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72 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 72 MAP 2021

DAVID H. MARION, RECEIVER FOR BENTLEY FINANCIAL SERVICES, INC. AND ENTRUST GROUP,

Appellee,

v.

BRYN MAWR TRUST COMPANY,

Appellant.

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM AND THE PENNSYLVANIA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Appeal from the Order of the Superior Court dated February 16, 2021 at No. 2470 EDA 2018 Vacating the Judgment of the Montgomery County Court of Common Pleas, Civil Division, dated July 26, 2018 at No. 2003-19232 and Remanding for a new trial.

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Dated: December 6, 2021

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, bipartisan organization representing businesses, health care, and other perspectives. PCCJR is dedicated to improving Pennsylvania's civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts.

The Pennsylvania Institute of Certified Public Accountants ("PICPA") is the second oldest and fourth largest certified public accountant ("CPA") organization in the United States. Membership includes more than 20,000 practitioners in public accounting, business and industry, government, and education. PICPA's expressed goal is to speak on behalf of members when such action is in the best interest of the CPA profession in Pennsylvania and the public interest.

PCCJR and PICPA have an interest in this appeal because the judgment of the Superior Court recognizing a novel cause of action for aiding and abetting fraud, if allowed to stand, would make Pennsylvania a less attractive place to conduct business. It would also expose Pennsylvania business professionals (such as CPAs) to unwarranted litigation risk and liability based on a legal theory without precedent. The harm to Pennsylvania businesses and consumers would be avoided if the Court rejected the cause of action and would at least be reduced if the Court placed significant limits on its viability.

No person or entity other than the *amici*, their members, or their counsel authored this brief in whole or in part or paid in whole or in part for its preparation.

SUMMARY OF ARGUMENT

PCCJR and PICPA respectfully urge the Court to reverse the judgment of the Superior Court and rule that (1) Pennsylvania law does not recognize a cause of action for aiding and abetting fraud, and that (2) if Pennsylvania law recognizes a cause of action for aiding and abetting fraud, a party is liable under such cause of action only when proven to have had actual knowledge of the underlying fraud.

The Court should not recognize a novel cause of action for aiding and abetting fraud because it is unsupported in the law and bad policy. Such a cause of action would be duplicative of the existing cause of action for fraud, as explained herein and in the brief of Appellant Bryn Mawr Trust Company. It would also have terrible consequences for Pennsylvania businesses and consumers. Under the Superior Court's decision, for example, Pennsylvania businesses would face the impossible task of ensuring that each of its business partners, clients, and customers is not engaging in any conduct that could possibly give rise to allegations of fraud. Any tangential connection to alleged fraud would result in litigation, at minimum, and possibly even liability for another party's misdeeds or settlements to limit the possible exposure. Consequently, rather than focusing on providing better goods and services, Pennsylvania businesses would be distracted by potentially needing to

investigate their business partners, clients, and customers. And rather than competing to offer lower prices in the marketplace, Pennsylvania businesses would need to raise prices to reflect the risk of being haled into court because another party committed fraud and the cost of monitoring their partners, clients, and customers. Those costs would be passed along to consumers and harm Pennsylvania's economy as a whole. The best way to guard against these negative outcomes is to reject the creation of a novel cause of action for aiding and abetting fraud.

As it stands, the law of fraud is relatively clear and predictable. As in many other jurisdictions, common law fraud requires a material factual misrepresentation made with knowledge or belief of its falsity and with the intention that the other party rely on it, resulting in justifiable reliance to that party's detriment. That has been the law of Pennsylvania for centuries. And ample authority has fleshed out those concepts to allow Pennsylvania businesses, professionals, and consumers to order their affairs in a predictable way. Parties in Pennsylvania know when they may face liability for fraud. A novel cause of action for aiding and abetting fraud would upend that well-settled law. If the Superior Court's decision is correct, then any Pennsylvania business or professional that provides goods or services to a client or customer facing allegations of fraud could be sued for aiding and abetting that fraud.

Implementing the decision would also be unfair and chaotic. It would be unfair to impose an affirmative duty on Pennsylvania businesses to uncover misdeeds of its clients and customers. And it would be chaotic to do so because it would require those businesses to adopt procedures that interfere with business relationships. From a practical perspective, even if a client or customer has not committed fraud, all it takes is an allegation of fraud against the client or customer to produce tag-along litigation against every business providing goods or services to the alleged fraudster. That tag-along litigation would then claim that those providers should have suspected that something was awry and undertaken to stop the alleged fraud. The Court should reject this dangerous expansion of potential liability.

But even if the Court were to recognize a cause of action for aiding and abetting fraud, it should adopt a demanding standard to mitigate the resulting harms. At a minimum, the Court should hold that defendants are not liable for aiding and abetting fraud absent proof that they had actual knowledge of the underlying fraud. Anything else would allow creative counsel to file lawsuits—and, often, to survive preliminary objections—based on bare allegations that a party who did business with an alleged fraudster should have known about the fraud. Beyond the unfairness of Monday-morning quarterbacking and guilt by association, an actual knowledge requirement is necessary to guard against an explosion of meritless litigation, wasted resources, and coercive settlements. Anything less would allow plaintiffs to assert

claims against a host of entities providing goods and services in Pennsylvania on the basis of bare allegations that the entities "should have known" of the fraud. That would place a massive burden on Pennsylvania businesses and further undermine the predictability of Pennsylvania law.

The judgment of the Superior Court recognizing a novel cause of action for aiding and abetting fraud should be reversed.

ARGUMENT

In deciding whether to recognize a novel cause of action, this Court has rightly applied a demanding standard. "[U]nless the justifications for and consequences of judicial policymaking are reasonably clear with the balance of factors favorably predominating, we will not impose new affirmative duties." *Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1245 (Pa. 2012) (citation omitted). The Court must refrain from imposing new common law duties absent "an adequate foundation to make an informed social policy assessment which would support the imposition of a new affirmative duty[.]" *Id.* at 1250–51 (citation omitted). Put another way, "before a change in the law is made, a court, if it is to act responsibly must be able to see with reasonable clarity the results of its decision and to say with reasonable certainty that the change will serve the best interests of society." *Cafazzo v. Cent. Med. Health Servs., Inc.*, 668 A.2d 521, 527 (Pa. 1995) (citation omitted).

Recognition of a novel cause of action for aiding and abetting fraud is not in society's best interests. Such cause of action would be unnecessary insofar as it applied to conduct that already constitutes common law fraud. And it would be very bad public policy insofar as it broadened fraud-based liability beyond the scope of fraud today. Such an expansion would upend centuries of common law jurisprudence clarifying the scope of fraud-based liability in Pennsylvania. The result would be bad for Pennsylvania businesses and bad for Pennsylvania consumers.

I. A Novel Cause of Action for Aiding and Abetting Fraud Would Unnecessarily Burden Pennsylvania Businesses and Harm Pennsylvania Consumers.

Pennsylvania law does not need a novel cause of action for aiding and abetting fraud. As other jurisdictions have recognized, a business that engages in fraudulent conduct or otherwise supports another in committing fraud is rightly liable under principles of common law fraud without resort to the concept of aiding and abetting.

"There is nothing to be gained by multiplying the number of torts, and specifically by allowing a tort of aiding and abetting a fraud to emerge by mitosis from the tort of fraud, since it is apparent that one who aids and abets a fraud, in the sense of assisting the fraud and wanting it to succeed, is himself guilty of fraud, … in just the same way that the criminal law treats an aider and abettor as a principal." *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623–24 (7th Cir. 2000) (citations

omitted); *see also Siavage v. Gandy*, 829 S.E.2d 787, 790 (Ga. 2019) ("[W]e find no significant distinction between aiding and abetting fraud as a separate tort and committing the tort of fraud as a joint tortfeasor."); *Federated Mgmt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 853 (Ohio Ct. App. 2000) (affirming trial court's decision not to recognize a claim for aiding and abetting fraud because "one who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abettor to fraud").

By contrast, there is great value in the clarity and predictability provided by the existing Pennsylvania law of fraud. Pennsylvania courts have been interpreting the concept of fraud for centuries. *See, e.g.*, *Leedom v. Philips*, 1 Yeates 527, 528 (Pa. 1795) ("Fraud is a concealment of any thing material, which concerns the other party in interest.") (citation omitted); *In re Passarelli Family Tr.*, 242 A.3d 1257, 1268 (Pa. 2020) ("For more than a century, our courts have reviewed fraudulent inducement claims in myriad contexts using the elements of common-law fraud."). The elements of a fraud claim under Pennsylvania law are well established. *See Gibbs v. Ernst*, 647 A.2d 882, 207–08 (Pa. 1994). Pennsylvania businesses and consumers have long been able to order their affairs around those clear and predictable standards. There is simply no need to embrace a novel cause of action expanding the possible forms of conduct that could result in liability for fraud committed by another actor. "Law should be kept as simple as possible. One who

aids and abets a fraud is guilty of the tort of fraud (sometimes called deceit); nothing is added by saying that he is guilty of the tort of aiding and abetting as well or instead." *E. Trading Co.*, 229 F.3d at 624.

The Supreme Court of the United States relied on such policy considerations in refusing to recognize a private right of action for aiding and abetting securities fraud. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court noted that the possibility of aiding and abetting liability under federal securities law would "lead[] to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Id.* at 188 (citation omitted). It concluded that a "shifting and highly fact oriented disposition of the issue of who may [be liable for] a damages claim" for securities fraud under federal law "is *not* a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Id.* at 188-89 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975)) (alternation in original) (emphasis added). Though *Central Bank* involved a fraud statute, the same considerations apply here, with even greater force: there is no need to create uncertainty when a mountain of existing case law regarding common law fraud enables actors to understand their potential liabilities.

Nor is there any need to adopt a novel cause of action to protect against fraud in Pennsylvania. Other legal and regulatory regimes provide strong incentives for

businesses to act honestly. For example, accountants who engage in manipulative or deceptive practices may be fully liable for fraud, and other laws may provide safeguards against fraudulent accounting practices. *See* Lewis D. Lowenfels & Alan R. Bromberg, *Liabilities of Lawyers and Accountants Under Rule 10b-5*, 53 THE BUSINESS LAWYER 1157 (1998) (noting that accountants and lawyers may be primarily liable to non-clients under Rule 10b-5 even without aiding and abetting liability). Separate aiding and abetting liability is unnecessary.

Meanwhile, the practical consequences of rewriting Pennsylvania's longstanding jurisprudence regarding fraud liability raises a host of serious concerns. First is the very real possibility of abusive litigation that drags Pennsylvania businesses into court based on thin allegations that another's fraud should have been detected sooner. Experience teaches that among the most obvious targets of civil aiding and abetting accusations are professionals who provide necessary ancillary services to principal actors in the marketplace. *See* Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 265 & n.117 (2005) (describing how aiding and abetting liability risks "over-inclusiveness" and may "encompass routine business transactions and thereby threaten the vitality of commerce"); David A. Robinson, *A Business Lawsuit "Mega Weapon": Aiding & Abetting*, ENTERPRISE COUNSEL GROUP (July 19, 2018), https://www.ecg.law/blog/a-business-lawsuit-mega-weapon-aiding-abetting ("Just

as aiding and abetting is a potential mega weapon for business plaintiffs, it is equally a lethal 'land mine' for unsuspecting businesses and business owners (particularly professional firms)."). It would be all too easy for a plaintiff to allege that a professional providing services to an alleged fraudster should have uncovered the fraud or that the services provided constituted "substantial assistance" necessitating discovery and perhaps a trial.

That uncertainty is only compounded by the hazy definition of what constitutes "substantial assistance." The standard for "substantial assistance or encouragement" adopted by the Superior Court requires consideration of vague issues such as "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, [and] his relation to the other and his statement of mind[.]" Op. 17 (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. d). It also listed "the duration of the assistance" and "the foreseeability of the harm that occurred" as "significant" factors in the substantial assistance inquiry. *Id.* Any provider of goods or services that adds value to a customer or client could be alleged to satisfy this nebulous standard. The standard also leaves businesses confused about what is and is not permitted: At what point would an accountant who provides necessary advice to a client go from being a service provider to a backstop against the possibility that the client is perpetrating a fraud on third parties? Would it turn on the type of business the client is in, or how

long the client has used the accountant's services? The answer is entirely unclear. Resort to a multi-factor test for whether conduct rises to the level of aiding and abetting fraud will not give Pennsylvania businesses sufficient guidance or predictability with which to order their affairs. *See* Combs, *supra*, at 267 (recognizing "a great deal of uncertainty as to what is required to impose civil aiding and abetting liability").

Critically, because the standard is fuzzy, it would be easy to plead claims for aiding and abetting fraud that would survive preliminary objections. *See* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAWYER 1135, 1147 (2006) ("If the claim is for aiding and abetting fraud, then the elements of fraud must be alleged with the requisite specificity, though the other elements of aiding and abetting ordinarily are subject to a liberal notice pleading standard[.]"). Under the Superior Court's approach, aiding and abetting liability is easy to allege and hard to disprove. Businesses who made no misrepresentation and owed no duty to plaintiffs would find it difficult to extricate themselves from meritless and even frivolous lawsuits at an early stage.

Consider a hypothetical: an accountant who asks a client to provide certain information so the accountant can advise on a particular venture, but the client chooses to abandon the venture before providing that information. Under the Superior Court's reasoning, the accountant then has a duty to inquire about not just

the information that the client declined to provide, but also the client's decision to abandon the venture, to ensure that the client is not thereby concealing a fraud that would otherwise be uncovered by the accountant. Such a standard would be very disruptive to the accountant-client relationship, which Pennsylvania courts have held to be one of confidentiality. *See, e.g.*, *Agra Enters., Inc. v. Brunozzi*, 448 A.2d 579, 581–82 (Pa. Super. 1982). It would transform accountants from trusted advisors into inquisitors who must assume the worst of their clients on penalty of paying for their fraud.

The risks associated with a novel cause of action for aiding and abetting liability become even more severe in cases, such as this one, brought by trustees or receivers for defunct businesses. *See* Mason, *supra*, at 1172 (describing suits by bankruptcy trustees against "suppliers, accountants or law firms" a "common fact-pattern" for claims of aiding and abetting fraud). In contrast to "[t]he filing of lawsuits by a going concern[,]" which "is properly inhibited by concern for future relations with suppliers, customers, creditors, and other persons with whom the firm deals (including government) and by the cost of litigation[,]" a "trustee of a defunct enterprise does not have the same inhibitions." *Maxwell v. KPMG LLP*, 520 F.3d 713, 718 (7th Cir. 2008). Moreover, "while the management of a going concern has many other duties besides bringing lawsuits, the trustee of a defunct business has little to do besides filing claims that if resisted he may decide to sue to enforce." *Id.*

Expanding liability will only exacerbate the problem posed by trustees and receivers, whose *raison d'etre* is to file suit against parties from whom payment may be extracted.

Without clear guidance on when they may become liable for another's fraud, and with litigious actors waiting to file suit against them as deep pockets tangentially related to another's fraud, Pennsylvania businesses will have no choice but to take defensive actions that are detrimental to the economy and consumers. Some may offer fewer services or drop clients to limit the risk of litigation or liability. Others may undertake intrusive efforts to police their partners and customers in the hopes of avoiding litigation. And many would increase prices to account for the new costs and risks that the law would impose on them based on such third-party misconduct. As a matter of simple economics, Pennsylvania consumers would have fewer goods and services to choose from, and those goods and services that remain available would become more expensive. Businesses would be forced to analyze opportunities not only on their commercial merits but also on their potential for crushing fraud liability based on the conduct of a third party. Those presently doing business in Pennsylvania would be incentivized to do business with foreign companies to avoid risking fraud liability. Recognition of a novel cause of action for aiding and abetting fraud would chill legitimate commerce and harm the economy as a whole.

For all these reasons, recognizing a novel cause of action for aiding and abetting fraud is bad public policy. It purports to solve a problem that the law already addresses but is ripe for abuse by creative counsel who, looking for deep pockets, would sue every entity providing goods and services to an alleged fraudster as an alleged aider and abettor. What's more, those entities providing goods and services would likely pay extortionate settlements for meritless claims to avoid the burden and expense of discovery. The Court should reject the cause of action.

II. If Pennsylvania Recognizes a Novel Cause of Action for Aiding and Abetting Fraud, Liability Must Require Actual Knowledge of the Underlying Fraud.

Given the negative consequences that would result from the creation of a novel cause of action for aiding and abetting fraud, if the Court were to do so, it must—at a minimum—require actual knowledge of the alleged fraud to state a claim. *See* Combs, *supra*, at 299 ("[T]he formulation and application of the test for civil aiding and abetting liability is not a mere dispute as to words. The formulation chosen significantly affects the scope of liability.").

Most jurisdictions that recognize a cause of action for aiding and abetting fraud hold that a party is not liable unless it had actual knowledge of the underlying fraud. *See, e.g.*, *Casey v. U.S. Bank Nat'l Ass'n*, 26 Cal. Rptr. 3d 401, 406 (Cal. Ct. App. 2005) ("California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong

the defendant substantially assisted." (citation omitted)); *Johnson v. Filler*, 109 N.E.3d 370, 376 (Ill. App. Ct. 2018) (rejecting the "should have known" or "constructive knowledge" standard for liability in favor of "the standard of actual knowledge"); *Insight Ky. Partners II, L.P. v. Preferred Auto. Servs., Inc.*, 514 S.W.3d 537, 551 (Ky. Ct. App. 2017) (requiring "actual knowledge of [a tortfeasor's] alleged breach" before imposing aiding and abetting liability); *Meridian Med. Sys., LLC v. Epix Therapeutics, Inc.*, 250 A.3d 122, 129 (Me. 2021) (requiring "actual—and not merely constructive—knowledge that the principal tortfeasor is engaged in tortious conduct"); *Go-Best Assets Ltd. v. Citizens Bank of Massachusetts*, 972 N.E.2d 426, 438 (Mass. 2012) (affirming summary judgment for lack of evidence of actual knowledge regarding the fraud); *El Camino Res. Ltd. v. Huntington Nat'l Bank*, 712 F.3d 917, 922 (6th Cir. 2013) ("We agree that actual knowledge is required to prove a claim for aiding and abetting tortious conduct under Michigan law."); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 188 (Minn. 1999) ("However, where the conduct is not a facial breach of duty, courts have been reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful."); *Oster v. Kirschner*, 905 N.Y.S.2d 69, 72 (N.Y. App. Div. 2010) ("A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of . . . actual knowledge[.]"); *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 113 (Nev. 1998),

overruled in part on other grounds by GES, Inc. v. Corbitt, 21 P.3d 11, 15 (Nev. 2001) (requiring "knowing support or encouragement" of the "alleged fraudulent conduct").

As this broad consensus suggests, an actual knowledge requirement is good public policy because it helps to offset at least some of the harm that arises from a cause of action for aiding and abetting fraud. For example, requiring actual knowledge would help ensure that Pennsylvania businesses are not held liable for a third party's fraud based solely on hindsight bias. It is easy to articulate how a fraud could have or should have been detected with the benefit of hindsight, but that is not fair to businesses that are providing goods and services to customers all across the Commonwealth. They should not be judged by what they might have discovered had they second-guessed their customers on issues that, looking back, might have hinted at the possibility of fraud. Rather, they should be judged based on whether they knowingly assisted in the commission of a fraud.

Consider another hypothetical: an accountant who suspects a client is committing fraud and conducts a reasonable investigation into the client's affairs but fails to discover that the client was in fact committing fraud. Regardless of the accountant's investigation, the client's customers and investors could sue the accountant based on allegations that the accountant should have discovered the alleged fraud and taken actions to sever ties with the client. Under the Superior

Court's approach, those allegations would suffice for the case to proceed to discovery. Moreover, the accountant's suspicions would be used as proof that the accountant "should have known" of the fraud notwithstanding its investigation, further sealing the accountant's fate—at least in having to go through discovery. Even an accountant with a robust compliance process would have to incur substantial legal fees or pay coercive settlements for meritless claims.

An actual knowledge requirement could also help Pennsylvania businesses avoid discovery on meritless claims. Adopting a heightened standard for stating a claim for aiding and abetting fraud would help guard against the routine inclusion as defendants of all providers of goods and services to the alleged fraudster based on bare allegations that the providers "should have known" about the fraud. The actual knowledge requirement would not be a panacea because knowledge may still be alleged generally. Pa. R.C.P. 1019(b); *see also* Mason, *supra*, at 1147 ("If the claim is for aiding and abetting fraud, then the elements of fraud must be alleged with the requisite specificity, though the other elements of aiding and abetting ordinarily are subject to a liberal notice pleading standard[.]"). But plaintiffs are still required to plead "facts constituting the cause of action[.]" *Griffin v. Rent-A-Center, Inc.*, 843 A.2d 393, 395 (Pa. Super. 2004) (citation omitted); *see also* Mason, *supra*, at 1148 ("Knowledge of the fraud must be pled by stating how the defendant knew of the

wrongdoing.")[1] Plaintiffs would thus have to plead facts supporting a general allegation of knowledge and otherwise have a good faith basis—beyond a general assumption that someone doing business with an alleged fraudster must have had some reason to suspect the fraud—before bringing a claim.

III. The General Assembly Should Get to Decide Whether to Create a Novel Cause of Action for Aiding and Abetting Fraud.

Responsible decision-making in areas of public impact require consideration of broad potential social effects that may result from a particular policy decision. This Court has repeatedly recognized that the General Assembly's policymaking resources are far superior to its own because "[c]ommon-law decision-making is subject to inherent limitations, as it is grounded in records of individual cases and the advocacy by the parties shaped by those records." *Off. Comm. of Unsecured Creditors of Allegheny Health Educ. & Rsch. Found. v. PricewaterhouseCoopers*, 989 A.2d 313, 333 (Pa. 2010). *See also Pegram v. Herdrich*, 530 U.S. 211, 221–22

[1] If this Court recognizes a novel cause of action for aiding and abetting fraud, it should follow those federal courts that have held that the underlying allegations of fraud must be pleaded with particularity. *See, e.g.*, *Filler v. Hanvit Bank*, 156 F. App'x 413, 417 (2d Cir. 2005) ("[T]he particularity requirements of [Federal] Rule [of Civil Procedure] 9(b) apply to claims of aiding and abetting fraud no less than to direct fraud claims." (citation omitted)); *Jones v. Petland, Inc.*, No. 2:08-CV-1128, 2010 WL 597503, at *3 (S.D. Ohio Feb. 12, 2010) (same); *Banc of Am. Sec. LLC v. Stott*, No. 04-81086-CIV, 2005 WL 8156027, at *5 (S.D. Fla. Aug. 30, 2005) (same); *cf.* Pa. R.C.P. 1019(b).

(2000) (describing the broader tools available to the legislative branch in making social policy judgments, including the availability of comprehensive investigations).

Though this Court is the ultimate authority on Pennsylvania common law, given the serious consequences that would flow from recognizing a novel cause of action for aiding and abetting fraud or from imposing an inappropriate standard for liability, this Court should not embark on a broad policymaking endeavor. A novel cause of action for aiding and abetting fraud would have far-reaching consequences that the Court should not trigger lightly. It should instead defer to the General Assembly to study the need (or not) for a cause of action for aiding and abetting fraud and the consequences likely to flow from adopting a particular knowledge requirement in connection with it.

CONCLUSION

For the foregoing reasons, and those stated by the Appellant, PCCJR and PICPA respectfully request that this Court reverse the judgment of the Superior Court and hold that there is no cause of action under Pennsylvania law for aiding and abetting fraud or, in the alternative, that actual knowledge is required to satisfy the elements of any cause of action under Pennsylvania law for aiding and abetting fraud.

Respectfully submitted,

Dated: December 6, 2021

/s/ Michael L. Kichline

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CERTIFICATE OF CONFIDENTIALITY COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: December 6, 2021

/s/ Michael L. Kichline
Michael L. Kichline

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Pa.R.A.P. 531(b)(3) and 2135(a) because it contains 4636 words excluding the parts exempted by Pa.R.A.P. 2135(b).

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Dated: December 6, 2021

/s/ Michael L. Kichline
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CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and correct copy of the foregoing was served on the following counsel via U.S. Mail which satisfies the requirements of Pa.R.A.P. 121:

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David H. Marion, Receiver for Bentley Financial Services, Inc. and Entrust Group, Appellees	:	72 MAP 2021
v.	:	
Bryn Mawr Trust Company, Appellant	:	

PROOF OF SERVICE

I hereby certify that this 6th day of December, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE SUPREME COURT OF PENNSYLVANIA

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Address:	1650 Market Street One Liberty Place, Suite 1800 Philadelphia, PA 19103
Phone:	215--86-4-7165
Representing:	Appellee David H. Marion

Served:	Justin Edward Proper
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	1650 Market St Ste 1800 Philadelphia, PA 19103
Phone:	215-864-7165
Representing:	Appellee David H. Marion

Served:	Justin M. Romeo
Service Method:	eService
Email:	justin.romeo@dechert.com
Service Date:	12/6/2021
Address:	Dechert LLP 2929 Arch Street Philadelphia, PA 19104
Phone:	724--97-1-5136
Representing:	Appellant Bryn Mawr Trust Company

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Justin M. Romeo
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	2929 Arch St Philadelphia, PA 19104
Phone:	215-994-2518
Representing:	Appellant Bryn Mawr Trust Company

Served:	Marc Lloyd Penchansky
Service Method:	eService
Email:	penchanskym@whiteandwilliams.com
Service Date:	12/6/2021
Address:	1650 Market Street, Suite 1800 Philadelphia, PA 19103
Phone:	215--86-4-6279
Representing:	Appellee David H. Marion

Served:	Marc Lloyd Penchansky
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	White And Williams Llp 1650 Market St Ste 1800 Philadelphia, PA 191037304
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Representing:	Appellee David H. Marion

Served:	Melissa Ann Ruth
Service Method:	eService
Email:	ruthmelissaa@gmail.com
Service Date:	12/6/2021
Address:	22 N. Front St. 2F Philadelphia, PA 19106
Phone:	484-894-9048
Representing:	Appellant Bryn Mawr Trust Company

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Melissa Ann Ruth
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	McElroy Deutsch Mulvaney & Carpenter Llp 1617 Jfk Blvd Ste 1500 Philadelphia, PA 19103
Phone:	215-600-3482
Representing:	Appellant Bryn Mawr Trust Company

Served:	Michael Hugh McGinley
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Email:	michael.mcginley@dechert.com
Service Date:	12/6/2021
Address:	Cira Centre 2929 Arch Street Philadelphia, PA 19104
Phone:	215-.99-4.2463
Representing:	Appellant Bryn Mawr Trust Company

Served:	Michael Hugh McGinley
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	Cira Centre 2929 Arch Street Philadelphia, PA 191042808
Phone:	215-994-2463
Representing:	Appellant Bryn Mawr Trust Company

Served:	Ryan Martin Moore
Service Method:	eService
Email:	ryan.moore@dechert.com
Service Date:	12/6/2021
Address:	315 Arch Street, Unit 306 Pennsylvania Philadelphia, PA 19106
Phone:	215--99-4-2028
Representing:	Appellant Bryn Mawr Trust Company

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Ryan Martin Moore
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	2929 Arch St Philadelphia, PA 19104
Phone:	215-994-2028
Representing:	Appellant Bryn Mawr Trust Company

Served:	Stephen Paul Chawaga
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Service Date:	12/6/2021
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Phone:	215--55-7-2900
Representing:	Appellant Bryn Mawr Trust Company

Served:	Stephen Paul Chawaga
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	McElroy Deutsch Et Al 1617 John F Kennedy Blvd Ste 1500 Philadelphia, PA 191031815
Phone:	215-557-2900
Representing:	Appellant Bryn Mawr Trust Company

Served:	Steven B. Feirson
Service Method:	eService
Email:	steven.feirson@dechert.com
Service Date:	12/6/2021
Address:	Dechert LLP Cira Centre-2929 Arch St. Philadelphia, PA 19104
Phone:	215-994-2489
Representing:	Appellant Bryn Mawr Trust Company

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Steven B. Feirson
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	Dechert Llp 2929 Arch St Cira Ctr Philadelphia, PA 191042808
Phone:	215-994-2489
Representing:	Appellant Bryn Mawr Trust Company

Served:	Thomas Ben Fiddler
Service Method:	eService
Email:	fiddlert@whiteandwilliams.com
Service Date:	12/6/2021
Address:	1800 One Liberty Place 1650 Market Street Philadelphia, PA 19103-7395
Phone:	215--86-4-7081
Representing:	Appellee David H. Marion

Served:	Thomas Ben Fiddler
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	1800 One Liberty Pl Philadelphia, PA 191037395
Phone:	215-864-7081
Representing:	Appellee David H. Marion

Served:	Thomas R. Hurd
Service Method:	eService
Email:	thurd@mdmc-law.com
Service Date:	12/6/2021
Address:	Suite 1500 1617 JFK Blvd Philadelphia, PA 19103
Phone:	215- 55-7-2942
Representing:	Appellant Bryn Mawr Trust Company

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Thomas R. Hurd
Service Method:	First Class Mail
Service Date:	12/6/2021
Address:	McElroy Deutsch Et Al 1617 John F Kennedy Blvd Ste 1500 Philadelphia, PA 191031815
Phone:	215-557-2900
Representing:	Appellant Bryn Mawr Trust Company

/s/ Michael Lee Kichline

(Signature of Person Serving)

Person Serving:	Kichline, Michael Lee
Attorney Registration No:	062293
Law Firm:	Morgan Lewis & Bockius, LLP
Address:	Morgan Lewis & Bockius Llp 1701 Market St Philadelphia, PA 19103
Representing:	Amicus Curiae Pennsylvania Coalition for Civil Justice Reform Amicus Curiae Pennsylvania Institute of Certified Public Accountants