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S.C. SUPREME COURT

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Unpublished Opinion No. 2015-UP-491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 REPLY BRIEF ON APPEAL

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TABLE OF CASES AND AUTHORITIES

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ARGUMENT

I. PLAINTIFFS FAIL TO ADDRESS THE IRRECONCILABLE CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND PRIOR CASE LAW THAT HOLDS A CPA HAS NO DUTY TO DISCLOSE CLIENT INFORMATION TO NON-CLIENTS.

Plaintiffs' claims always have rested on the bedrock allegation that Defendants, upon learning of the relevant transactions, should have done more to stop the trustees' defalcations than advise their client, Jacquelin K. Stevenson. Subjecting Defendants to civil liability for not disclosing information to non-clients is contrary to the precedents of this Court which hold that an accountant has no duty to disclose client information to non-clients. See, Brief of Petitioners, pp. 16-18, citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997). Imposing such liability also would contravene settled South Carolina law that holds a party ordinarily has no duty to act in the absence of an affirmative legal duty. See, Brief of Petitioners, pp. 16-18, citing Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 137 S.E.2d 512 (Ct. App. 2012).

In the Brief of Respondents, Plaintiffs do not acknowledge, let alone try to reconcile, the conflict between the Court of Appeals' decision and prior case law. To be clear, Plaintiffs do not address the arguments and authority set forth in Defendants' detailed discussion of this issue. If Plaintiffs determined that the Court of Appeals' decision could be reconciled with ML-Lee and other case law, Plaintiffs no doubt would have included that explanation in their brief. The absence of such a discussion shows that Plaintiffs cannot explain when this new duty to disclose client information to non-clients arises, the non-clients to whom it is owed, and the character of the action by which a CPA might satisfy the duty. If Plaintiffs cannot answer these questions, accounting professionals likewise can only speculate on the particulars of this nebulous new duty. The decision of the Court of Appeals would expand CPA liability to non-clients in

contravention of this Court's decisions limiting such liability, and for this reason, the Court of Appeals' decision should be reversed.

II. CASE LAW CITED BY PLAINTIFFS DOES NOT SUPPORT AIDER-ABETTOR LIABILITY BASED ON SILENCE OR INACTION IN THIS MATTER.

The Brief of Respondents makes plain that Plaintiffs' sole remaining claim, for aiding and abetting a breach of fiduciary duty, rests squarely on the allegation that Defendants did not tell Plaintiffs about the trustees' defalcations. Plaintiffs repeatedly reference transactions that occurred after the death of Mrs. Stevenson's bookkeeper, when Defendants had physical custody of a trust checkbook for a period of time (although never had check-signing authority). See, e.g., Brief of Respondents, p. 1. But Plaintiffs acknowledge that their claim is in no way limited to those transactions. See, e.g., Brief of Respondents, p. 5 ("Neither Kerrison nor Carter informed Respondents of the Brothers' illegal actions."); see also, Brief of Respondents, pp. 1, 3, 4, 6-7, 12, 14, 15, 17-18, 20-21. Plaintiffs also object that Defendants did not do more to stop the trustee defalcations. See, e.g., Brief of Respondents, p. 4 ("In fact, the Professionals took no further action at that time and let the scheme continue."). Plaintiffs ask this Court to find that such silence and inaction amount to the substantial assistance that is a necessary element of an aiding and abetting breach of fiduciary claim. Signifying the radical nature of Plaintiff's proposed expansion of accountant liability in this state, the cases Plaintiffs cite from far-flung jurisdictions do not support liability in these circumstances.

Case law on which Plaintiffs rely indicates that aider-abettor liability founded on allegations of silence and inaction is appropriate where the alleged aider-abettor had a duty to speak or act. Plaintiffs acknowledge that the issue of whether silence and inaction amounts to substantial assistance turns on the nature of the duty owed by the alleged aider-abettor to the plaintiff. See Brief of Respondents, pp. 15-16, quoting Woodward v. Metro Bank of Dallas, 522

F.2d 84 (5th Cir. 1975) (stating that most courts seem to agree that inaction can be a proper basis for aider-abettor liability in an action arising under section 10(b) of the Securities and Exchange Act "if the aider and abettor owes the plaintiff an independent duty to act or to disclose"). Similarly, Plaintiffs cite another federal case arising under section 10(b) of the Securities and Exchange Act for the proposition that a "party who assists in fraudulent acts may be liable, though assistance was comprised of mere silence or inaction." Brief of Respondents, p. 16, citing Kerbs v. Fall River Industries, Inc., 502 F.2d 731 (10th Cir. 1974). However, in Kerbs, the U.S. Court of Appeals for the Tenth Circuit expressly grounded its analysis in the nature of the statutory duties owed by the alleged aider-abettor, who was "a "corporate 'insider' possessed of material information" pertinent to the securities transaction. See Kerbs, 502 F.2d at 740:

> Thompson was obliged to speak out. The duty of disclosing material facts is one imposed upon 'insiders' by § 10 and Rule 10b-5. Thompson not only breached that duty, but allowed his presence and acquiescence to lend the appearance of legitimacy to an otherwise fraudulent deal.

These cases do not support a claim for aiding and abetting a breach of fiduciary duty in the circumstances presented here.[1] 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. Defendants owed Plaintiffs no independent duty to act or to disclose,

[1] Plaintiffs also cite Chapin v. Univ. of Massachusetts at Lowell, 977 F.Supp. 72 (D.Mass. 1997) in which a police chief was alleged to have aided and abetted sexual harassment. The Chapin court's analysis addressed Massachusetts statutes and case law that are inapplicable in this matter. As discussed in Brief of Petitioners, pp. 21-22, the Massachusetts Supreme Court in Spinner v. Nutt, 417 Mass. 549, 556, 631 N.E.2d 542, 546 (1994) held that professionals were not subject to aider-abettor liability in circumstances similar to those in this matter.

and therefore the cases on which Plaintiffs rely do not support aider-abettor liability in this matter.[2]

III. PLAINTIFFS MISCHARACTERIZE THE CIRCUMSTANCES IN WHICH ATTORNEY CARTER DETERMINED THE TRUSTEES SHOULD EXECUTE PROMISSORY NOTES DOCUMENTING THE DISBURSEMENTS.

Attorney T. Heyward Carter, Jr., represented Mrs. Stevenson, the sole lifetime beneficiary of the trusts. Disbursements from the trusts to the trustees were not documented when Defendant Lynne Kerrison learned of the transactions and notified Mr. Carter. (R. p. 1549, July 14, 2011 Dep. of T. Heyward Carter, Jr., p. 64, Lines 16-19). In his capacity as the attorney for Mrs. Stevenson, Mr. Carter determined that the disbursements should be documented with promissory notes executed by the trustees because "I just wanted to be sure these were documented as trust assets." (R. p. 1551, July 14, 2011 Dep. of T. Heyward Carter, Jr., p. 66, Lines 6-8).

The Court of Appeals correctly noted that the record shows Mr. Carter always served his client's interests to the best of his ability. See, Bennett v. Carter, No. 2015-UP-491, p. 3 (S.C. Ct. App. Oct. 14, 2015) ("He was always acting in what he believed was Mother's best interest."). Plaintiffs' baseless claims to the contrary rest not on record evidence but rank speculation as to the motives of Mr. Carter (and by extension, Defendants, as Plaintiffs collectively define Mr. Carter and Defendants as the "Professionals" and then allege the "Professionals" schemed to disguise the disbursements as loans). Plaintiffs' risible allegations illustrate the grave dangers of exposing professionals to aiding and abetting breach of fiduciary

[2] In seeking to distinguish Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186 (Minn. 1999), Plaintiffs state that Defendants "acknowledge that they had a duty to inform Respondents." Brief of Respondents, p. 15. That is false. Defendants have consistently maintained that they owed Plaintiffs no duty of disclosure.

duty claims asserted by non-clients. As stated in a law review article that Plaintiffs cite with approval in their brief:

> One court has explained that "[h]olding attorneys liable for aiding and abetting the breach of a fiduciary duty in rendering professional services poses both a hazard and a quandary for the legal profession." It is certain that such "overbroad liability might diminish the quality of legal services, since it would impose 'self-protective reservations' in the attorney-client relationship." Attorneys will constantly try to balance their duty to zealously represent their clients with the fears of potential exposure to liability in instances when their legal advice may disregard the interests of the third parties. In fact, the "mere threat of an aiding-and-abetting claim is enough to create pause in an attorney's zealous representation of her client and force her to consider her own self-interests--resulting in a damned-if-you-do/damned-if-you-don't situation."

Katerina Lewinbuk, "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, 169 (Spring 2008), citing Chem-Age Indus. v. Glover, 652 N.W.2d 756, 774 (2002). These concerns would apply equally to professional accountants.

IV. FEDERAL LAW BARRED DEFENDANTS FROM DISCLOSING THE TRUSTEES' TRANSACTIONS TO PLAINTIFFS.

Federal law makes it a crime for a tax return preparer to disclose tax return information in the circumstances presented here. The Court of Appeals' decision would subject a tax return preparer to civil liability for failure to disclose tax return information. See Brief of Petitioners, pp. 25-31. Plaintiffs deny that these conflicting legal duties place tax professionals in the "untenable situation" of having to choose between facing civil liability under state law for nondisclosure and criminal liability under federal law for disclosure. See Brief of Respondents, p. 21. But Plaintiffs fail to identify contrary legal authority that would actually permit Defendants to disclose these transactions to Plaintiffs. Rather, Plaintiffs incorrectly contend that (A) the claims in this case "do not arise out of tax preparation

services," (B) "there is no indication" that 26 U.S.C. § 7216 preempts the duty of disclosure imposed by the Court of Appeals' decision, and (C) the related-taxpayer exception at 26 C.F.R. § 301.7216-2(e)(1) permitted Defendants to disclose the trustees' transactions to Plaintiffs. Each incorrect statement is discussed below.

A. This Case Arises Out of Tax Preparation Services.

Plaintiffs incorrectly state that this case does not arise out of tax preparation services. Brief of Respondents, pp. 19-20. Plaintiffs claim this matter instead relates to bookkeeping services that were provided long after Defendants learned of the trustee transactions and notified the attorney for their client, Mrs. Stevenson.[3] Brief of Respondents, p. 10. Yet Plaintiffs make clear throughout their brief that their claimed damages are in no way limited to those subsequent bookkeeping services. Plaintiffs seek to hold Defendants civilly liable for not disclosing the trustees' transactions to Plaintiffs. Such a claim inarguably arose from a tax engagement, as Ms. Kerrison learned of the transactions when she reviewed documents provided to her by Mrs. Stevenson's bookkeeper, Pat Neapolitan, for the purpose of preparing the tax return of Mrs. Stevenson. (R. p. 912, July 13, 2011 Dep. of Lynne Kerrison, p. 30, Lines 6-11). Such records are the classic example of tax return information. See 26 C.F.R. § 301.7216-1(b)(3). As such, Ms. Kerrison could not make that information known to any third party in any manner absent express authority in federal statute or regulation. See 26 C.F.R. § 301.7216-1(b)(5). Contrary to Plaintiffs' argument, this case arises out of tax preparation services and so is subject to the comprehensive regulatory scheme created by 26 U.S.C. § 7216 and related regulations.

[3] If Defendants acquired confidential client information in the course of a non-tax engagement, Defendants could not disclose that information to third parties without violating the statutory duty of confidentiality imposed by the General Assembly. See S.C. Code. Ann. § 40-2-190(A) (discussed below).

B. Federal Law Barring Disclosure of Tax Return Information Preempts the State Common Law Duty of Disclosure Imposed By the Court of Appeals' Decision.

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. See Brief of Petitioners, pp. 28-30. Plaintiffs broadly assert that, "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." Brief of Respondents, p. 20. But Plaintiffs identify no statutory language evidencing such intent. In fact, the plain language of the statute and related regulations make clear federal authorities' intent to create a comprehensive regulatory scheme governing disclosure of tax return information in every instance: a tax professional is unambiguously forbidden to disclose tax return information to third parties unless a federal statute or regulation expressly authorizes the disclosure. See 26 U.S.C. § 7216; 26 C.F.R. § 301.7216-2(a).

One circumstance in which a tax return preparer may permissibly disclose tax return information is pursuant to an "order of any court of record, Federal, State, or local." See 26 C.F.R. § 301.7216-2(f)(1). It is this regulatory provision that was at issue in the case cited by Plaintiffs. Brief of Respondents, p. 20, citing Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Res. Auth., 79 F.R.D. 72, 80 (D.P.R. 1978). No court order required Defendants to disclose the trustee transactions to Plaintiffs. Therefore, Mitsui does not support Plaintiffs' argument that Defendants could permissibly disclose the trustees' transactions to Plaintiffs.

However, it is instructive to note the deep deliberation that the Mitsui court gave to the question of whether to order discovery of a litigant's tax returns, noting that federal courts "have been cautious in ordering the disclosure of tax returns" absent a showing of relevance, materiality and, in some cases, "a compelling need for the information it contains, such as is not otherwise readily obtainable." Id. at 81 (citations omitted). Even upon determining that a

litigant was entitled to discover an opposing party's tax returns, the Mitsui court ordered the returns to be produced *in camera* so that a magistrate might first "segregate all information not pertinent to our case." Id. at 82. Far from supporting Plaintiffs' claim that Defendants could have voluntarily disclosed confidential tax information to third parties, Mitsui evidences the comprehensive federal policy of barring disclosure of tax returns except when expressly allowed by one or more of the narrow exceptions set forth in federal statute or regulation.

C. The Related-Taxpayer Exception at 26 C.F.R. § 301.7216-2(e)(1) Did Not Permit Defendants to Disclose the Trustees' Transactions to Plaintiffs.

Plaintiffs incorrectly claim that the "related-taxpayers" exception authorized Defendants to disclose the trustees' transactions to Plaintiffs. On its very face, the regulation has no application in the circumstances presented here.

Regulations adopted by the Internal Revenue Service create several discrete exceptions to the general rule barring disclosure under 26 U.S.C. § 7216. Plaintiffs contend that the "related-taxpayers" regulation authorized Defendants to tell Plaintiffs of the trustees' defalcations because the definition of "related taxpayer" includes a "trust or estate and beneficiary." Brief of Respondents, pp. 20-21, citing 26 C.F.R. § 301.7216-2(e)(2). The argument is defeated by the plain language of the regulation. The exception 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. It does not permit disclosure of information, nor its use, for any other purpose. The regulation says:

> **(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. Even when the related-taxpayer exception applies, its application is remarkably narrow, as the tax professional may only disclose to the second taxpayer the information obtained from the first taxpayer "in the form in which it appears on the return." Id. Ms. Neapolitan provided information regarding the trustees' transactions to Defendants for the purpose of preparing the tax return of Mrs. Stevenson, the sole lifetime beneficiary under both trusts. There is no evidence, that Defendants used that information to prepare tax returns for Plaintiffs, and absent such evidence the related-taxpayer regulation is inapplicable.

V. STATE LAW BARRED DEFENDANTS FROM DISCLOSING THE TRUSTEES' TRANSACTIONS TO PLAINTIFFS.

Plaintiffs make no substantive argument that Defendants could have disclosed the trustees' defalcations to Plaintiffs without violating S.C. Code. Ann. § 40-2-190(A). Brief of Respondents, pp. 21-22. The statute plainly bars a CPA from voluntarily disclosing confidential client information to third parties. See S.C. Code. Ann. § 40-2-190(A). It is a crime for a CPA to knowing violate § 40-2-190(A). See S.C. Code. Ann. § 40-2-200. The General Assembly created several exceptions to this duty of confidentiality. See S.C. Code. Ann. § 40-2-190(A). Plaintiffs do not claim that any of these exceptions authorized Defendants to tell Plaintiffs of the

trustees' defalcations. See Brief of Respondents, pp. 21-22. Indeed, Plaintiffs do not even acknowledge the patent conflict between § 40-2-190(A), which bars disclosure to third parties, and the Court of Appeals' decision, which mandates such disclosure. Id. Instead, Plaintiffs avoid the issue entirely, claiming that Defendants' citation to S.C. Code. Ann. § 40-2-190(A) represents an issue raised for the first time on appeal. Brief of Appellees, p. 21. This argument is without merit, as Defendants have consistently contended that requiring a CPA to disclose confidential client information to third-parties conflicts with a CPA's obligation to keep such information confidential, and the statute provides additional grounds that support this argument. Plaintiffs further evade the issue by arguing that § 40-2-190(A) does not allow a CPA "to actively participate in a client's breach of fiduciary duty." Brief of Respondents, p. 21. Yet Plaintiffs clearly seek to hold Defendants civilly liable for not disclosing the trustee transactions to Plaintiffs. See, e.g., Brief of Respondents, p. 5 ("Neither Kerrison nor Carter informed Respondents of the Brothers' illegal actions."). To date, Plaintiffs have identified no legal authority for the proposition that Defendants could have disclosed trustee defalcations to third parties without violating S.C. Code. Ann. § 40-2-190(A). Tellingly, Plaintiffs in their response brief do not even argue that such disclosures would not violate the statute. See Brief of Respondents, pp. 21-22. By their steadfast refusal to substantively respond to this issue, Plaintiffs tacitly admit that a CPA cannot simultaneously comply with the duty of confidentiality under S.C. Code. Ann. § 40-2-190(A) and the duty to disclose client information to third parties adopted by the Court of Appeals.

VI. DEFENDANTS GAVE EFFECTIVE NOTICE OF THE TRUSTEES' TRANSACTIONS TO THEIR CLIENT.

Plaintiffs repeatedly and incorrectly claim that Defendants did not give their client, Jacquelin Stevenson, notice of the trustees' transactions. See, e.g., Brief of Respondents, p. 12.

In fact, as noted in the decision of the Court of Appeals, the record is clear that Defendants gave valid notice to their client when they notified her attorney, T. Heyward Carter, Jr., of the transactions. Defendant Lynne Kerrison learned of the transactions from records that Mrs. Stevenson's longtime bookkeeper, Pat Neapolitan, supplied for the preparation of Mrs. Stevenson's tax return. (R. p. 912, July 13, 2011 Dep. of Lynne Kerrison, p. 30, Lines 6-11). Ms. Kerrison promptly notified Mrs. Stevenson's attorney, Heyward Carter. "I wanted him, as an attorney, to look at the transaction and do what he felt he should do with that information." (R. p. 923, July 13, 2011 Dep. of Lynne Kerrison, p. 41, Lines 19-21).

The Court of Appeals held that Defendants gave valid notice to their client, Mrs. Stevenson, when they notified Mr. Carter of the trustees' transactions. See, Bennett v. Carter, No. 2015-UP-491, p. 3 (S.C. Ct. App. Oct. 14, 2015), citing Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979) ("It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority."). The Court of Appeals noted that this rule does not apply "where the agent is acting fraudulently against his principal or for any other reason has an interest in concealing his acquired knowledge from his principal." Id. But this exception was inapplicable where the record shows Mr. Carter at all times faithfully served his client's interests to the best of his ability. Id.

Plaintiffs repeatedly object that Defendants did not also give notice to Kathleen Turner, whose mother in February 2003 executed a durable Power of Attorney in favor of Ms. Turner and Daniel Stevenson. See, e.g., Brief of Respondents, pp. 3-4. The Court of Appeals correctly held that Defendants, having given valid notice to the attorney for Mrs. Stevenson, had no separate duty to disclose the transactions to Ms. Turner as attorney-in-fact for her mother.

Bennett v. Carter, No. 2015-UP-491, at p. 3 (S.C. Ct. App. Oct. 14, 2015). Plaintiffs offer no authority that would support the existence of such a duty.

VII. ANY CLAIM FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY IS BASED ON THEORIES OF FRAUD AND DECEIT COMMITTED BY THE STEVENSON BROTHERS, AND THEREFORE DID NOT SURVIVE THE DEATH OF JACQUELIN STEVENSON.

Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is based on theories of fraud and deceit and so the claim abated on the death of Mrs. Stevenson. Plaintiffs seek to distinguish this Court's holding in Ferguson on the grounds that Defendants are alleged to have aided and abetted the Stevenson Brothers in breaching *statutory* duties. Brief of Respondents, p. 22. Ferguson cannot be distinguished on those grounds, as the cause of action in that case also involved an alleged statutory violation. See Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("Although Mr. Ferguson's cause of action arose directly under the Dealers Act, his action was based upon a theory of fraud and deceit."). Plaintiffs' argument that their claim is not based on theories of fraud and deceit because they allege violation of statutory duties ignores this Court's clear holding in Ferguson.

Plaintiffs' argument that their claim is not based on theories of fraud and deceit committed by the Stevenson Brothers runs contrary to Plaintiffs' own characterization of their claim. See, e.g., Brief of Respondents, p. 1 ("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."); see also, Brief of Respondents, pp. 5-6 ("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."); see also, Brief of Respondents, p. 7 (alleging that Defendants aided the trustees' "thefts" from the trusts and "agree[ed] to keep the Brothers' scheme a secret."); see also, Brief of Respondents, p. 11 ("They even covered up the illegal

withdrawals with fake promissory notes."); see also, Brief of Respondents, p. 12 (the promissory notes "cloaked the improper withdrawals with the air of legitimacy"). Plaintiffs' claim is clearly based on theories of fraud and deceit and therefore did not survive the death of Mrs. Stevenson.[4]

Finally, Plaintiffs incorrectly claim that the state of mind of Mrs. Stevenson is not relevant to this claim. Brief of Respondents, p. 23, n.24. The state of mind of Mrs. Stevenson is critically important where Plaintiffs allege that Defendants hid the Stevenson Brothers' withdrawals from their client, Mrs. Stevenson, who was the sole lifetime income beneficiary of both trusts and held a power of appointment for one of the trusts. Brief of Respondents, p. 19. Evidence regarding the state of mind of Mrs. Stevenson 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.").

Plaintiffs' claim for aiding and abetting a breach of fiduciary duty is based on theories of fraud and deceit and so the claim abated on the death of Mrs. Stevenson.

CONCLUSION

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

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[4] Plaintiffs cite Estate of Cornell v. Johnson, 367 P.3d 173, 177 (2016), for the proposition that breach of fiduciary duty claims survive a trust beneficiary's death. That case is distinguishable because the Idaho court did not consider whether the claim was based on theories of fraud and deceit. Rather, the court applied Idaho law that provides "an injury which lessens the estate of the injured party does survive, and thus is assignable." Id..

Respectfully submitted, this the 24th day of February, 2017.

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PROOF OF SERVICE

I certify that on this 24th day of February 2017, I have served on the Respondents' counsel a copy of the attached Reply 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:

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