negligence, breaches of fiduciary duties, and aiding and abetting a breach of fiduciary duty. After conducting extensive discovery, both the Attorneys and the Accountants moved for summary judgment. (R.p. 108). Prior to the April 29, 2013 hearing on summary judgment, Respondents resolved the action against the Attorneys. (R.p. 1855:7-11). The lower court granted the Accountants' motion for summary judgment.

On appeal, the Court of Appeals unanimously held that the trial court erred in granting summary judgment on Respondents' individual claim for aiding and abetting a breach of fiduciary duty.¹ Accountants then sought certiorari from this Court.

II. Chronology of Events

The Thomas Stevenson Will, which created two trusts, was executed on February 5, 1985. (R.pp. 1456-1479). The two trusts were the "Jacquelin K. Stevenson Marital Trust" ("Marital Trust") and a qualified terminable interest property trust ("QTIP Trust")(collectively "the Trusts"). (R.pp. 1456-1479). The trusts were valued at over five million dollars. (R.p. 1484; 1240:9-24). Mr. Stevenson died in 1988 and he was survived by his wife. (R.p. 1252:1-8). Respondents and their brothers, Tom and Dan, are beneficiaries of both Trusts. (R.pp. 1435:12-

¹ Judge Few's separate opinion concurred as to the majority's decision on the issue of aiding and abetting, but dissented in part because Judge Few found that Kerrison had a duty to the Trusts which was breached. App. 6-7. Judge Few determined that as to the Respondents' claims for breach of fiduciary duty and professional negligence, the matter should be remanded to the Circuit Court for a determination as to whether beneficiaries could bring these claims against the Accountants for their breaches to the Trusts. App. P.7. Judge Few's opinions are fully supported by the record and allow the case to stand on these issues alone.

28; 1436:8; 1456-1479). The Marital Trust provided Mrs. Stevenson with a power of appointment to name the beneficiaries of that Trust in her Will; she named Jacquelin, Genevieve, Kathleen, Tom and Dan, as well as her child from a former marriage, James King, as beneficiaries of the Marital Trust upon her death. *Id.*

The Thomas Stevenson Will also provided that, upon the death of Mrs. Stevenson, the beneficiaries of the QTIP Trust would be his children-- Jacquelin, Genevieve, Kathleen, Tom, and Dan. (R.pp. 1242:10-22; 1456-1479). Mr. Stevenson's Will also named Tom and Dan (along with Norman W. Stevenson, Henry Buist and James G. Boyd) as co-trustees of both the Marital Trust and the QTIP Trust. (*Id.*) In 1999, after other trustees had passed away or become ill, the two brothers were left as the only trustees. (R.pp. 795:15-796:15). In late 2000, Mrs. Stevenson had become ill and was in an assisted care facility. (R.p. 1303:6-10). On January 4, 2001, Mrs. Stevenson executed a Durable Power of Attorney in favor of two of her children, Kathleen and Dan, which had been prepared by Carter. (R.pp. 835-841). Mrs. Stevenson remained in the assisted care facility and eventually passed away in 2006. (R.p. 519:19-20).

From 1999 through 2006 -- a time period in which the Brothers served as the only trustees-- they both took millions from the Trusts, hiding the thefts by describing them as loans to various business owned by either Tom or Dan.² (R.pp. 912:3-25; 924:10-12). The Professionals learned in 2001 that the Brothers were acting improperly as trustees. (R.p. 1331:10-16). Kerrison and Carter both recognized the borrowing scheme was illegal. (S.R.p 62:1-2). Kerrison told Carter about the improprieties in the fall of 2001, but did not advise any

² The Professionals acknowledged the impropriety of the Brothers' conduct and even suggested the promissory note scheme. (R.pp. 1482-1485).

of the Respondents, not even Kathleen, who held a power of attorney for elderly and ill Mrs. Stevenson. (R.p. 966:22-967:5; 1034; 1116; 1300:3-15). Kerrison decided to delay telling Respondents and instead, she and Carter determined that they should have a meeting with Tom and Dan to discuss their illegal activities. (R.pp. 1027:24-1028:3).

On October 23, 2001, Kerrison and Carter met with Tom and Dan--the ones stealing the money-- to tell them to stop taking money from the Trusts and to tell their sisters. *Id* As Carter testified, "we did discuss the propriety of that and the -- the fact that it was not something the trustees were supposed to be doing."³ (R.p. 1331:13-15). The Professionals never told Kathleen or anyone else that what the Brothers were doing was illegal. In fact, the Professionals took no further action at that time and let the scheme continue. *Id* At the time of the October 23, 2001 meeting, Dan had already stolen \$717,000 (R.p. 384) and Tom had stolen \$500,000. (R.pp. 383; 386).

As time passed, the Accountants not only failed to stop the Brothers from looting the Trusts..they assisted the Brothers in taking money from the Trusts. At the end of 2002, Kerrison's firm began doing the bookkeeping for the Trusts and Mrs. Stevenson after her personal bookkeeper passed away. The Accountants actually took possession of the Trusts' checkbooks and *wrote* the improper checks to Dan and Tom. (R.pp. 916:23-25; 957:6-16; 1046:6-20). To make withdrawals from the Trusts, either Tom or Dan would come to the Accountants' office and simply request a withdrawal and one of the Accountant's employees would then write the check as requested, even if Tom and Dan did not produce documentation,

³Carter also testified that at the time that meeting was held he "was concerned that they had breached their fiduciary duties." (S.R.p. 62:1-1).

such a copy of a bill or other legitimate trust expense, to justify the withdrawal. (R.p. 1050:5-25). The Accountants' process for approving withdrawals totally ignored their earlier recognition that the Brothers' withdrawals were illegal. (R.p. 957:9-16).

When the Accountants wrote checks to Dan, he invested the money in his business, Fabtech. The Accountants knew that Dan was using trust money for his personal business venture, as Kerrison testified that she "knew that some of the checks were written to [the Brothers'] companies." (R.p. 1016:3-5). While this was occurring, Harold Pratt-Thomas, a partner with the Accountants, was also personally investing in Dan's Fabtech business, as well as sitting on its board. (R.p. 989:12-17). Thus, the Accountants had a financial interest in Dan's business and had an incentive to keep Dan's business solvent by allowing the improper withdrawals. (R.p. 989:12-17).

In addition, Kerrison, a partner with Accounting firm, filed tax returns for the Trusts (and Mrs. Stevenson) each year and knew that Tom and Dan had continued to take money from the Trusts. The withdrawals (thefts) continued even after the October 23, 2001 meeting in which Kerrison and Carter told the Brothers it was improper. (R.pp. 943:5-25; 966:13-16; 979:24-981:5). Incredibly, just one month after the October 23, 2001 meeting, Dan had stolen an additional \$40,000 and Tom had stolen an additional \$150,000. (R.pp. 383-384; 386).

Tom and Dan continued to take monies from the trust after the October 23, 2001 meeting, but no one informed Respondents. In a letter to Tom and Dan dated November 25, 2002, Carter even acknowledged that Respondents, especially Kathleen who held the power of attorney, needed to be told. (S.R.p. 72:3-21; 74:21-75:10). Neither Kerrison nor Carter informed Respondents of the Brothers' illegal actions. Amazingly, Kerrison and Carter even participated

in the preparation of fake promissory notes for Tom and Dan, in an attempt to further hide the thefts. (R.pp. 1011:11-22; 1481). With the full knowledge and assistance of the Accountants, Tom and Dan continued to engage in stealing millions of dollars from the Trusts. By the end of the year 2005, Tom had stolen \$750,000 and Dan had stolen \$3,668,276. (R.pp. 381-386).

In March of 2006, Kerrison and Carter, obviously aware that Tom and Dan had continued to loot the Trusts, drafted a letter to Kathleen, dated March 24, 2006, to finally inform Respondents that the Trusts held millions of dollars' worth of fake unsecured promissory notes (in actuality, the monies stolen by the Brothers).⁴ (R.pp. 1368:3-15; 1482-1483). However, at the request of Tom and Dan, this letter was not actually sent. (R.p. 1484-1485).

On April 27, 2006, Kathleen Turner attended a meeting with Carter and Kerrison, as well as the Brothers. Finally, five years after the Accountants first learned that Tom and Dan were taking money from the Trusts, they informed Kathleen (holder of her mother's power of attorney) that Tom and Dan had stolen money from the Trusts. (R.pp. 1378:1-1379:16). Carter and Kerrison have admitted that the purpose of this meeting was to finally provide "full disclosure" to Kathleen (which had never been given) and that it was at this meeting where documentation of the withdrawals was finally provided to Respondents. (R.pp. 966:22-967:9; 1034; 1116:3-21).⁵ By that time, Tom and Dan had stolen almost five million dollars (\$5,000,000) from the Trusts. (R.p. 364). Respondents filed suit against the Attorneys and the

⁴The letter of Carter and Kerrison does not explain the notes or identify the maker of the notes, nor does it mention that the Brothers had been illegally looting the trusts. (R.pp. 1482-1483).

⁵ After learning of the Brothers' actions, the three Respondents were appointed as co-Trustees of the Trusts, replacing Tom and Dan. (R.pp. 621:22-25; 795:15-796:15; 876). Kathleen and Jacquelin were appointed Personal Representatives of Mrs. Stevenson's Estate in 2007. *Id*

Accountants on April 24, 2009.

The lower court granted summary judgment to the Accountants on July 3, 2013. The lower court ruled that the Accountants had not “knowingly participated” in Tom and Dan’s breach of duties, even though the evidence in the record shows a history of both knowledge and participation by writing checks, preparing promissory notes, meeting with the Brothers, drafting letters regarding the thefts (which were not sent), and agreeing to keep the Brothers’ scheme a secret. (R.pp. 1481-1485)-- all such actions taken with the Accountants’ knowledge that Tom and Dan were violating their fiduciary duties.⁶

The Court of Appeals reversed the lower court and specifically held, as to the aiding and abetting claim, that Kerrison recognized that the withdrawals were not proper but that she took “no further action regarding Thomas’s and Daniel’s activities” and that in addition, “Kerrison’s firm actually had possession of the trust checkbooks and wrote the checks for Thomas’s and Daniel’s withdrawals of funds from the trusts.” App. P. 4. Thus, the Court of Appeals properly concluded that Respondents had presented sufficient evidence “from which a jury could infer [Accountants] knowingly participated in Thomas’s and Daniel’s breach of their fiduciary duty.” App. P. 4.⁷

⁶ The trial court also ruled that the Accountants had no duty to Respondents and granted summary judgment as to Accountants on the breach of fiduciary duty and professional negligence claims.

⁷ With regard to the breach of fiduciary duty and professional negligence claims, the Court of Appeals’ majority opinion affirmed the lower court’s summary judgment. In dissent, however, Judge Few determined that Kerrison had a duty to the Trusts and that as to the Respondents’ claims for breach of fiduciary duty and professional negligence, the matter should be remanded to the Circuit Court for a determination as to whether beneficiaries could bring these claims against the Accountants for their breach of duties owed to the Trusts. App. P. 7.

ARGUMENT

Standard of Review

This Court reviews the grant of a summary judgment motion *de novo*, applying the standard of Rule 56, SCRPC, that summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pye v Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *B & B, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). “[T]he non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v Mid-S. Mgmt Co*, 381 S.C. 326, 673 S.E.2d 801 (2009). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v Hitachi Constr. Mach Co, Ltd*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) (emphasis added).

I. The Accountants, who admittedly knew the activities of the Brothers were illegal and who helped the Brothers, clearly “knowingly participated” in the breach of fiduciary duties by the Brothers.

A. The Accountants provided the method by which the Brothers stole from the Trusts and assisted in covering up the thefts.

A cause of action for aiding and abetting a breach of fiduciary duty occurs where a plaintiff proves (1) a breach of a fiduciary duty owed to the plaintiff, (2) the defendant's knowing participation in the breach, and (3) damages. *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). In an aiding and abetting claim, whether the defendant had an independent duty to the plaintiff is irrelevant:

The absence of a direct fiduciary relationship, however, does not immunize the accountants from the plaintiffs' claims here. Where, as here, it is demonstrated, prima facie, that the accountants had complete knowledge of the misuse of condominium funds, and were indispensable to the board member defendants in their efforts to conceal the misuse of those funds, the accountants may be held liable for aiding and abetting the breach of fiduciary duty by the board member defendants.

Caprer v Nussbaum, 36 A.D.3d 176, 194, 825 N.Y.S.2d 55, 71 (App. Div. 2006); *see also*, Lewinbuk, Katerina P. "Let's Sue all the Lawyers: The Rise of Claims Against Lawyers Aiding and Abetting a Client's Breach of Fiduciary Duty." 40 *Ariz.St.L.J.* 135, 141 (Spring 2008)("[a] critical distinction between a claim for aiding and abetting a client's breach of fiduciary duty and other claims...is that a plaintiff need not allege that the [abettor] actually owed the plaintiff a direct duty of care.").

In aiding and abetting, "[t]he gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Future Group, II v Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). Here, the Court of Appeals correctly held that Respondents had presented sufficient evidence of the Accountants' knowledge and participation to withstand summary judgment.⁸

The Restatement (Second) of Torts, §876(b), Comment d states: "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the advisor as participation or physical assistance." The Comment continues: "if the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is

⁸ As noted in the section on Standard of Review, Respondents need only show a scintilla of evidence that the Accountants knowingly participated in the breach.

responsible for the consequences of the other's act.” Restatement (Second) of Torts, §876, Comment d. “For example, providing specific advice to the client as to the necessary steps for breaching a fiduciary duty she owes to the plaintiff, as well as drafting certain documents to assist with the same may constitute evidence of a lawyer’s substantial assistance.” Lewinbuk, *supra*.

Multiple cases have found that a defendant’s actions in furthering improper withdrawals constitutes “knowing participation.” For instance, in *Lawyers Title Ins. Corp. v. United Am. Bank of Memphis*, 21 F. Supp. 2d 785, 799 (W.D. Tenn. 1998), a title insurer that was damaged by losses as a result of closing attorney's misappropriation from escrow account brought an action against the bank at which the account was maintained. The plaintiff there argued that the bank’s practices of issuing instant credit on checks deposited by the attorney, alerting him to overdrafts in the account, and extending personal loans to cover overdrafts without following the bank's standard loan procedures were essential factors that enabled the attorney to misappropriate millions of dollars. *Lawyers Title Ins Corp* , 21 F. Supp. 2d at 798. The district court denied the bank’s request for summary judgment, holding that the bank’s act could constitute knowing participation:

Although UAB normally has no duty to monitor an escrow account, where it has notice that the fiduciary is breaching its duties with respect to the account, the bank cannot continue to provide assistance and willfully ignore the breach to its own benefit.

Id at 799; *see also*, *Smith v Smutty Mcgee's, Inc* , No. 15668, 1998 WL 246681, at *3, 24 Del. J. Corp. L. 297, 306 (Del. Ch. May 8, 1998) (A wife/manager’s acts in writing checks associated with husband’s breach of fiduciary duties were evidence of knowing participation); *Envtl Equip & Serv. Co. v Wachovia Bank, N.A.*, 741 F. Supp. 2d 705, 727 (E.D. Pa. 2010) (aiding or

abetting claim available if the bank knowingly or recklessly cashed unauthorized checks and turned a blind eye to irregular banking practices).

As is clear from the record, the Accountants knew as early as 2001 that the Brothers' withdrawals were improper. However, despite knowing that the Brothers were breaching their fiduciary duties as trustees, the Accountants wrote the checks for the withdrawals for years. They even covered up the illegal withdrawals with fake promissory notes. In other words, the Accountants knew that the Brothers were breaching their fiduciary duties and assisted by actually providing and writing the checks. As Kerrison testified:

Q. And that Dixon Hughes at some point in time upon the death of Pat⁹ started writing the checks?

A. Yes, sir, we wrote the checks.

Q. And who okayed the checks to be written?

A. Any of the siblings would come into the office and they would meet with Angela Heisenbottle, and Angela would write the checks and then either Dan or Tom would sign the checks.

(R.p. 957:9-16).¹⁰ The Accountants admitted providing these checks even though Dan and Tom did not present any documentation showing that the withdrawal was for a legitimate trust expense:

Q: Okay, What if Tom or Dan came by and didn't have any documentation and they said, I just want you to write a check to whoever, you would write the check.

⁹ Pat Napolitano served as Mrs. Stevenson's personal bookkeeper. (R.p. 909:16-17).

¹⁰ Certainly, after learning in the October 23, 2001 meeting that the Brothers were in breach of fiduciary duty, the Accountants should not have written the checks, thereby continuing the improper withdrawals and furthering the breach of fiduciary duty. (R.p. 1331:10-16; S.R.p. 26:19-22).

A. Yes.

(R.p. 1050:19-23).

In addition to providing the checks to Tom and Dan to facilitate the improper withdrawals, the Accountants provided other assistance:

1. The Accountants met with the Attorneys and the thieves, Tom and Dan, to tell them to stop stealing rather than advise Mrs. Stevenson and/or Kathleen of the thefts. (R.pp. 1027:25-1028:3; 1331:10-16).
2. The Accountants recognized that Respondents should be told of Tom and Dan's breach of duty and in conjunction with the Attorneys, drafted a letter to clearly inform Respondents about the improper withdrawals; yet the Accountants and the attorney agreed to delay sending the letter at Tom and Dan's request. (R.pp. 1368:3-15; 1482-1485).
3. The Accountants participated in drafting fake promissory notes that documented the withdrawals as loans. (R.pp. 1011:11-22; 1481).

There is no question that the Accountants knew Dan and Tom were not supposed to be withdrawing money (and were in breach of their fiduciary duty in so doing) and that the Accountants' assistance allowed Dan and Tom to continue to make improper withdrawals for five years. In addition, the promissory notes, which the Accountants participating in drafting for Tom and Dan to sign, cloaked the improper withdrawals with the air of legitimacy. In other words, just as in the *Lawyers Title* case, the Accountants' actions here constituted "essential factors that enabled [Tom and Dan] to misappropriate millions of dollars." *Lawyers Title Ins. Corp*, 21 F. Supp. 2d at 798.

Moreover, the Accountants wrongly "provide[d] assistance and willfully ignore[d] the breach **to its own benefit**." *Id.* at 799 (emphasis added). At the time that the Accountants were issuing these checks, one of the partners in the accounting firm, Harold Pratt-Thomas, had

invested in one of Dan's businesses which was being funded by the stolen trust funds. (R.p. 989:12-17). Thus, the Accountants had an interest in keeping Dan's business solvent by allowing the improper withdrawals.

Petitioners argue that accountants cannot be held liable for aiding and abetting when they only provided routine professional services, relying heavily on *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999). (Pet. Brief p. 19-20). However, *Witzman* has no application here. In that case, a trustee was sued by his sister (and trust beneficiary) for failing to provide accountings to the probate court for 1978-1993, for paying himself excessive compensation, and engaging in self-dealing. After the trustee was sued, he had his accountants, Lehrman, Lerhman & Flom, prepare financial accountings for those years. The trustee and his sister reached a settlement, but the sister later filed a motion to compel performance and for reformation, alleging that the trustee had made material misrepresentations about trust assets. The sister then sued the accountants alleging, inter alia, that they aided and abetted her brother by "prepar[ing] trust 'draw' accounts from which [the trustee] withdrew money from the Marital Trust for personal use, by doing nothing to prevent [the trustee] from charging excessive fees and compensation to the trusts, and by failing to disclose that [the trustee] had not transferred certain assets from his father's estate to the trusts as required by the 1978 Decree of Distribution."

Witzman, 601 N.W.2d at 183.

The *Witzman* court rejected the claim of aiding and abetting,¹¹ holding that the plaintiff had failed to alleged facts to show that the accountants had actual knowledge of the trustee's

¹¹ While the accountants styled their motion as one for summary judgment, the motion actually asserted that the allegations of the plaintiff's complaint, even if taken as true, were insufficient. Thus, the motion was "more akin to a motion to dismiss" rather than summary judgment.

breach of fiduciary duty.¹² The court also found that the plaintiff had failed to allege facts to show substantial assistance, finding that that the accountant's preparation of financial statements and draw accounts were services performed without knowledge of the trustee's improper activity, and that:

[B]ecause Witzman was not LL & F/Flom's client and Witzman's allegations are insufficient to show that LL & F/Flom had actual knowledge that [the trustee] was using the trusts' assets to Witzman's detriment, LL & F/Flom's failure to disclose [the trustee's] business dealings to Witzman does not rise to the level of substantial assistance.

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

In other words, the accountants in *Witzman* had no knowledge of the trustee's breaches, whereas here, the Accountants admitted that they knew that the Brothers were in breach of their duties as early as October 2001. Moreover, unlike the accountants in *Witzman*, once armed with their knowledge of the Brothers' breaches, the Accountants here did not just fail to disclose the wrongful conduct, but acted in ways that furthered the breaches, to wit: they wrote checks to the Brothers upon demand without proof of a legitimate trust expense; they drafted promissory notes to cover-up the thefts; and they drafted a letter to clearly inform Respondents about the improper withdrawals but delayed sending the letter at the Brothers' request, and all of this over a five-year period of time.

Witzman, 601 N.W.2d at 185.

¹² The court found that while it was arguably permissible to infer that the trustee's longtime accountants knew of the trustee's action, a plaintiff must plead specific facts showing actual knowledge in order to sustain an aiding and abetting claim. Here, the Accountants admit that they had actual knowledge.

Finally, in *Witzman*, the court noted that the plaintiff was not a client of the accountants and therefore they were not required to inform the sister of any trust transactions. Here, of course, Mrs. Stevenson was a client as was Kathleen,¹³ who also stood in her incapacitated mother's shoes through the 2001 power of attorney.

The court's holding in *Witzman* is specific to the facts of that case and provides no support to the Accountants here. The Accountants acknowledge that they had a duty to inform Respondents, but instead accepted the Brothers' claims that they would tell their sister themselves. The Accountants did nothing for five years, and then again acknowledged their duty to inform Respondents by drafting the March 24, 2006 letter, which they then did not send at the Brothers' request. (R.p. 1483; 1484-5). Finally, on April 27, 2006, the Accountants, along with the Attorneys, had a meeting with Kathleen and the Brothers in which the Brothers' withdrawals were finally disclosed to Kathleen. (R.pp. 966:22-967:9; 1034; 1116:3-21).

B. The Accountants' five-year failure to inform Respondents' of the thefts from the Trusts, coupled with the Accountants' actions furthering the thefts from the Trusts, is also proof that they knowingly participated in the Brothers' breach of fiduciary duty.

Furthermore, in addition to active participation, a person can also provide assistance through inaction or nonfeasance. A body of case law has developed holding that a party may be liable as an aider and abettor for silence and inaction. *See, e.g. Woodward v Metro Bank of Dallas*, 522 F.2d 84 (5th Cir.1975). "Although courts are by no means unanimous in treating the question of substantial assistance in a case of inaction, most seem to agree that, if the aider and abettor owes the plaintiff an independent duty to act or to disclose, inaction can be a proper basis

¹³ In deposition testimony, Kerrison testified that her office handled the taxes for Kathleen and her husband. R.p. 889:24-890:5; 986:2-22.

for liability under the substantial assistance test.” *Metge v Baehler*, 762 F.2d 621, 624–25 (8th Cir. 1985); see, e.g., *Kerbs v. Fall River Indus., Inc.*, 502 F.2d 731, 740 (10th Cir. 1974) (stating that party who assists in fraudulent acts may be liable, though assistance was comprised of mere silence or inaction) (abrogated on other grounds); *Green v Jonhop, Inc.*, 358 F. Supp. 413, 419 (D. Or. 1973) (holding defendants liable for acquiescence in misleading financial prediction by remaining silent in face of inaccuracy). In *Chapin v University of Massachusetts*, 977 F.Supp. 72 (D.Mass.1997), the court held that the plaintiff had an actionable claim against the police chief for aiding and abetting sexual harassment where the chief failed to act. The court noted that in situations where the nonfeasance results from “deliberate indifference” and not mere inattention or negligence, such nonfeasance “is not ‘mere inaction,’ but a designed and willful act of forbearance *in a situation where action is required*” *Id.* at 79 (emphasis supplied).

Of course, in this case, the culpability of the Accountants is obvious and stems both from active participation and through their inaction. Kerrison became aware in 2001 that Tom and Dan had withdrawn money from the Trusts. (R.p 909:9-17). She knew the withdrawals were illegal. (R.pp. 923:23-924:7; 924:10-925:1). She attended a meeting with Dan, Tom and Carter on October 23, 2001, during which she was specifically advised by Carter of the impropriety of the withdrawals. Carter explained that “It was not something the trustees were supposed to be doing, at least without the consent of beneficiaries.” (R.p. 1331:10-16).

It is undisputed that the Accountants had a duty to Jacqueline Stevenson, as well as the Trusts.¹⁴ That duty extended to Kathleen, as she was designated as Mrs. Stevenson’s attorney-

¹⁴ Respondents alleged in the Complaint that the Accountants had a fiduciary duty relationship with the Trusts, Mrs. Stevenson, and Kathleen, via the power of attorney. In their Answer, the Accountants stated: “Defendants admit that they performed accounting services for the benefit of

in-fact under the 2001 Power of Attorney.¹⁵ See *Muller v Bank of Am , N A.*, 12 P.3d 899, 904 (Kan. App. 2000), citing 3 *Am Jur: 2d Agency* § 21 (The holder of a power of attorney steps into the shoes of the grantor, and is basically an alter ego of the grantor); *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008) (“Furthermore, a person acting as an attorney-in-fact under a POA is an agent, one who stands in the shoes of a principal.”). Despite their duty, the Accountants, for five years, failed to inform Mrs. Stevenson or Kathleen, while at the same time, facilitated the Brothers’ breach of fiduciary duty by continuing to issue the checks to Dan and Tom from the trust accounts and creating fake promissory notes.

Kerrison failed to discharge her professional obligations and continued to be an integral part of Tom’s and Dan’s misconduct throughout 2002, 2003, 2004 and 2005. (R.p. 966:9-16). As a result, Tom and Dan were free to continue raiding the Trusts for years, causing millions of dollars in damages, for which the Accountants are liable. A reasonable jury could conclude that the actions of the Accountants in issuing checks and creating fake promissory notes, along with their silence while knowing that Tom and Dan were acting improperly, clearly constitute knowing participation in the breach of fiduciary duty.

Accountants argue that a defendant does not provide “substantial assistance” by failing to disclose a client’s wrongdoing to a non-client unless a defendant owes a duty of disclosure directly to the non-client.¹⁶ (Pet. Brief, p. 22-23). In support of their argument, Accountants

the subject trusts and Jacquelin K. Stevenson and **had duties towards the subject trusts and Jacquelin K. Stevenson that they undertook contractually, and that are implied by law.**” (R.p. 102) (emphasis added).

¹⁵ The Accountants were provided with a copy of the power of attorney by the Attorneys in October 2001. (R.p. 1008:17-1009:12; 1165).

¹⁶ The Accountants have continued to misstate Respondents’ case, claiming that inaction or

cite to a series of Seventh Circuit cases which have held that accountants are not liable for failing to disclose certain information to investors or shareholders.¹⁷ Those cases involved an action for fraud and aiding and abetting under 10(b) of the Securities Act,¹⁸ and require a different analysis.¹⁹ In fact, in *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490 (7th Cir. 1986), another Seventh Circuit securities case the Accountants cite for the proposition that accountants are not required to “tattle” on their clients, the court specifically stated:

We express no opinion on whether the Firms did what they should, whether there was malpractice under state law, or whether the rules of ethics (or other fiduciary doctrines) ought to require lawyers and accountants to blow the whistle in equivalent circumstances.²⁰

silence on their part cannot constitute aiding and abetting because they had no independent duty to Respondents. The Accountants completely ignore that Kathleen was a client herself. R.p. 889:24-890:5; 986:2-22. They also ignore that Kathleen held the power of attorney for her mother (and had since 2001) and that Mrs. Stevenson had health problems which Kerrison ultimately learned left Mrs. Stevenson mentally incapacitated. R.p. 1207:7-23. Furthermore, unlike all of the cases cited by the Accountants, it is not the Accountants’ silence and inaction alone that renders them liable, it is their silence accompanied by their overt acts in furthering the Brothers’ breach of fiduciary duty.

¹⁷ E.g., *Latigo Ventures v. Laventhol & Horwath*, 876 F.2d 1322 (7th Cir. 1989); *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928 (7th Cir. 1988); *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990). The Accountants also cited a Tenth Circuit case for the same argument, *Windon Third Oil & Gas Drilling P'ship v. Fed. Deposit Ins. Corp.*, 805 F.2d 342 (10th Cir. 1986).

¹⁸ In 1994 the United States Supreme Court ruled that Section 10(b) provided no private cause of action for aiding and abetting. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

¹⁹ Furthermore, at least two of the securities cases the Accountants rely on - *Quintel Corp., N.V. v. Citibank, N.A.*, 589 F. Supp. 1235 (S.D.N.Y. 1984) and *Barker Henderson, Franklin, Starnes & Holt*, 797 F.2d 490 (7th Cir. 1986)--were dismissed at the pleadings stage because the complaints failed to allege facts showing the defendants had knowledge of the primary violator’s wrongdoing or aided in the scheme. Of course, the instant case was before the trial court on summary judgment and the deposition testimony and evidence in the record clearly showed that the Accountants knew the actions of the Brothers were illegal and that the Accountants took affirmative acts that furthered the Brothers’ scheme.

²⁰ In addition, none of the cases cited on pp. 22-25 of Petitioners’ Brief involved accountants

Moreover, unlike the investors that are strangers to the accountants in the line of Seventh Circuit cases, here, the person the Accountants failed to tell was their own client: Mrs. Stevenson, who was old and infirm. Thus, Kathleen, as the holder of the power of attorney standing in her mother's shoes, should have been informed.²¹ Instead, the Accountants bowed to the requests of the Brothers and did nothing for five years.

II. The Accountants were not barred by federal law from disclosing the breach of fiduciary duty.

The Accountants claim that the Court of Appeals' decision would require them to disclose information in violation of a federal statute. The Accountants argue that 26 U.S.C.A. § 7216 preempts any duty the Accountants had to disclose the withdrawals. However, the Court of Appeals properly disregarded the Accountants' argument because Section 7216 is a criminal statute which imposes misdemeanor liability on a tax preparer who "uses any such information for any purpose other than to prepare, or assist in preparing, any such return...." 26 U.S.C.A. § 7216(a)(2). The tax preparer "shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." *Id.* The Court of Appeals' decision correctly prevents the Accountants from using this statute as a defense to aiding and abetting the breach of fiduciary duty.

The Accountants ignore that the claims in this case do not arise out of tax preparation

who actively participated in furthering the breaches, as the Accountants did here by writing checks without documentation, drafting promissory notes, and drafting letters to the beneficiaries but withholding them at the Brothers' request, all while knowing that the Brothers' withdrawals from the trusts were illegal and improper.

²¹ As noted previously, Kathleen was also a client of the Accountants.

services, but rather the obligations of a public accounting firm and its members, who performed bookkeeping services and maintained the checkbooks for the Trusts, and provided checks to Tom or Dan upon request, despite participating in and knowing that the withdrawals were not proper.

Furthermore, there is no indication that this statute preempts any common law duties of the Accountants. Preemption can be explicit or implicit: “Congress’ intent may be explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Section 7216 does not have any explicit preemption language. It is clear from the language of the statute that it was not meant to occupy the field so as to displace state common law duties of an accountant. As one court noted, the purpose of this section was “primarily oriented to discourage the misuse of confidential information received by nonprofessionals preparing tax returns.” *Mitsui & Co (USA), Inc. v. Puerto Rico Water Res. Auth.*, 79 F.R.D. 72 (D.C. Puerto Rico 1978).

Moreover, contrary to the Accountants’ claim, the related taxpayer exception would allow Petitioner to make the disclosure to Respondents. This exception specifically allows the accountants to disclose to a “related taxpayer” information obtained from the first taxpayer. 26 C.F.R. § 301.7216-2(e)(1)(i).²² Included in the definition of “related taxpayer” is a “**trust or estate and beneficiary.**” 26 C.F.R. § 301.7216-2 (e)(2) (emphasis added). The Accountants argue that the exception only applies if the information is needed to prepare the tax return of the “related taxpayer.” The Accountants have already admitted that they prepared tax returns for Tom, Dan, Mrs. Stevenson, the Trusts, and Kathleen. (R.p. 888-890). Kathleen, as holder of the

²²Section 7216 (b)(3) states that the disclosure prohibition does “not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section.” 26 U.S.C.A. 7216(b)(3).

power of attorney, stood in the shoes of her mother and the other Respondents, as beneficiaries of the Trusts, are related taxpayers. Thus, the exception clearly applied. In addition, the Accountants made disclosures to Tom, Dan, and the Attorneys, and ultimately Kathleen, without any concern as to the statute; yet now, the Accountants try to invoke it as protection. Even if the statute did apply, the Accountants cannot pick and choose when the statute applies, to their benefit in litigation.

Furthermore, the Accountants claim that they would be placed in the “untenable position” of having to choose between facing civil liability for nondisclosure or criminal liability for disclosure. (Pet. Brief; p. 29). Even if this statute prevented the Accountants from disclosing the improper withdrawals, the statute does not require that they participate or assist in the thefts for five years, nor does it prevent the Accountants from taking steps to prevent improper withdrawals, such as requiring adequate supporting documentation from Tom and Dan. Instead of breaching their perceived ethical duties and assisting in the looting of a trust, the Accountants could have resigned and avoided potential liability.

Apparently in desperation, the Accountants also argued, for the first time in their Petition for Writ of Certiorari (and again in their recent brief), that the Court of Appeals’ decision conflicts with the confidentiality requirements of S.C. Code § 40-2-190. It is well-settled that an issue cannot be raised for the first time on appeal. *Malloy v Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). This argument was not made in any other court or brief before the Petition for Certiorari, and as such, should not even be considered.

Even if the argument is considered, it has no merit. South Carolina Code § 40-2-190 states, in part, that an accountant:

must not voluntarily disclose information communicated by the client relating to and in connection with services rendered. This information is confidential....

Id. Nothing in that code section allows an accountant to actively participate in a client's breach of fiduciary duty, which the Accountants did here, in providing checks to the Brothers and preparing promissory notes to legitimize the thefts.

III. The cause of action for aiding and abetting a breach of fiduciary duty survives Mrs. Stevenson's death.

The Accountants argue that the claims against them cannot survive Mrs. Stevenson's death because they are based on fraud and deceit, citing *Ferguson v Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94 (2002). However, the claims here are rooted in the breach of the Brothers' fiduciary duties-- which are statutory-- and *Ferguson* does not apply to this case.

In the *Ferguson* case, the plaintiff sued an automobile dealership claiming that the assessment of a closing fee and failure to disclose it were unfair and deceptive acts. The Court held that:

At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices.

Id. at 565, 564 S.E.2d at 97. Similarly, the other case upon which the Accountants primarily rely, *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991), found that a fraud cause of action could not survive because fraud "requires a special quality of proof" regarding whether the victim "knew the statement was false, relied upon it, and was justified in so relying." *Id.* at 517. There are no such fraudulent statements or reliance issues here.

This case is simple - the Accountants knew that the Brothers were in breach of their duties and actively participated in furthering those breaches.²³ The Brothers' duties are created by statute:

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article.

S.C. Code § 62-7-801. Furthermore, “[a] trustee shall administer the trust solely in the interests of the beneficiaries.” S.C. Code § 62-7-802(a). In addition:

A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust of the material facts necessary to protect their interests.

S.C. Code § 62-7-813. There is no question that the Brothers' withdrawals were not in good faith and in the interests of the beneficiaries. Similarly, the Accountants knew that Tom and Dan were not telling their sisters, the Respondents, about the withdrawals from the Trusts. Thus, the claims against the Accountants are not based on fraud but instead are based on the Accountants assisting Tom and Dan in the breaching the fiduciary duties imposed upon them by statute.²⁴

²³In *Estate of Cornell v Johnson*, 367 P.3d 173 (Idaho 2016), the court found that a trust beneficiary's claims against trustee for breach of fiduciary duty survived beneficiary's death. If a trustee's breach of fiduciary duty survives, than clearly aiding and abetting that breach would also survive.

²⁴ The Accountants claim that survivability is crucial to a fraud case because the state of mind of the victim is an issue. Here, however, the claims in this case are rooted in the breach of fiduciary duty. The state of mind of Mrs. Stevenson is not an issue because whether a person breached a duty of care is an objective standard, and Respondents' expert George DuRant has provided an opinion that the duty of care was breached. Furthermore, the Accountants do not deny that they did not disclose the withdrawals to Mrs. Stevenson or Kathleen as her attorney-in-fact. In addition, the Accountants have admitted writing checks to Tom and Dan without any documentation, such as a loan document or authorization from Mrs. Stevenson. The Brothers' withdrawals were clearly in breach of their fiduciary duties as trustees, as the Accountants recognized in 2001, and Mrs. Stevenson's state of mind is irrelevant in this case.

The actions of the Accountants are clearly outside the ambit of fraud. As a result, Respondents' claims survived the death of Mrs. Stevenson under S.C. Code § 15-5-90.²⁵

Moreover, our courts allow evidence of fraudulent acts to support surviving claims. In *Brailsford v Brailsford*, 380 S.C. 443, 450, 669 S.E.2d 342, 345-46 (Ct. App. 2008), the Court of Appeals rejected the argument that the fraud exception to survivability prevented a court from considering evidence of fraud on any other type of claim:

We, however, do not read *Ferguson* to go so far as to deny the admission of evidence of fraudulent conduct to support an otherwise surviving claim....[T]o the extent the Order may be interpreted to suggest that causes of action which do survive William cannot be supported by evidence of the defendant's fraudulent and deceitful conduct, the Order is hereby modified.

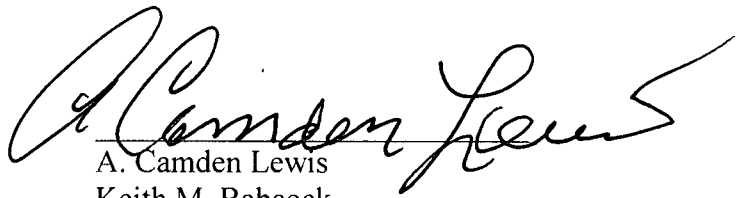
Id. Thus, any fraudulent conduct by Tom and/or Dan can be considered evidence in determining Appellant's claim for aiding and abetting the breach of fiduciary duty.

CONCLUSION

The Accountants recognized that the withdrawals by the Brothers were illegal, but kept the Brothers' secret for five years instead of telling Kathleen, who held the power of attorney for her infirm mother. In addition to keeping the withdrawals a secret, the Accountants actively participated in the scheme by writing the Brothers checks that the Accountants knew were not for legitimate trust expenses and by creating fake promissory notes to cover up the withdrawals.

²⁵ S.C. Code § 15-5-90 states: "Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding." As this Court has noted, "[a] liberal construction should be given to the provisions of a remedial statute, such as that providing for a survival of a right of action...." *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941).

It is clear that the Accountants knowingly participated in the breach of the Brothers' fiduciary duties and they should be held accountable for aiding and abetting. Furthermore, as set forth above, the federal statute upon which Petitioners rely for protection does not apply. Finally, the death of Mrs. Stevenson does not abate a cause of action for aiding and abetting as that cause of action is based on the Brothers' breach of statutory fiduciary duties.



A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS, BABCOCK LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
Telephone: 803-771-8000
Facsimile: 803-733-3541

ATTORNEYS FOR RESPONDENTS

Columbia, South Carolina
February 14, 2017

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-10-400
Unpublished Opinion NO. 2015-UP-491

RECEIVED

FEB 14 2017

SC Court of Appeals

RECEIVED

FEB 15 2017

S.C. SUPREME COURT

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.; Douglas Capital Management, Inc.; 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., P.A.; and
Lynne L. Kerrison are

Petitioners.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent complies with Rule 211(b),
SCACR.

A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS BABCOCK, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

ATTORNEYS FOR RESPONDENTS

Columbia, SC
February ____, 2017

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-10-400

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

RECEIVED

FEB 14 2017

SC Court of Appeals

RECEIVED

FEB 15 2017

S.C. SUPREME COURT

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.; Douglas Capital Management, Inc.; 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., P.A.; and
Lynne L. Kerrison are

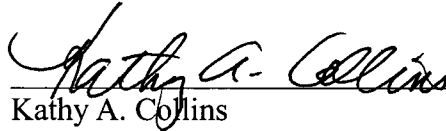
Petitioners.

PROOF OF SERVICE

I, Kathy C. Collins, employee for the law firm of Lewis Babcock L.L.P., hereby certify that I have served **Brief of Respondents** upon opposing counsel by mailing a copy of same, first-class postage prepaid and return address clearly indicated on said envelope, to said opposing counsel addressed as follows:

Frederick K. Sharpless, Esquire
Sharpless & Stavola, P.A.
Post Office Box 22106
Greensboro, North Carolina 27420

M. Dawes Cooke, Jr., Esquire
Barnwell Whaley Patterson & Helms, LLC
Post Office Drawer H
Charleston, South Carolina 29402


Kathy A. Collins

Columbia, South Carolina

February 14, 2017.