STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young
Case No. 2011-CP-10-400

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

Appellants,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; 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

Respondents.

BRIEF OF APPELLANTS

A. Camden Lewis
Keith M. Babcock
James M. Griffin
Ariail E. King
LEWIS, BABCOCK & GRIFFIN, LLP

1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
Telephone: 803-771-8000
Facsimile: 803-733-3541

ATTORNEYS FOR APPELLANTS

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Statement of the Issues on Appeal

1. Did the lower court err in holding that Appellants' case was barred by the statute of limitations?
2. Did the lower court err in finding Respondents owed no duty to the Appellants?
3. Was the lower court wrong in holding that Respondents had not "knowingly participated" in the breach of fiduciary duty perpetuated by the trustees?

Statement of the Case

This cases arises out of family trusts, for which two brothers, Thomas C. Stevenson, III (Tom) and Daniel R. Stevenson, II (Dan)(collectively "the Brothers"), were trustees and beneficiaries. Their sisters, Appellants Jacquelin S. Bennett (Jacquelin), Genevieve S. Felder (Genevieve) and Kathleen S. Turner (Kathleen), were also beneficiaries. In early 2006, Appellants learned that the Brothers had been stealing money from the trusts and describing the thefts as loans. Appellants sued the Brothers on January 22, 2008 and in discovery, learned about the professional negligence of certain 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"), had been keeping secret the illegal activities of the Brothers in taking money from the trusts.

Appellants then brought this action for professional negligence, breaches of fiduciary duties, and aiding and abetting a breach of fiduciary duty. The defendants included both the Attorneys and the Accountants; the claims against the Attorneys have been resolved. (R.p. 1855:7-11). The actions of the Professionals resulted in losses to the Appellants of almost five million ($5,000,000) dollars. (R.p. 364).

Appellants, along with the Brothers, are beneficiaries of the Last Will and Testament of their late father, Thomas C. Stevenson, Jr.[1] (hereinafter "Thomas Stevenson Will") and the Last

[1]Mr. Stevenson died in 1988. (R.p. 1252:1-8).

Will and Testament of Jacquelin K. Stevenson, their mother,[2] (hereinafter "Jacquelin Stevenson Will"). (R.pp. 1275:15-17; 1456-1479; S.R.p, 94). The Thomas Stevenson Will created two testamentary trusts: the "Jacquelin K. Stevenson Marital Trust" (hereinafter "Marital Trust") and a qualified terminable interest property trust (hereinafter "QTIP Trust"). (R.pp. 1456-1479).

Tom and Dan served as two of five trustees for the trusts until 1999. In that year, after other trustees had passed away or become ill, the two brothers were left as the only trustees. Now serving as the only trustees, Tom and Dan began stealing money, disguised as loans. In 2001, the Professionals told Tom and Dan that there were questions as to the propriety of making "loans" to themselves. (R.p. 1402:2-9). From 1999-2006, the Brothers, with the knowledge and assistance of the Attorneys and the Accountants, improperly withdrew millions of dollars. Appellants learned of their brothers' actions on April 27, 2006 and the resulting loss of over $5 million and sued the Brothers.[3] Ultimately, one brother settled and a verdict was reached against the other, but very few funds were available to be recovered. During discovery in that suit, the activities of the Professionals came to light.

Appellants filed this suit, on April 24, 2009, against the Attorneys and the Accountants. (R.p. 31). 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 these motions, Appellants resolved the action against the Attorneys. (R.p. 1855:7-11). After a hearing on the matter, it became apparent that the lower court was attributing meetings between Kathleen and

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[2]Mrs. Stevenson died in 2006 (R.p. 519:19-20).

[3]In 2007, Kathleen and Jacquelin were appointed Personal Representatives of Mrs. Stevenson's Estate. (R.pp. 621:22-25; 795:15-796:15; 876). All three Plaintiffs were appointed as co-Trustees of the Trusts, replacing Tom and Dan. Id.

the Brothers (where the Professionals were not mentioned or involved) as somehow starting the statute of limitations for this action. With the court's confusion as to the events of these meetings, and in an abundance of caution, Appellants moved to withdraw a response to a Request for Admission. (R.p. 453). On June 19, 2013, before an order was entered, Appellants moved to withdraw or amend a response to a confusing Request for Admission. (R.p. 464). The lower court issued an order on July 3, 2013, which granted the Accountants' summary judgment based upon meetings in which the Accountants were not involved or mentioned. The lower court failed to address the amendment of the admission. (R.p. 1). Appellants moved to alter to amend the order. (R.p. 469). The Court declined to alter its judgment and denied Appellants' motion to alter or amend the response to the Request for Admission.[4] (R.pp. 23; 27). This appeal followed.

Statement of the Facts

The Thomas Stevenson Will, which created two trusts, was executed on February 5, 1985 (R.pp. 1456-1479). Mr. Stevenson died in 1988 and he was survived by his wife. (R.p. 1252:1-8). Appellants and their brothers, Tom and Dan, are beneficiaries of both trusts. (R.pp. 1435:12-28; 1436:8; 1456-1479). The Marital Trust provided Jacquelin K. Stevenson with a power of appointment to name the beneficiaries of the Marital 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 Jacquelin K. Stevenson, the beneficiaries of the QTIP Trust would be his children-- Jacquelin, Genevieve,

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[4]The Court did correct certain language in the original order to reflect the actual arguments made by Appellants, but did not reverse its grant of summary judgment.

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. As of 1999, Tom and Dan were the only remaining co-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 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 2007. (R.p. 519:19-20).

From 1999 through 2006 -- a time period in which the Brothers served as the only trustees-- they both stole money, hiding the thefts by describing them a loans to various business owned by either Tom or Dan.[5] (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 of the Appellants, not even Kathleen, who held a power of attorney for Mrs. Stevenson.(R.pp. 966:22-967:5; 1034; 1116; 1300:3-15). Carter also failed to inform Appellants. Instead, Kerrison 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

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[5]The Professionals acknowledged the impropriety of the Brothers' conduct. (R.pp. 1482-1485)

trustees were supposed to be doing."[6] (R.p. 1331:13-15). Carter 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, neither Carter nor Kerrison stopped the Brothers from looting the trusts. In fact, Kerrison's firm began doing the bookkeeping for the trusts and Mrs. Stevenson after her personal bookkeeper passed away at the end of 2002. 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). Tom or Dan would come to the Accountants' office and meet with one of the employees, who would then write the check as requested by Tom or Dan, totally ignoring Accountants' earlier recognition that such was illegal. (R.p. 957:9-16).

When the Accountants wrote checks to Dan, he invested the money in his business, Fabtech. While this was occurring, Harold Pratt-Thomas, a partner with the Accountants, was also investing in Fabtech and sat on its board. (R.p. 989:12-17). Thus, the Accountants had a financial interest in the business and an incentive to keep the 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 loans (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

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[6]Carter 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).

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, but no one informed Appellants. In a letter to Tom and Dan dated November 25, 2002, Carter even acknowledged that Appellants, 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 Appellants of the Brothers' illegal actions. Amazingly, Kerrison and Carter participated in the preparation of promissory notes for Tom and Dan, in an attempt to further hide the thefts. (R.pp. 1011:11-22; 1481). With the 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, dated March 27, 2006, to finally inform Appellants that the trusts held millions of dollars worth of unsecured promissory notes (in actuality, the monies stolen by the Brothers).[7] (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. It was at this meeting where Kathleen was first informed 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 provide "full disclosure" to Kathleen (which had never been

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[7]The letter of Carter and Kerrison does not state from who the notes were, nor does it mention that the Brothers had been illegally looting the trusts. (R.pp. 1482-1483).

given) and that it was at this meeting where documentation of the withdrawals was finally provided to Appellants. (R.pp. 966:22-967:9; 1034; 1116:3-21). By that time, Tom and Dan had stolen almost five million dollars ($5,000,000) from the trusts. (R.p. 364). Appellants filed suit against the Attorneys and the Accountants on April 24, 2009.

The lower court granted summary judgment to the Accountants on July 3, 2013. The lower court held that the statute of limitations began to run on one of three dates:

1) an April 19, 2006 meeting in which Tom said he disclosed investments and loans in Fabtech and Easy Tray (the Brothers' businesses). The Professionals were not at that meeting and their knowledge and participation was never mentioned.

2) a May 21, 2003 meeting between Kathleen, Tom and Dan, in which Kathleen Tom mumbled for a little while, which lead Kathleen to believe something was wrong with Tom personally. The Professionals were not mentioned.

3) in October 2001, when Kerrison told Carter about the Brothers' thefts and they both agreed that Brothers' actions were improper. None of the thefts were disclosed to Kathleen or the other Appellants.

Essentially, the lower court ignored the fact that none of the meetings between Kathleen and Tom disclosed the thefts to Kathleen, nor mentioned the Professionals. The lower court further ignores that the April 27, 2006 meeting was the first time that the thefts were "fully disclosed."

The lower court also ruled that the Accountants had no duty to any of the Appellants despite the fact that Mrs. Stevenson, who was elderly and ill, had been a client of the Accountants, and Kathleen held her mother's power of attorney.

Finally, the lower court found 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 both writing checks, preparing promissory notes, and keeping the Brothers' scheme a secret. (R.pp. 1481-1485).

ARGUMENT

Standard of Review

This Court reviews the grant of a summary judgment motion *de novo*, applying the standard of Rule 56, SCRCP 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 Liquors, Inc. v. O'Neil,* 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). 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 lower court erred in finding the Appellant's case was barred by the statute of limitations.

The lower court found that the statute of limitations began on one of three dates:

1) on April 19, 2006, when Tom Stevenson allegedly told Kathleen about his investments and loans of trust funds into his business;

2) on May 21, 2003, where Tom lead Kathleen to believe something was wrong with

him personally; or

3) in October 2001 when Carter and Kerrison came to the conclusion that the Brothers were improperly taking money from the trusts (but kept that secret from Appellants).

The fact that the lower court posited so many alternatives (all of which are based on disputed factual issues) suggests that this issue was not appropriate for determination on summary judgment. Moreover, the statute of limitations could not begin to run until the full disclosure meeting of April 27, 2006 at which time Kathleen first learned about the looting of the trusts.

Section 15-3-530 of the South Carolina Code (Supp.2003) sets forth a three-year statute of limitations for negligence actions. Under the discovery rule, the statutory period begins to run from the date the injured party either knows or should have known that a cause of action arises from the wrongful conduct. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). One is charged with discovery when the facts and circumstances would put a person of common knowledge and experience on notice that some claim might exist against a particular party. *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct.App.1987). The injury alone is not sufficient; the statute is only triggered by notice of a cause of action against another person. *True v. Monteith*, 327 S.C. 116. 489 S.E.2d 615 (1997). Appellants were not put on notice until "full disclosure" of the loans (thefts) was given on April 27, 2006.

The record indicates that the only meeting at which any of the Appellants were informed about assets and the withdrawals by Tom and Dan was on April 27, 2006; at all other meeting prior to this, the attorneys were not present or discussed. Kerrison testified that she told Carter

about the improper withdrawals in 2001. (R.pp. 918:11-25; 936:10-17). She also testified that she knew that Dan and Tom were supposed to hold a family meeting but did not do so. (R.pp. 957:17-959:6). Carter's billing records and testimony indicate he participated in a conference with Tom and Dan Stevenson, Kathleen Turner, Lynne Kerrison on April 27, 2006. (R.pp. 1378:1-1379:16). It was at this meeting that Kathleen was fully informed about the "funds that had been taken out over a period of time by Dan and Tom out of the two trusts." Id. Obviously, Kathleen could not have known about the involvement by the Attorney and Accountants' until she learned of the thefts themselves. Kerrison also acknowledged being at that meeting and that Kathleen was shown various documents regarding the withdrawals by Dan. (R.pp. 966:22-967:9; 1034). Kerrison has described it as the meeting which was designed to fully disclose to Kathleen the improper withdrawals:

> Q. Are you referring to the meeting at Heyward Carter's office on April the 27th, 2006?
>
> A. Yes, sir.
>
> * * *
>
> Q. Oh, okay. So on the second page you indicate Heyward Carter, Lynne Kerrison, Tom Stevenson, Dan Stevenson, Kathleen Turner were at the meeting?
>
> A. Yes, sir.
>
> Q. And this is the meeting to do the full disclosure to Kathleen?
>
> A. Yes, sir.

(R.p. 1116:3-21).

A. The lower court improperly ruled that an April 19, 2006 meeting at Tom Stevenson's business started the statute of limitations as to the Accountants, who were not there nor mentioned.

The lower court's conclusion that the statute began running on April 19, 2006 is based upon conversations (in which Professionals were not mentioned) and a confusing request to admit with more than one interpretation. The interpretation advanced by Accountants has been directly contradicted by Kathleen. Appellants moved to withdraw or amend the request, as more fully discussed in Section I.B, *infra*. However, even if the admission stands, the ambiguous nature leads to multiple interpretations, and at summary judgment, all inferences must be construed in favor of the non-moving party. Moreover, the confusing nature of the request should not allow the lower court to erroneously include the Professionals in the admission. This suit is against the Accountants who were not participants in conversations that Tom and Dan had with Kathleen. The Accountants are not mentioned in the Request for Admission. Thus, the admission, even if allowed to stand, cannot be held against Kathleen as to her claim against the Accountants.

On May 11, 2011, the Accountants served Requests to Admit on each of the three Appellants. Kathleen was served with 171 Requests, while Genevieve and Jacquelin each received 167 Requests. The request at issue is the very last request of the 171 Requests to Kathleen, which stated:

> 171. Thomas Stevenson informed you that he and Daniel Stevenson removed money from the trust on April 19, 2006.

(R.p. 211).

This request is confusing in that it does not state how much money was removed. The request does not state for what purpose the money was removed. More importantly, the request does not show that the Appellants admitting anything with regard to the Professionals. It is

certainly ambiguous in that, even if Tom had "removed" any money, the Request does not include what the removal was for or whether the Accountants knew about that withdrawal.

Case law dictates that this ambiguous request must be construed against the Accountants. *Adams v. Orr*, 260 S.C. 92, 194 S.E.2d 232 (1973)(Trial court was correct in refusing to hold that the requested matters were admitted where admission as worded was subject to more than one interpretation); *Talley v. U.S.*, 990 F.2d 695, 699 (1st Cir. 1993)(To the extent that the request is ambiguous, that ambiguity is to be construed against the party whose lawyer drafted the request).

More importantly, however, is the fact that the lower court, without evidence, attributed Tom's alleged "removal" of money to the Accountants. The Request for Admission does not include any mention of the Accountants. There is no testimony that Kathleen was told of the Accountants or Attorneys' knowledge of the thefts by the Brothers until April 27, 2006. In other words, even if the lower court properly deemed admitted the fact that on April 19, 2006, Tom told Kathleen he had removed money from the trust, Kathleen had no notice of any claims against the Accountants or Attorneys. As this Court has held "...knowledge of an injury alone" does not trigger the statute of limitations; there must be knowledge of facts to put a person on notice that she has a cause of action against another. *True v. Monteith*, 327 S.C. 116. 489 S.E.2d 615 (1997).[8] How can admissions by Tom-- that he "removed" money from the trusts-- put Kathleen on notice as to the existence of a cause of action for professional negligence against the Accountants? There is nothing in the Request or the response to show that Appellants had

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[8]In the *True* case, the court found that although the injury was caused by the attorney's failure to include a cost-of-living provision in a 1973 lease drafted for his client, the statute of limitations did not start to run until 1990, when the client discovered that the attorney had failed to disclose the fact that he also represented the lessee in that transaction.

knowledge of a claim against Accountants as result of Tom and Dan's "removals" until the April 27, 2006 meeting with Carter and Kerrison. In addition, as previously discussed, under Rule 56, SCRCP, the lower court was required to construe Kathleen's response to this ambiguous request to admit in her favor. The lower court erred in construing an admission of the Brothers--that never mentions the Professionals--as notice to Kathleen of the negligence of the Accountants, as well as failing to construe all ambiguities in favor of Appellants.

B. The lower court erred in denying Appellants' timely motion to withdraw a response to a Request for Admission.

As noted, the lower court failed to construe the ambiguity within the request to admit in favor of Kathleen and concluded that the statute began running on April 19, 2006, which is contrary to Kathleen's detailed testimony. Furthermore, the lower court wrongly applied the request, which involved Tom and Dan only, to the Accountants. Appellants objected and, on June 19, 2013, moved to withdraw the Requests for Admission prior to the entry of the lower court's Order granting summary judgment to the Accountants. (Plaintiffs' Objections to Proposed Order of Defendants Lynn Kerrison and Dixon Hughes, or in the Alternative, Motion to Amend a Response to a Request to Admit). The order granting summary judgment was issued on July 3, 2013, but did not address Appellants' motion to amend or withdraw. On July 25, 2013, Appellants moved to alter or amend the order, and requested the court to rule on their motion to withdraw the request for admission.

The lower court refused to allow a withdrawal or amendment of the admission, wrongly claiming that the motion was untimely.[9] (R.p. 27). However, Appellants made the motion as

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[9]At the time of Appellants' motion to withdraw the request, there was no final order and thus, no untimeliness. *See Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259,

soon as it became apparent that confusion abounded; the lower court, despite the fact that there was no admission as to Kathleen's knowledge of the Accountants' conduct, was using the admission concerning Tom and Dan's "removal" of money from the trusts to start the statute of limitations for professional negligence against the Accountants. The lower court also found that "the ultimate result would not be changed" by amendment of the admission because of its other rulings on the statute of limitation, which is not a proper consideration for a motion to amend (R.p. 27).[10]

The lower court disregarded Rule 1 of the South Carolina Rules of Civil Procedure (which guarantees the just determination of all actions) in ignoring Rule 36, SCRCP and the case law on the amendment of admissions with regard to a confusing request for admission. Rule 36(b), SCRCP governs requests to admit and states:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose.

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260 (1999) ("An order is not final until it is written and entered by the clerk of court. Until an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly.").

[10]The lower court order also notes that Appellants did not re-argue all previous positions, but only included issues that were raised and not ruled upon. (R.p. 29). Of course, Appellants merely followed the rule for a Rule 59(e) motion. See, *Elam v. S.C. Dep't of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004). A motion to alter or amend under Rule 59(e) is not an appeal in which the moving party argues the court's errors on rulings of issues actually addressed.

Thus, Rule 36 sets forth a two-part test for withdrawal or amendment of an admission: 1) whether a presentation of the merits furthered by the amendment; and 2) whether the party who obtained the admission can establish prejudice because of the amendment. Rule 36(b); *Barber v. Hobbs*, 313 S.C. 319, 321, 437 S.E.2d 409, 410 (Ct. App. 1993). Moreover, the case law is clear that courts allow amendments to requests to admit, especially when the truth becomes apparent in later discovery. *See*, *Barber v. Hobbs*, 313 S.C. 319, 437 S.E.2d 409 (1993). In *Barber*, the court allowed a defendant to withdraw or amend his answer to a requests for an admission even though the trial had already started. In that case, the plaintiff brought an action for wrongful death. Dr. Hobbs answered a request to admit as follows:

> REQUEST: Do you admit that on May 22, 1987, the Defendant diagnosed plaintiffs decedent's condition as pneumonia?
>
> RESPONSE: Admitted.

At his deposition several months after the admission, Dr. Hobbs testified that he "suspected" pneumonia the night of May 22. At trial, Dr. Hobbs testified that although he was worried about pneumonia on May 22 and ordered x-rays, he did not diagnose pneumonia until the following morning after reviewing the x-ray report. The plaintiff extensively examined Dr. Hobbs concerning the inconsistency. Dr. Hobbs then moved to amend his admission. The trial court granted the motion, reasoning it would be an injustice to preclude Dr. Hobbs from denying the admission and noting that presentation of the merits would be furthered by the amendment.

Several federal cases have specifically considered an admission affecting the statute of limitations. In *F.D.I.C. v. Prusia*, 18 F.3d 637, 639 (8th Cir. 1994), the court specifically considered an admission which affected the statute of limitations and whether the plaintiff had

timely filed an amendment. In that case, the court found withdrawal of the admission was proper, noting that reliance on the mistaken admission would deny the plaintiff the opportunity to have the merits of its claim considered. The court stated:

> Because allowing the erroneous admission to stand might have barred the FDIC's claim, permitting the amendment would have subserved the presentation of the merits.

F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994).[11] In other words, because courts favor decisions on the merits, the party whose admission prevents a trial on the merits can withdraw the admission.

In *Ropfogel v. United States*, 138 F.R.D. 579 (D. Kan. 1991),[12] the court identified several factors to be considered in allowing withdrawal of admissions: (1) whether the admission is contrary to the record in the case; (2) whether an admission is no longer true because of changed circumstances; (3) whether, through an honest error, a party has made an improvident admission; and (4) whether the effect of upholding the admission would be practically to eliminate any presentation on the merits.

In this case, at least three out of the four factors are present. While the Accountants argue that Kathleen admitted that she was told on April 19, 2006, about Tom and Dan's "removal" of money, Kathleen's testimony is completely opposite. Kathleen testified that she met with Tom at his place of business on April 19, 2006 and that she got a tour of his business-- and later Dan's

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[11]Like the case here, that matter was before the Court on a motion for summary judgment.

[12]The Notes to Rule 36, SCRCP state: "This is the language of the current Federal Rule 36...." Federal case law can provide guidance where the state rules are based on the Federal Rules. *See, Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

business. (Turner Dep. p. 97-98). Kathleen also stated that, during that tour, he did not tell her about monies taken from the trusts. (R.pp. 585:24-586:9). Moreover, the other evidence, such as Heyward Carter's billing records showing the May 27, 2006 meeting, corroborate Kathleen's testimony. Under both the first factor in *Ropfogel*, and the holding in the *Barber* case in South Carolina, the admission should not stand when it is clearly contradictory to the record.

In addition, the request may have been improvidently admitted (the third *Ropfogel* factor). The request here was the very last one of **171 requests**. Furthermore, it was poorly drafted and was ambiguous as to the date of the conversation and/or the date of the withdrawals. While the meaning of the request was unclear,[13] Kathleen's testimony is clear that on April 19, 2006, Tom did not inform her that he had stolen or taken from the Trusts. Because of the excessive amount of requests and the ambiguous nature of the request, it was improvidently admitted and meets the third factor of the *Ropfogel* supporting the withdrawal of the admission.[14] Furthermore, as noted above, ambiguous requests must be construed against the drafting party -- here, the Accountants. *Adams v. Orr*, *Talley v. U.S.*, *supra.*

Finally, allowing the admission to stand -- despite the fact it is in contradiction to the evidence and was accidentally or improvidently admitted -- would wrongly eliminate any

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[13]In *Adams v. Orr*, the Supreme Court affirmed the trial judge who had refused to hold that an ambiguous request admitted, stating that "[i]n view of the fact that the request for admission was subject to more than one reasonable interpretation, we cannot say that the trial judge erred" in setting aside the admission. Similarly, in *Talley v. U.S.*, 990 F.2d 695, 699 (2st6 Cir. 1993), the court considered a purported admission by the defendant and stated "[t]his last request, whether deliberately or not, is an invitation to confusion." The court noted that the request could construed in two different ways and that "[t]o the extent that the request is ambiguous, that ambiguity is to be construed against Talley (whose lawyer drafted the request)."

[14]Moreover, even if Tom did admit to taking money on that day, Kathleen had no notice that the Professionals had been involved until the meeting on April 27, 2006.

presentation of the merits, which is disfavored. See, *Barber*; Rule 36, SCRCP, *supra.* Moreover, there is no prejudice to the Accountants as they have already questioned Kathleen about the events of that day. Kathleen testified that she toured Tom's business but that he did not tell her that he took money from the Trusts to fund his business. (R.pp. 585:24-596:17).

The lower court could not have relied on the admission, as Kathleen testified to the true facts at her deposition. Furthermore, as recognized in *Wright Miller & Kane, 8B Fed. Prac. & Proc. Civ.* § 2264 (3d ed.), relying on admissions in preparing a motion for summary judgment does not, by itself, constitute prejudice (citing *Conlon v. U.S.*, 474 F.3d 616 (9th Cir. 2007).

C. The lower court erred in ruling that any May 21, 2003 conversation concerning the borrowing of money by Tom and Dan Stevenson has the effect of starting the statute of limitations for the Accountants.

The lower court next held that the Appellants were on notice of any claim as of May 21, 2003, a date when Kathleen's met with the Brothers. However, the lower court erred as there was disputed testimony as to Tom's statements that day, but there is no dispute that the Accountants (and/or the Attorneys) were not present. In addition, there is no evidence that the improper conduct of the Accountants or the Attorneys was disclosed that day.

Tom claims that he provided a document entitled "Stevenson Family Assets" to Kathleen, although this document has never been produced. Even if the document existed, it would have, at most, listed the loan (theft) values and not the illegality of the loans.[15] (R.pp. 1653-1654). Regardless, there is no evidence that any knowledge or participation by the Accountants was included in that document. . Kathleen clearly testified that Tom mumbled for a few minutes but

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[15]It should be remembered that it is not the fact of whether there are good loans, but whether or not there are any loans. (R.p. 1331:13-16).

did not say anything about stealing from the trusts and that she was not provided an asset sheet. (R.pp. 552-555). Furthermore, there is absolutely no evidence to indicate that the Accountants' knowledge and participation was discussed at this meeting.

On a motion for summary judgment, "the court may not judge the credibility of the witnesses...." *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989). Furthermore,

> at the summary judgment stage of litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact... Nor does the judge make credibility determinations with respect to statements made in affidavits ... or depositions.

L & W Wholesale, Inc. v. Gore, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...." *Anderson v. The Augusta Chronicle,* 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App.2003).

The evidence is conflicting as to whether an asset sheet was produced on May 21, 2003. The Accountants did not attend this meeting and have no personal knowledge of any conversations.[16] Kathleen denies that Tom and Dan told her they had taken money. Kathleen testified that Tom mumbled for a few minutes but did not explain the improper withdrawals and did not provide her with any written information on the family assets. (R.pp. 552-555). However, what is clear is that there is no testimony by anyone that Kathleen was informed of the Accountants' knowledge or actions.

The lower court found that because Kathleen testified that she thought "something must

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[16]Tom and Kathleen have both testified that the only people attending were themselves and Dan. (R.pp. 548:20-24; 1741:24-1742:2).

be very wrong" (R.p. 570), the matter was appropriate for summary judgment. Obviously, Kathleen was worried about her brother's personal well being. However, there was **no** indication that the meeting was about the trusts or that Tom and Dan had stolen from them. The court is misconstruing a sister's worry that something might be wrong with her brother *personally*. Regarding the May 21, 2003 meeting, Kathleen has stated that she thought "something was bothering Tom" and that she was "concerned," but she did not know what was bothering him. Turner 5/21/09 Dep. 43-44. Kathleen also clearly testified that: she was not informed about the subject matter of the meeting ahead of time (R.pp.550:24-551:1; 567:8-12); she did not understand any of Tom's mumbling in the approximately 10-15 minute meeting (R.pp. 552:6-16; 553:20-554:1); that Dan said nothing (R.p. 571:11-18); and that Tom kept whatever document he had in his lap and never showed it to her (R.p. 564:17-23). In other words, as Kathleen testified, she was concerned something might be wrong with Tom, but there was nothing to put her on notice of a claim against even Tom or Dan (let alone the Accountants) during this 2003 meeting. The lower court took a sister's observation that something might be wrong with her brother personally, and it turned that comment into the trigger for the statute of limitations against the Professionals. Kathleen's testimony should not be so construed on a motion for summary judgment.

Moreover, even if had Tom admitted taking money from the trusts at the May 21, 2003 meeting, his disclosure did not include the professional negligence of Accountants so to as to trigger the statute of limitations against them.

In fact, the testimony of Carter supports Kathleen's testimony and indicates that the only meeting in which any of the Appellants were informed about assets and the loans (thefts) by Tom

and Dan [and the Professionals' knowledge of the loan (thefts)] was on April 27, 2006.[17] Carter's billing records and testimony indicate that there was a conference with Tom, Dan, Kathleen, Kerrison and himself on April 27, 2006, at which Kathleen was informed about the "funds that had been taken out over a period of time by Dan and Tom out of the two trusts." (R.pp. 1378:1-1379:16). Carter has agreed that this meeting was one in which full disclosure of the loans was finally made:

> Q. Would you characterize that as full disclosure of the trusts--of the loans from the trusts?
>
> A. I think it would have been, at least as far as I had any information on them and I think as far as Lynne Kerrison would have had any information on them as far --which as far as I know was complete.

(R.p. 1379:17-24).

Other evidence in the record indicates that Appellants were not informed of any trust withdrawals until the April 27, 2006 meeting. Carter testified that in March 2006, he drafted a letter for Lynne Kerrison and himself to sign, which letter would inform Kathleen about the alleged loans. (R.pp. 1368:3-15; 1482-1483). Obviously, if Dan and Tom had already advised Kathleen of the loans, no letter from the Carter was needed. This letter was not actually sent in March, 2006 as a result of a request by Dan and Tom (R.pp. 1484-1485). Furthermore, Carter wrote a letter to Dan and Tom, dated March 28, 2006, (with courtesy copies to Kerrison), which stated:

> I want to confirm my statement to you at our meeting yesterday afternoon, that I would delay sending the letter which Lynne Kerrison and I have signed and which

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[17]And indeed, a reasonable jury could conclude that common sense indicates that the April 27, 2006 meeting would not have been needed if Tom and Dan had already disclosed the withdrawals on any prior occasion.

> is dated March 27, 2006, addressed to Dan and your sister Kathleen, for a reasonable time until you and Dan have a chance to talk to Kathleen or we have met again with Lynne and Howell Morrison present. I understand from a message left by Tom this morning that you plan to talk to Kathleen as soon as you can arrange it, and may like to meet again with me and Lynne Kerrison.

Id. The letter continued:

> As I conveyed to you at our meeting yesterday afternoon, I believe that you have placed me in a very awkward position by not following through on what I clearly understood to be your commitment three years ago to meet with all the beneficiaries of your father's trusts....

Id. Clearly, as of that March 28, 2006 letter, no one had advised Appellants of the loans (thefts), and certainly no one had informed Appellants of the Professionals' knowledge and furtherance of the loans (thefts).

Additionally, Kerrison's testimony supports the fact that the loans (thefts), and her knowledge and involvement, was not disclosed to Appellants until April 27, 2006. She testified that she told Carter in 2001. (R.pp. 918:11; 936:10-17). She also testified that she knew that Dan and Tom were supposed to hold a family meeting but did not. (R.pp. 957:17-959:6). She agreed to the March 27, 2006 letter to Kathleen drafted by Carter (which he then did not send).[18] Obviously, there was no need for the letter or the April 27, 2006 meeting if Kathleen had already been informed. The testimony and evidence in the record supports Kathleen's testimony that the April 27, 2006 meeting was the first and only time she was informed about the thefts that the Brothers called loans, and it was only thereafter that she became aware of the Attorneys' and Accountants' knowledge and participation in the withdrawals.

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[18]As noted previously, the March 27, 2006 letter did not truly disclose the illegality of Tom and Dan's withdrawals, but merely advised securing the supposed loans with sufficient assets.

D. The conclusion by Lynn Kerrison and Heyward Carter that Tom and Dan Stevenson were illegally removing funds from the trusts does, which was never disclosed to Appellants, not start the statute of limitations as to professional negligence.

The lower court found that notice to an attorney is notice to his client, and thus, once Kerrison told Carter in October 2001 of the improper withdrawals, the statute began to run. The lower court primarily relies on *Dorman v. Campbell*, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998). In *Dorman*, because the lawyer had been notified that a house was below flood level, his clients (the buyers) were also found to have on notice at that time, even if they had no actual notice. The *Dorman* court noted that the Dormans had viewed the house several times; had hired "a host of professionals" to inspect the house; had received both a plat showing the house was a flood hazard area and a flood elevation certificate that clearly indicated the house was below the base flood elevation. In finding that the contents of the letter to the attorney was imputable to his clients, the court stated:

> The plain reading of the letter, **along with the other facts of this case,** would put a reasonable person on notice of a flood elevation problem and a potential problem with the lower level addition.

Dorman v. Campbell, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998) (emphasis added). Again, the court in *Dorman* reiterated that notice to the attorney alone was not the basis for the decision:

> We find that Buist's letter, **in conjunction with the other evidence,** put the Dormans on notice that some problem may have existed with the addition was below flood level.

Id. at 186, 500 S.E.2d at 789 (emphasis added). Here, unlike *Dorman,* there is the absence of any "other evidence" to put Appellants on notice of any problem with the trusts. Thus, the

Accountants disclosure to Heyward Carter does not serve as notice to Appellants and does not start the clock for the statute of limitations.

Moreover, there is an exception to the rule that a principal is affected with knowledge his agent receives. *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979). This exception "exists in situations 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. Here, a jury would likely conclude that Carter acted fraudulently in that he protected the thieves, Dan and Tom, under the misguided idea that he needed to keep the family "harmonious." (S.R.p. 73:6-16). Instead of following his duty to inform Mrs. Stevenson, and by extension, Kathleen as the holder of the Power of Attorney, Carter thought it was better that Tom and Dan tell their sister, so he concealed his knowledge. (R.p. 429:3-13). Carter also drafted, or assisted in drafting Promissory Notes, to cover up the thefts of the Brothers, which is was clearly concealing knowledge from his client. Thus, Carter's knowledge in 2001 cannot be attributed to Appellants.

In conclusion, the lower court failed to apply the proper factors and erred in refusing to set aside the admission. Furthermore, the evidence in the record shows that Kathleen was not informed of Tom and Dan's thefts and the Accountants' knowledge and participation until the April 27, 2006 meeting. Thus, this action, filed on April 24, 2009, was filed within the three-year statute of limitations.

II. The Accountants owed a continuing duty to Appellants to tell them of the illegal activity of the trustees, Tom and Dan Stevenson.

The lower court erred in concluding that the Accountants did not owe any duty to

Appellants because they were not clients, and in its alternative conclusion any duty that Accountants had was satisfied by the October 2001 disclosure to Carter Heyward. The lower court misunderstood the law and facts of the case and completely ignored the 2001 power of attorney granted by Mrs. Stevenson to Kathleen.[19]

The lower court held that "if there was a duty owed to [Appellants], it had to be owed as result of the relation between [Accountants] and one or more [Appellants], not as a result of a relation between [Accountants] and Jacquelin Stevenson." (R.pp. 28-29). In so ruling, the lower court wrongly disregarded the importance of the fact that Kathleen held her mother's Power of Attorney and as such, she was clearly in a fiduciary relationship with the Accountants. This is especially true since, during the entire time Kathleen was her mother's attorney-in-fact, her mother was ill and in a hospital or nursing facility.

Kathleen was appointed as Mrs. Stevenson's attorney-in-fact under a Power of Attorney in 2001. "It has been said that *an attorney in fact is essentially an alter ego of the principal....*" *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. App. 2000) (emphasis in original), citing 3 *Am.Jur. 2d Agency* § 21. *See also*, *Estate of Keatinge v. Biddle*, 789 A.2d 1271, 1274 (Maine 2002); ("In essence, an attorney-in-fact is the alter ego of the principal."). "Furthermore, a person acting as an attorney-in-fact under a POA is an agent, one who stands in the shoes of a principal." *State v. Campbell*, 756 N.W.2d 263, 271 (Minn. Ct. App. 2008). Kathleen was the attorney-in-fact and alter ego of her mother, and the duty the Accountants owed to Mrs Stevenson extended to her. Therefore the Accountants did have a duty to disclose the loans

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[19]Appellants sued in all of their capacities, in an abundance of caution. However, the fact that Kathleen has held power of attorney for Mrs. Stevenson since 2001 is a critical fact. Amazingly, the lower court does not even recognize the status of the power of attorney.

(thefts) to Kathleen, especially since Mrs. Stevenson was elderly, infirm, and either hospitalized or in a nursing facility. The Affidavit of George DuRant, a certified public accountant and expert for Appellants, specifically noted that the Accountants should have given notice to Kathleen, in her capacity as the holder of a power of attorney, of the improprieties with regard to the trusts. (R.p. 355 ¶11).

The Order concluded that Plaintiffs were not clients and could not assert claims for breach of any professional duties. However, Mrs. Stevenson was a client of the Accountants -- as they admitted in their Answer to the Complaint. Paragraph 42 of the Amended Complaint stated:

> Defendants Kerrison and Dixon-Hughes served as accountants for the two subject Trusts and Jacquelin K. Stevenson.

(R.p. 94 ¶42). The answer to that paragraph was "Admitted." (R.p. 102 ¶42). Moreover, Paragraph 46 of the Complaint alleged, in part, that "Defendants Kerrison and Dixon-Hughes were in a fiduciary relationship with Plaintiffs..." and Paragraph 47 alleged that:

> Defendants Kerrison and Dixon-Hughes were required to fully disclose to Plaintiffs, including Jacquelin K. Stevenson via her power of attorney, Kathleen Turner, all known significant and material information including but not limited to the fact that the trustees were engaging in improper self-dealing withdrawals.

(R.p. 95 ¶47). In the Answer to both of these paragraphs, the Accountants stated:

> Defendants admit that they performed accounting services for the benefit of the subject trusts and Jacquelin K. Stevenson and **had duties towards those the subject trusts and Jacquelin K. Stevenson that they undertook contractually, and that are implied by law.**

(R.p. 102 ¶ 47). Thus, the Order's holding that "the only clients to whom Lynn Kerrison and Dixon Hughes provided accounting services" were Tom and Dan is contrary to the admissions of

the Accountants.[20] Mrs. Stevenson was a client and the Accountants did owe her a duty. Appellant Kathleen was appointed as attorney-in-fact for her mother in 2001. The holder of a power of attorney steps into the shoes of the grantor, and is basically an alter ego of the grantor. *Muller v. Bank of Am., N.A.*, 12 P.3d 899, 904 (Kan. App. 2000), citing 3 *Am.Jur. 2d Agency* § 21. In other words, as of January 2001 when the Power of Attorney was executed, Kathleen Turner *was* Mrs. Stevenson and the duties owed to Mrs. Stevenson, to which Respondent have already admitted existed, were extended to Kathleen. The lower court erred in finding that the duty had to exist between Appellants and Respondent independently of the Respondent's duty to Mrs. Stevenson.

The lower court, citing *ML Lee Acquisition Fund L.P.D. v. Deloitte & Touche,*, 327 S.C. 238, 489 S.E.2d 470 (1997), also wrongly found that there was no duty to disclose client information to non-clients except where non-clients justifiably rely on information affirmatively communicated by an accountant. However, because Kathleen held the Power of Attorney for Mrs. Stevenson, she was a client and the duty to disclose extends to her. Thus, the Order's reliance on *ML Lee* has no application; the Power of Attorney extends the client relationship to Kathleen. In addition, one of the other cases cited by the lower court actually supports Appellants argument. In *Johnson v. Robert E. Lee, Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012) the court held that an accountant's duty did not extend to a third party absent a "statute, contract, relationship, status, property interest, **or some other special circumstance.**" Id., 401 S.C. at 504, 737 S.E.2d at 514 (emphasis added). The Power of Attorney held by Kathleen is a special

[20]The Accountants went so far as to write improper checks to the Brothers.

circumstance extending the duty of the Accountants.[21]

The lower court also erred in finding that 26 U.S.C.A. § 7216 would preempt any duty the Accountants had to disclose the withdrawals. 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. Here, the claims do not arise out of tax preparation services, but a rather the general obligations of a public accounting firm and its members. 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).

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[21]The lower court also cited cases from other jurisdictions which disallowed actions by beneficiaries against accountants serving the trusts. However, as noted earlier, in this case, the Accountants also owed duties to Mrs. Stevenson and Kathleen, as the holder of the power of attorney, and thus, those cases have no relevance here. In addition, since the Appellants are Personal Representatives of Mrs. Stevenson's Estate, they can bring any claims she had against her Accountants.

Moreover, there is an exception allowing the Accountants to make the disclosure to Appellants. 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). Kathleen, as holder of the power of attorney, stood in the shoes of her mother and the other Appellants, as beneficiaries of the Trusts, are related taxpayers. Thus, the lower court erred in finding that the Accountants were barred by § 7216 from disclosing the withdrawals.[23]

In conclusion, the Accountants admittedly owed duties to Mrs. Stevenson, which extend to the holder of the power of attorney, Kathleen. The existence of these duties support causes of action for both professional negligence and/or breach of fiduciary duty. The lower court erred in holding there were no duties owed by the Accountants, and should be reversed.

III. The Accountants, who admittedly knew the activities of the trustees were illegal and who helped the trustees, clearly "knowingly participated" in the breach of fiduciary duties by the trustees.

The lower court found that the Accountants could not have aided or abetted Tom and Dan Stevenson's breach of fiduciary duties. The lower court reasoned the Accountants had not acted with knowing participation in the improper withdrawals, stating: "Beyond showing Ms. Kerrison and the firm's admitted knowledge of the trustee's actions, plaintiffs offered no evidence of

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[22]Section 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).

[23]Furthermore, the Defendant here were not releasing confidential information used to prepare tax returns, but actively writing improper checks to two trustees who were looting the Trusts.

participation of the trustees' breaches of duty, or any other affirmative act on the part of Ms. Kerrison or the firm." (R.p. 21). This statement is factually incorrect. The Accountants knew that it was improper and a breach of duty for the Brothers to withdraw money from the trusts but wrote the checks for the withdrawals for years. In other words, the Accountants knew that the trustees were breaching their fiduciary duties and assisted by actually providing and writing the checks:

> Q. And that Dixon Hughes at some point in time upon the death of Pat[24] 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 Heisenbuttle, and Angela would write the checks and then either Dan or Tom would sign the checks.

(R.p. 957:9-16).[25] 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.[26]

Furthering improper withdrawals constitutes "knowing participation." Cf. *Smith v. Smitty Mcgee's, Inc.*, 24 Del. J. Corp. L. 297, 306 (1998) (wife/manager who wrote checks associated

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

[25]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. (R.p. 1331:10-16; S.R.p. 26:19-22).

[26]In addition, the Accountants helped legitimize the thefts by drafting promissory notes making it appear as if the money had properly been borrowed. (Rp.p. 1011:11-22; 1481).

with husband's breach of fiduciary duties was 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). There is no question that the Accountants knew Dan and Tom were not supposed to be withdrawing money (and were in breach of fiduciary duty) and that the Accountants aided the withdrawals by providing the checks any time Dan and Tom so requested.

Furthermore, contrary to the lower court's ruling, in addition to active participation, a person can also provide assistance (and therefore aid and abet) through inaction or nonfeasance. *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 the plaintiff had an actionable claim against the police chief for aiding and abetting sexual harassment where 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).

The culpability of the Accountants is obvious and stems both from active participation and through their inaction when they had a duty to act. Respondent Kerrison became aware in 2001 that Tom and Dan had withdrawn money from the Trusts. (R.p 909:9-17). She knew there

was a question about the legality of these withdrawals. (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). The Accountants not only failed to inform Kathleen and the other beneficiaries of the improper withdrawals, but also continued to issue the checks to Dan and Tom from the trust accounts.

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, along with their silence while knowing that Tom and Dan were acting improperly, clearly constitute knowing participation in the breach of fiduciary duty.

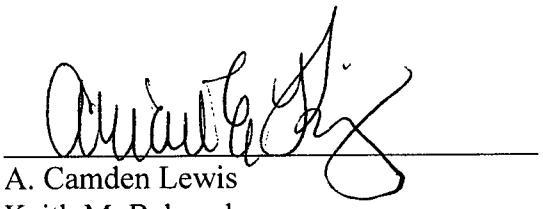
CONCLUSION

The lower court, in finding that the statute of limitations had run, ignored the fact that the Accountants were not mentioned at any meetings between Kathleen and Tom in which admissions were allegedly made by Tom; construed ambiguities in favor of the Accountants instead of Appellants; and, allowed the Professionals' 2001 activities, which where hidden from Appellants, to start the statue of limitations against Appellants' claims.

Furthermore, without explanation, the lower court failed to recognize or explain why the power of attorney gave no rights to the holder (Kathleen).

Finally, although the Accountants had an interest in the entity receiving stolen money at the same time they were helping to facilitate the Brothers' stealing of the money, the lower court wrongly found that the Accountants had not knowingly participated in the breach of fiduciary duty.

For these reasons, and as set forth more fully above, the lower court's grant of summary judgment must be reversed.



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

ATTORNEYS FOR APPELLANTS

Columbia, South Carolina.
April 22, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young
Case No. 2011-CP-10-400

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

Appellants,

v.

T. Heyward Carter, Jr.; Evans, Carter; Kunes & Bennett, P.A.; 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

Respondents.

CERTIFICATE OF COUNSEL

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

A. Camden Lewis

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

ATTORNEYS FOR APPELLANTS

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PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served the **Brief of Appellants and Reply Brief of Appellants** upon opposing counsel, by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to said opposing counsel at the following addresses:

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

Connie W. Grugan

This 24th day of April, 2014.