

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case Number: 2019-000941  
Unpublished Opinion Number: 2022-UP-207 (SC Ct. App. filed May 18, 2022)  
Petition for Rehearing denied June 22, 2022

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Floyd Hargrove, ..... Petitioner

v.

Anthony E. Griffis, Sr., ..... Respondent

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APPENDIX

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SC Bar Number 12213

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Floyd Hargrove, Appellant,

v.

Anthony E. Griffis, Sr., Respondent.

Appellate Case No. 2019-000941

---

Appeal From Beaufort County  
Eugene C. Griffith, Jr., Circuit Court Judge

---

Unpublished Opinion No. 2022-UP-207  
Submitted April 1, 2022 – Filed May 18, 2022

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**AFFIRMED**

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James Arthur Brown, Jr., of Law Offices of Jim Brown,  
P.A., of Beaufort, for Appellant.

Anthony Eric Griffis, Sr., pro se, of Griffis Law Office,  
of Aiken; and Sean Michael Bolchoz, of Bolchoz Law  
Firm, PA, of Hilton Head Island, for Respondent.

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**PER CURIAM:** Floyd Hargrove appeals an order dismissing his claims for breach of fiduciary duty and conspiracy. Hargrove is a former real estate agent who sued the seller's attorney—but not the seller—over a commission Hargrove says he was owed from a 2009 sale. Hargrove argues he did not need an expert affidavit even

though he sued a lawyer for acts done in the lawyer's professional capacity, the statute of limitations had not run, his claims did not violate public policy, and he had standing to bring both claims. On his conspiracy claim, he argues he pled special damages separate from his breach of fiduciary duty claim.

"A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

We affirm the judgment of dismissal. The following are alleged as facts in Hargrove's complaint: the closing occurred in May 2009, Hargrove's employer made a time-sensitive demand for payment in October 2009, and the demand went unanswered. Hargrove filed this lawsuit in 2018—nine years after the transaction closed. The circuit court correctly held these alleged facts established Hargrove knew or should have known by November 2009—when the payment demand expired—that he had a potential cause of action related to the commission.<sup>1</sup> See *Dorman v. Campbell*, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998) ("[T]he statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto."); S.C. Code Ann. §§ 15-3-530 and -535 (2005) (providing three years to sue on contract actions "after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action").

As already mentioned, the defendant in this case—Eric Griffis—is a lawyer who represented the seller in the transaction. Hargrove alleges he did not learn until 2017 that Griffis allegedly instructed the attorney who closed the transaction to not pay a commission. Even so, this does not change that a reasonable person looking for a commission would have been on notice of a claim in 2009 when the commission was not paid. Additionally, a reasonable person would have also been on notice of a claim when the time-demand to pay the commission went unanswered.

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<sup>1</sup> Though Hargrove did not file this case until 2018 and has never filed suit against the seller, the complaint alleged Hargrove sued his former employer over the commission. There, but not here, he sued within three years of November 2009.

Though the statute of limitations issue is dispositive,<sup>2</sup> we note our agreement with the circuit court that Hargrove needed to submit an expert's affidavit to support his fiduciary duty claim because there is no allegation in the complaint that Griffis acted outside the scope of representing his client; thus, this is necessarily a professional negligence case. We hasten to add that it seems firmly established that Griffis did not owe Hargrove a fiduciary duty. Griffis did not represent Hargrove. Griffis was obligated to follow the instructions of his client—the seller. We are not aware of any rule allowing Hargrove to turn a breach of contract action against the seller into a conspiracy claim against the seller's lawyer. For these reasons, the circuit court's order of dismissal is

**AFFIRMED.**<sup>3</sup>

**THOMAS, MCDONALD, and HEWITT, JJ., concur.**

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<sup>2</sup> See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (2008) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

<sup>3</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.



THE STATE OF SOUTH CAROLINA  
Court of Appeals

-----  
APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

-----  
Appellate Case Number: 19-00941  
Opinion Number: 2022-UP-207  
-----

Floyd Hargrove ..... Appellant  
v.  
Anthony E. Griffis, Sr., ..... Respondent

-----  
PETITION FOR REHEARING  
-----

**APPELLANT FLOYD HARGROVE** respectfully petitions for rehearing pursuant to Rule 221(a), SCACR, on the basis that this Court overlooked and misapprehended material facts and principles of law in its unpublished per curiam opinion affirming the dismissal of his claims of breach of fiduciary duty and conspiracy on May 18, 2022. *Hargrove v Griffis*, 2022-UP-207 (SC Ct App filed May 18, 2022). Appellant is requesting that this Court rehear all issues raised on direct appeal and relied upon by the circuit court in its dismissal because this Court relied upon contract law analysis in its dispositive ruling, overlooking the facts and law cited by Appellant, and cited no law in its discussion in dicta of some of the other issues. However, at the outset, Appellant would note the two most significant issues which were misapprehended or overlooked: 1) that the statute of limitations accrual date of November, 2009 was modified by an alternate payment arrangement, see Issue I(B) below, and 2) that a watershed opinion changing

the law concerning the elements of the tort of civil conspiracy issued after the briefing of this case<sup>1</sup> should have been applied retroactively.

# **I. The Trial Court Erred in Dismissing the Claim of Breach of a Fiduciary Duty**

## **A) An Expert Affidavit was Not Required Because the Complaint Pled a Duty Owed by Respondent to Appellant which Arose Independent of Respondent's Duty to His Client.**

This Court should rehear this issue because the opinion's discussion of the fiduciary relationship omits discussion of the facts pled viewed in a light most favorable to Appellant. The opinion also omits discussion of the law concerning fiduciary duties owed to third parties. Further, the discussion omits analysis of the expert affidavit requirement as written in the applicable statute.

Appellant's complaint averred that Respondent was not his attorney. ROA, p. 54, ¶¶'s 44 & 47. Appellant pled facts establishing his equitable interest in a portion of the sales commission. ROA, pgs. 51-52, ¶¶'s 4 - 18. Appellant pled that Respondent informed closing counsel not to pay any commission. ROA, p. 54, ¶¶'s 43 - 51<sup>2</sup>.

Respondent owed a duty of fair dealing to third parties with interests in the closing such

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<sup>1</sup>This opinion, *Paradis v Charleston County School District*, 861 SE2d 774 (SC 2021), was provided to this Court on July 19, 2021, pursuant to SCACR Rule 208(b)(7). This opinion was refiled by the Supreme Court on August 18, 2021.

<sup>2</sup>Respondent's alleged assertion to closing counsel that no commission was due, pled in Appellant's complaint, is directly contradicted by Respondent's Answer and attached Exhibits in which he avers that the commission would be paid in an alternate fashion. See ROA, pgs. 58 - 59, ¶ 5. Appellant asserts this contradiction, viewed in the light most favorable to his cause, suggests an attempt to extinguish Appellant's equitable interest.

that an incorrect statement interfering with these interests would be unfair.<sup>3</sup> See *Stiles v Onorato*, 457 SE2d 601, 602 (SC 1995)(citing with approval *L & H Airco, Inc. v. Rapistan Corp.*, 446 NW2d 372 (Minn.1989) for the proposition that an attorney may be held liable for “affirmative misrepresentations”) & SCACR Rule 407, Rule 4.4, n.1 (“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but *that responsibility does not imply that a lawyer may disregard the rights of third persons.*”)(emphasis added). Appellant’s complaint pled facts under which such a duty arose. The unpublished opinion does not discuss *Stiles* or the multiple cases analyzing duties owed to a third party or applying these principles to the pleadings in the light most favorable to Appellant.

Likewise, rehearing is proper because of the statutory limitation on the need for an expert affidavit. An affidavit is required by statute when a complaint alleges “professional negligence.” SC Code Section 15-36-100(B). In contrast, an affidavit is not required when a complaint avers “negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.” SC Code Section 15-36-100(C)(2).

The opinion issued by this Court omits discussion of the statutory language but instead indicates an affidavit is required because Respondent acted within “the scope of representing his client.” While undersigned can imagine that such an interpretation is reasonable, this “scope of representation” language does not appear in the statute. Instead, the language triggering the need for an affidavit is “professional negligence.”

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<sup>3</sup> As to the proposition that the question of whether a fiduciary relationship exists is an equitable one, see *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 152 (SC Ct App 1987), overruled by *Paradis v. Charleston Cnty. Sch. Dist.*, 861 S.E.2d 774 (SC 2021).

Appellant concedes that there is case law indicating that a claim of breach of a fiduciary duty merges with a legal malpractice claim when they arise from the same duty, but this is just not the situation here because the Complaint averred that there was no attorney-client relationship between Appellant and Respondent. ROA, pgs. 51 - 57.

Thus, this Court should rehear this portion of the appeal for the reasons cited above.

**B) The Statute of Limitations Had Not Expired Because the Pleadings Indicated the Payment Date had Changed from the Date of Closing until the Occurrence of Multiple Future Acts**

When pronouncing the only dispositive ruling in this case, this Court's opinion indicated Appellant averred the closing occurred in May 2009 and that, following an unanswered demand (made by a third party), Appellant should have known by November, 2009 that he would not receive his equitable interest in the commission. However, this Court should rehear this portion of the case because both the Complaint and Answer with its attached exhibits indicated that an alternate payment arrangement purported to modify the date the payment was due and imposed conditions precedent to this payment. Further, the Complaint indicated that Appellant was unaware of the new conditions precedent for payment or the change in the identity of the realty to whom this commission would be paid.

Succinctly, Appellant pled that he should have been paid from proceeds disbursed to a realty at the 2009 closing<sup>4</sup>. However, Appellant also pled that he learned for the first time in January, 2018 that an alternate payment arrangement purportedly modified the terms of the payment. ROA, p. 55, ¶¶'s 57 - 69. Respondent's pleading also asserted an alternate payment

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<sup>4</sup>Specifically, the payment would go to the realty for whom the Appellant was working at the time of closing. ROA, p. 52, ¶ 9.

arrangement. ROA, pgs. 58 - 59, ¶¶'s 5 - 10 & pgs. 69, 75, and 77.

On page 69 of the Record, this purported payment arrangement required the occurrence of at least two significant conditions precedent to the accrual of any time for payment: 1) the development and construction of at least 10 “residences” upon the land sold through Appellant’s real estate efforts and 2) the sale of 10 of these residences. See ROA, p. 69, ¶ 11 (“Said amount, however, to be paid in equal installments of Ten Thousand and NO/100 (\$10,000.00) Dollars each simultaneously with the Release Payments for the first ten (10) Residences.”). Despite Respondent’s pleading indicating that Appellant’s “right to a commission pursuant to the Contract dated August 2, 2007, were voided by the default of the Purchaser (BDG) under that contract,” the exhibits attached to this pleading indicated that “payment of the Brokerage fee ... described in the contract *shall continue* to be payable by Seller to Southern Lifestyle Group.”<sup>5</sup> ROA, p. 60, ¶ 17 & p. 69, ¶ 11 (emphasis added to the second quote).

Thus, this Court should rehear this portion of the appeal and consider the averred modification to the payment arrangement affecting the accrual date of the cause of action for non-payment. This Court should also consider the conditions precedent imposed in the averred modification including the necessary development of the property, the construction of at least 10 residences and the sale of 10 of these homes. At worst, the Court should remand this matter on this ground to allow undersigned to plead the possible 10 dates upon which these conditions occurred. Viewed in the light most favorable to Appellant, it would appear there could be 10 different statute dates depending on the occurrence of the conditions precedent.

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<sup>5</sup>While not explicitly referenced in the pleadings, the reference in this portion of the record to Southern Lifestyles suggests that is the realty for whom Appellant was working at the time the original contract was signed in 2007, when viewed in the light favorable to Appellant.

**C/D) Public Policy Was Not Violated by Appellant's Causes of Action and Appellant had Standing to Sue**

This Court should rehear the appeal to the extent it does not overrule the circuit court's order finding that public policy prevented Appellant from filing a suit for damages because the commission could not be paid directly to him. Further, this Court should rehear the portion of the appeal indicating that he did not have standing. The trial court's order of dismissal did not cite any law concerning either of these separate grounds and this Court did not address either issue as it applied to either cause of action.

Succinctly, the Complaint alleged that Appellant did not receive his equitable interest in the commission. ROA, p. 52, ¶¶ 15, 17, & 18; p. 54, ¶52. This portion was pled as seventy (70%) of the full commission. Not only is pursuit of this claim not improper on policy grounds but in fact is allowed by law including the right to redress a grievance and the right to pursue a civil claim guaranteed as a constitutional right.

Finally, Appellant had standing. One with a financial interest in a controversy ordinarily will have standing to sue. *Lee v. Chesterfield Gen. Hosp., Inc.*, 344 S.E.2d 379, 384 (SC Ct. App. 1986), overruled on other grounds by *Paradis v. Charleston Cnty. Sch. Dist.*, 861 S.E.2d 774 (SC 2021). This Court's opinion itself indicated sufficient pleading of a financial interest when it indicated Appellant should have sued a different person (the seller) under a different theory of recovery (Breach of Contract).

Thus, undersigned respectfully requests that this Court rehear these issues and reverse the ruling of the lower court on these grounds.

## **II. The Trial Court Erred by Dismissing the Claim of Civil Conspiracy**

This Court should rehear the portion of the appeal concerning the claim of civil conspiracy and retroactively apply the watershed change in law announced by the South Carolina Supreme Court in the case captioned as *Paradis v. Charleston Cnty. Sch. Dist.*, 861 S.E.2d 774 (SC 2021). In *Paradis*, the Supreme Court overruled more than 40 years of precedent and indicated it was “returning to our long-standing precedent pre-*Todd*,” clarifying the proper elements required to be pled in a complaint asserting civil conspiracy. *Paradis*, at 780. The *Paradis* Court only precluded retroactive application of this ruling to cases which were not final and had “already been tried under the *Todd* framework.” *Paradis*, at 781.

The case at bar only proceeded to the pleading stage and, as indicated by the date of this Court’s opinion, is not yet final. Thus, this change in law is to be applied retroactively to Appellant’s cause.

### **A) An Expert Affidavit Was Not Required**

An expert affidavit was not required as to the cause of action for civil conspiracy because this cause did not involve a claim of professional negligence. In fact, the *Paradise* Court’s discussion of civil conspiracy claims provides an elementary basis to distinguish this cause from claims of negligence because “civil conspiracy is an intentional tort.” *Paradise*, at 780, n. 9. Further, it would turn the professional relationship between the seller and Respondent on its head to find that a combination of two people seeking to prevent, delay and/or conceal payment obligations and the timing of those obligations would constitute part of the representation of the seller. Both pleadings, the Complaint and Answer with exhibits, indicate that a commission should have been paid but no pleading averred that any payment had been made.

Thus, for the simple reason that civil conspiracy is an intentional tort and not one sounding in negligence, no expert affidavit was required. This is even more so the case when all averred facts pointed to the need for payment of a commission but at the same time indicated no commission had been paid for a multitude of reasons not yet explored through either the discovery or trial process.

**B) The Statute of Limitations Had Not Run**

The statute of limitations had not run as to civil conspiracy because civil conspiracy is a continuing tort and each overt act extends the scope of the conspiracy. This suit was filed in July, 2018. That was less than one year from Appellant's first notification that the non-payment was occasioned by Respondent informing the closing lawyer that no commission was due. This suit was also filed within six months of Respondent informing undersigned counsel that a different payment arrangement premised on the construction and sale of 10 residences had been made.

This Court should consider the email from Respondent to undersigned refocusing the non-payment issue from the 2009 closing to the 10 lot sale arrangement as an overt act. However, if it is true that the commission was not due at the 2009 closing but, instead, after the closing of 10 different residences not yet constructed at the time of the 2009 closing, then the omission of the 10 partial payments, due upon these 10 sales, would each be an overt act.<sup>6</sup>

South Carolina has found that some torts should be considered continuing torts for purposes of the statute of limitations. See *Silvester v. Spring Valley Country Club*, 543 S.E.2d

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<sup>6</sup>Of course, no claim for commission would be ripe until the residences were constructed and sold.

563, 567 (SC Ct App 2001)(Finding a claim of nuisance may be considered a continuing tort). Likewise, other states have also made such findings in both similar and dissimilar contexts. See *Eubank v. Van-Riel*, 221 N.C. App. 433, 727 S.E.2d 25 (NC 2012)(Discussing various situations in which the “continuing wrong doctrine” applies); *Mears v. Gulfstream Aerospace Corp.*, 225 Ga. App. 636, 640, 484 S.E.2d 659, 664 (GA 1997)(Discussing the continuing tort doctrine as related to a claim of intentional infliction of emotional distress); *Everhart v. Rich's, Inc.*, 229 Ga. 798, 802, 194 S.E.2d 425, 428 (GA 1972)(Discussing application of the theory of continuing tort whenever “any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time.”); and *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 787, 598 P.2d 45, 53 (CA 1979)(citing a litany of cases as support for application of the “last over act” doctrine to a claim of civil conspiracy.”).

Thus, Appellant pled overt acts which occurred within a year of the filing of this complaint which furthered the goal of depriving Appellant of his equitable interest in his portion of the commission proceeds.

**C/D) Public Policy Was Not Violated by Appellant’s Causes of Action and Appellant had Standing to Sue**

Appellant incorporates by reference the arguments contained in Part I, C & D of this petition addressing these same issues above.

**E) Appellant Pled Special Damages**

This Court should rehear this portion of the appeal to analyze the pleading of special damages. Apart from the change in law expressed in *Paradis*, Appellant pled two types of special damages: 1) the costs of pursuing a different suit against his former employer when an

alternate payment arrangement was made or discussed and 2) the loss of investment from the delay in receiving the payment as envisioned in the original contract for sale entered between the seller and buyer. ROA, p. 55, ¶¶s 70 & 71.

These two damages were not claimed as resulting from the first cause of action. The damage claimed under that cause of action was the loss of the equitable interest in the commission. Under the “force in numbers” theory, these alleged special damages might not have resulted had there not been a combination of actors.

Nonetheless, the *Paradis* case removes this element from the pleading requirements and this ruling should be applied retroactively to Appellant’s case.

Thus, this Court should rehear and address this portion of the circuit court’s ruling.

### CONCLUSION

Therefore, Appellant respectfully requests that this Court grant the petition to rehear this case, reverse the rulings of the trial court and remand this matter to the Beaufort County Court of Common Pleas. Alternatively, this Court should rehear this matter and remand this case to the trial court for retroactive application of the *Paradis* decision as to the civil conspiracy claim.

Respectfully submitted by,

/s/ James A. Brown, Jr.  
James A. Brown, Jr.  
SC Bar Number: 12213  
Attorney for Appellant Hargrove

June 1, 2022  
Beaufort, SC

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**RECEIVED****Jun 01 2022****SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
Court of Appeals

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APPEAL FROM BEAUFORT COUNTY,  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

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Appellant Case Number: 19-00941

Opinion Number: 2022-UP-207  
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Floyd Hargrove.....Appellant.

v.

Anthony E. Griffis, Sr.,.....Respondent.

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CERTIFICATE OF SERVICE  
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I certify that I have served copies of Appellant's Petition for Rehearing, by electronic copies of these items, on June 1, 2022. Due to the filing procedure engendered by the Covid-19 pandemic, the Petition for Rehearing and Certificate of Service were emailed to the following attorneys at the following email addresses: Anthony E. Griffis, Sr. At [tonygriffis@gmail.com](mailto:tonygriffis@gmail.com), and his Attorney of record, Sean Michael Bolchoz at [sbolchoz@bolchozlaw.com](mailto:sbolchoz@bolchozlaw.com).

June 1, 2022

s/ James A. Brown, Jr.  
James A. Brown, Jr.  
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Attorney for Appellant

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June 1, 2022

**VIA E- FILING ONLY****ctappfilings@sccourts.org**

The Honorable Jenny Abbott Kitchings

Clerk of Court

South Carolina

Court of Appeals

P. O. Box 11629

Columbia, SC 29211

Re: Floyd Hargrove v. Anthony E. Griffis, Sr.; Appeal Court Number: 19-00941

Clerk:

Under cover of this letter please find enclosed Appellant's Petition for Rehearing and Certificate of Service for the same. Also enclosed with the mailed copy of this letter is a check in the amount of \$50.00 which represents a filing fee for this Petition. Please contact me if you have any questions.

Sincerely,

/s/Jim Brown

Jim Brown

cc via Email w/attachments **ONLY**

Anthony E. Griffis w/enclosures &amp; certificate of service

Sean Bolchoz w/enclosures &amp; certificate of service

Floyd Hargrove w/enclosures &amp; certificate of service

# The South Carolina Court of Appeals

Floyd Hargrove, Appellant,

v.

Anthony E. Griffis, Sr., Respondent.

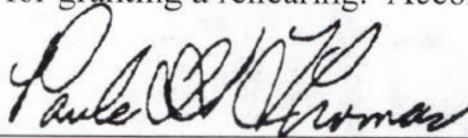
Appellate Case No. 2019-000941

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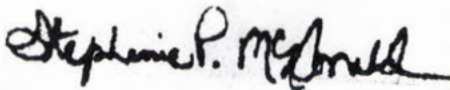
## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

James Arthur Brown, Jr., Esquire  
Anthony Eric Griffis, Sr., Esquire  
Sean Michael Bolchoz, Esquire  
The Honorable Eugene C. Griffith, Jr.

**FILED**  
**Jun 22 2022**

THE STATE OF SOUTH CAROLINA  
Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

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Common Pleas Number(s): 2018-CP-07-01449  
Appeal Court Number: 19-00941

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Floyd Hargrove ..... Appellant

v.

Anthony E. Griffis, Sr., ..... Respondent

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APPELLANT'S FINAL BRIEF

---

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Attorney for Appellant

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JAN 21 2020  
SC Court of Appeals

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## **STATEMENT OF THE ISSUES ON APPEAL**

- I. Did the Trial Court err in dismissing Appellant's Cause for Breach of a Fiduciary Duty?
  - A. Was an expert affidavit required in a claim against an attorney who was not in privity of contract with the Appellant making the claim?
  - B. Was Appellant's claim timely made when filed within one year of the closing attorney notifying Appellant that Respondent was the cause of the non-payment of a realtor commission owed to Appellant?
  - C. Was Appellant barred by public policy from recovering his portion of the realtor fees because he was not a broker in charge, but instead only the realtor who made the sale?
  - D. Did Appellant have standing to pursue his claim of breach of a fiduciary duty?
- II. Did the Trial Court err in dismissing Appellant's Cause for Conspiracy?
  - A. Was an expert affidavit required in a conspiracy claim alleging an attorney conspired with others, including non-lawyers, to conceal tortuous conduct through an unauthorized alternative payment arrangement of a real estate commission?
  - B. Was Appellant's conspiracy claim timely made when filed within 6 months of Appellant's discovery of an unauthorized modification of the terms of the real estate commission payment?
  - C. Was Appellant barred by public policy from recovering damages caused by a conspiracy to cover up tortuous conduct?
  - D. Did Appellant have standing to pursue his claim of conspiracy?
  - E. Did Appellant sufficiently plead special damages?

## **STATEMENT OF THE CASE**

Appellant filed a summons and complaint on or about July 18, 2018. (R. p. 50-57). This complaint alleged two causes of action, breach of fiduciary duty and conspiracy, over 86 paragraphs pled within seven pages. R, p. 51-57. Appellant sought a jury trial as to the issues of liability and damages. (R. p. 51).

An answer was filed on November 14, 2018. (R. p. 58). The answer contained a general denial as to both causes of action, an objection as to the existence of a fiduciary duty, and an objection to the pleading as to special damages. (R. p. 58-61). The answer also complained of the failure to provide an expert affidavit, of the running of the statute of limitations, of the public policy preventing recovery by Appellant, a lack of standing, and accord and satisfaction. (R. p. 61).

The answer included four exhibits. (R. pp. 63-79). These exhibits included documents relating to real estate negotiations. (R. pp. 63-73). These exhibits also included emails and letters discussing the payment of the real estate commission of which Appellant complains. (R. pp. 74-79).

Respondent also filed a Notice and Motion to Dismiss pursuant to SCRPC Rule 12(b)(6) and SC Code Section 15-36-100 on November 14, 2018. This motion asserted dismissal was appropriate for the same reasons asserted as defenses in the answer except for the general denial, the denial as to the existence of a fiduciary relationship and the accord and satisfaction. A hearing was held on this motion on January 8, 2019.

The Honorable Eugene C. Griffith, Jr. presided at this hearing. The Appellant was represented by undersigned counsel. Respondent represented himself.

Argument was held during which the Court referenced the pleadings in this case as well as pleadings in a related case which was referenced in the complaint. (R. p. 80-120). The Court also considered the evidence attached as exhibits to the answer. After taking the matter under advisement, the Court requested that Respondent prepare a proposed order granting the motion.

Undersigned filed objections to the proposed order. (R. pp. 14-18). Respondent filed a response to these objections. (R. pp. 19-20). The Court signed the order without modification and it was filed on March 15, 2019.

Undersigned then filed a Motion to Alter or Amend. (R. pp. 27-31). Respondent filed a response to this Motion. (R. p. 32). The Court signed a Form 4 order denying the Motion on April 25, 2019. (R. p. 24).

A Notice of Appeal was filed on May 28, 2019. This Notice was served upon Respondent on May 28, 2019. This brief follows.

### **STATEMENT OF FACTS**

On or about July 18, 2018, Appellant filed a complaint asserting two causes of action. The first cause of action alleged a breach of fiduciary duty and the second cause of action alleged a civil conspiracy. The following facts are pled in the complaint.

Appellant worked as a real estate agent who procured the sales contract between the seller of a piece of commercial real estate and the buyer. (R. p. 51, ¶ 4-6). The sales price was averred as four million dollars (\$4,000,000.00). (R. p. 51, ¶ 7). The two point five percent (2.5%) commission equaling one hundred thousand dollars (\$100,000.00) was owed to the realty for whom the Appellant was working at the time of closing. Complaint, ¶ 9. Respondent was the attorney representing the seller who owed the commission. (R. p. 54, ¶ 44).

Appellant was working for Citadel Realty at the time of the closing. (R. p. 52, ¶ 13). Appellant was owed seventy percent (70%) of this commission. (R. p. 52, ¶ 15). Despite assurances from Citadel Realty that its legal counsel would obtain the commission, Appellant was never paid. (R. p. 52, ¶ 19-23).

Appellant then made a demand of Citadel Realty which was unmet. (R. pp. 52-53, ¶ 24-25). Appellant filed suit against Citadel Realty on November 12, 2013. (R. p. 53, ¶ 26). This suit alleged three causes of action. (R. p. 53, ¶ 27).

Appellant filed a motion for default judgment followed by Citadel's motion to dismiss which, following conversion to a summary judgment motion, was granted. (R. p. 53, ¶ 28-31). However, Appellant filed a motion to alter or amend. This motion was partially granted and a part of the case was restored to the docket. (R. p. 53, ¶ 32).

The matter was mediated on May 11, 2016. At this time, Appellant was provided a document from an attorney involved in the closing which assured counsel for Citadel Realty that the commission would be paid. (R. p. 53, ¶ 34). Appellant had not seen this document before despite discovery requests. (R. p. 53, ¶ 35).

Appellant then sought to depose the attorney for the purchaser of the property and in doing so was provided a letter from the closing attorney. (R. p. 53, ¶ 36-40). The closing attorney informed Appellant that no commission was paid because Respondent told him not to pay the commission. (R. p. 54, ¶ 43). This July 19, 2017 letter was the first time that Appellant learned that another party caused the non-payment of the commission to anyone. (R. p. 54, ¶ 43-49).

According to the letter, Respondent told the closing attorney that no real estate

commission “remained due at the time of closing.” (R. p. 54, ¶ 50). Following the receipt of this information, undersigned contacted Respondent indicating an intention to file suit over this conduct. (R. p. 54, ¶ 53-55). Respondent acknowledged in a January 23, 2018 email that no funds were allocated for the commission at all. (R. p. 54, ¶ 56).

Respondent continued by asserting that alternate payment arrangements were made by which the commission would be paid at some future time following a condition precedent involving the development of the property. (R. p. 55, ¶ 57-58). Appellant was not aware of any alternative agreement, did not agree to the same and is unsure whether the condition precedent has occurred. (R. p. 55, ¶ 59-62). Appellant does not know if such an alternative agreement was made with others and only learned of this assertion by Respondent through the January 23, 2018 email.

Appellant spent resources litigating the case against Citadel Realty. (R. p. 55, ¶ 70). Appellant lost the value of his portion of the commission. (R. p. 55, ¶ 72). Appellant lost the investment opportunity to the money if an alternative payment arrangement was made. (R. p. 55, ¶ 71).

### **STANDARD OF REVIEW**

“A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true. ...[The court must] construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true. If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard applied by the trial court. This Court is free to decide questions of law, such as whether South Carolina recognizes a certain cause of action, with no particular deference to the trial court.” *Fabian v. Lindsay*, 765 S.E.2d 132, 136 (SC 2014).

### **ARGUMENT**

The trial court erred in dismissing both of Appellant’s causes of action against Respondent.

Aside from the particular arguments presented below, the trial court’s ruling is erroneous because he did not view the averments in the light most favorable to Appellant. Further, the trial court considered evidence not pled in the sworn averments. (R. pp. 63-79). This converted the motion before the court to a summary judgment motion under SCRCP Rule 56, despite the statements in the Order Granting Motion to Dismiss to the contrary.

When certain outside information is considered, the review is converted to a summary judgment motion. See SCRCP Rule 12(c). When such occurs, all parties are to be given a “reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” SCRCP Rule 12(c). The court’s dismissal is then erroneous because Appellant had not been able to engage in discovery in the suit by the time the motion was heard. See R., p. 113, l. 23- p. 114, l. 2.

### **I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S CLAIM OF BREACH OF A FIDUCIARY DUTY**

#### **A. An Expert Affidavit Was Not Required**

The trial court erred by finding a claim of breach of a fiduciary duty made against an

attorney was a claim of “professional negligence” requiring an expert affidavit at the pleading stage. An expert affidavit was not required because the fiduciary duty owed Appellant did not arise out of a professional relationship between Appellant and Respondent. The trial court’s order implicitly and incorrectly equated the fiduciary duty owed to Appellant by Respondent with one owed by attorney to his client. Because the trial court extended such a requirement to a cause of action not alleging professional negligence, this Court should reverse.

A plaintiff is required to obtain an expert affidavit supporting professional liability when asserting claims against some professionals. An attorney is such a professional. SC Code Section 15-36-100. However this pleading requirement is limited to actions involving claims of “professional negligence.” SC Code Section 15-36-100(B).

South Carolina law requires an expert affidavit when a claim for professional negligence is brought against an attorney by one in privity with that attorney. See *H and H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 748 SE2d 72 (SC 2013).

South Carolina law “imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina.” *Rydde v. Morris*, 675 S.E.2d 431, 435 (2009). “A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 170 (2012). Privity, in a legal malpractice setting is “established by the existence of an attorney-client relationship.” *Fabian v. Lindsay*, 765 S.E.2d 132, 136 (2014).

In contrast, to plead a claim for breach of fiduciary duty, the plaintiff must allege: (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and

(3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012). “A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Pitts v. Jackson Nat. Life Ins. Co.*, 574 S.E.2d 502, 507 (SC Ct. App. 2002). The South Carolina courts have recognized that an attorney may be liable for breach of a fiduciary duty. See *RFT Mgmt. Co.*, 732 SE2d 166, 173 (SC 2012) (“Our courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship.”)(Internal quotation omitted).

The South Carolina Supreme Court has held that a breach of fiduciary duty claim merges with a professional negligence claim when the fiduciary duty arises “out of the duty inherent in the attorney-client relationship.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012). On the other hand, a claim for breach of fiduciary duty, as a general matter, is distinguishable from a claim for legal malpractice because it can arise in contexts other than one involving an attorney-client relationship. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012). One must plead an obligation which “arises out of a duty other than one created by the attorney-client relationship or because it is based on different material facts” to distinguish one’s breach of fiduciary duty claim from a legal malpractice claim. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012).

Further, the South Carolina Supreme Court has expressly held that an “attorney may be held liable”... “where, in addition to representing his client, he breaches some independent duty to a third person...” *Stiles v. Onorato*, 457 SE2d 601, at 602 (SC 1995). The *Stiles* Court

reached this holding following citation with approval to various cases from other jurisdictions which “recognize[d] that an attorney may be held liable where he acts in bad faith.” *Stiles*, at 602. The *Stiles* opinion specifically mentioned that “an attorney may be held liable arising out of a conspiracy with his own client.” *Id.*

As mentioned by the *Stiles* Court, an attorney’s liability for a claim, as an exception to the general rule of immunity<sup>1</sup>, arises when such a claim is made for “acts taken outside the scope of a professional relationship.” *Stiles*, at 602, distinguishing *Gaar v. North Myrtle Beach Realty Co., Inc.*, 339 SE2d 887 (SC Ct. App. 1986)(emphasis added).

The case of *LaBerre v Gold*, cited approvingly by the *Stiles* Court, held that an attorney may be liable when his actions in a real estate closing converted money owed to a third party to the benefit of his client. *Stiles*, at 602, citing *Laberre v Gold*, 520 So2d 1327 (Miss 1987). In *Laberre*, the sole attorney incorrectly disbursed purchase proceeds and failed to satisfy the obligations to a third party creditor. The *Laberre* Court noted that the attorney, Laberre, only represented the party who improperly converted the money. Nonetheless, the *Laberre* Court held: “[w]hile an attorney cannot be held liable to third parties for his actions made in furtherance of his role as counselor, he has a duty to refrain from committing tortuous acts against third parties.” *LaBarre v. Gold*, 520 So. 2d 1327, 1331 (Miss. 1987).

Thus, attorney liability may take the form of other torts aside from professional

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<sup>1</sup>This appeal does not involve questions of immunity or whether a fiduciary duty was owed by Respondent to Appellant as neither of these questions were raised. The sole issue addressed in this portion of the brief is whether the claims brought by a third party realtor seeking funds derived from a listing agreement were claims of “professional negligence” when the alleged tortfeasor is an attorney. If so, then an affidavit would be required. If not, then the trial court erred in granting a 12(b)(6) dismissal on this ground.

negligence. Such liability can arise out of a special duty owed to third parties. As such, this conduct is beyond the reach of the statute requiring an expert witness affidavit.

The expert affidavit requirement of SC Code § 15-36-100 has never been extended by statute or case law to apply to an action involving a claim of breach of fiduciary duty brought by a third party for an act or omission arising outside of an attorney client relationship between the plaintiff and the defendant.

In the case at bar, Appellant pled that the liability arose from a duty owed by Respondent to Appellant, a third party, and was not pled as arising out of the attorney client professional relationship between Respondent and Appellant.

The action pled in the case at bar included a claim of breach of a fiduciary duty asserted by a real estate agent (Appellant) against an attorney (Respondent). As pled, Respondent represented the seller in a real estate transaction. (R. p. 54, ¶ 44). As pled, Respondent told the closing attorney that no real estate commission “remained due at the time of closing.” (R. p. 54, ¶ 50).

Specifically, the complaint did not allege privity between the Appellant and the Respondent. As such no claim of legal malpractice could have been brought by the Appellant against the Respondent. Thus, the pleading contained no professional negligence claim to merge with the breach of a fiduciary duty claim and no such professional negligence claim could have been made.

While the professional relationship between Appellant and the seller was an important factor as to any joint liability, the fiduciary duty arose out of the agency arrangement between Appellant’s brokerage and the seller. See *Rft Mgmt. Co, Inc.*, 173 (the duty is distinguishable if

it arose out of a duty owed other than one created by an attorney client relationship.) It may be that the seller was equally liable as to the breach of a fiduciary duty if he personally told the closing attorney to not pay the commission to the broker and no professional relationship would be involved. In this sense, Appellant did not complain of professional negligence.

Thus, the trial court erred in requiring an expert affidavit to a situation in which no professional relationship between the parties at suit existed.

B. The Statute of Limitations Had Not Run

The trial court erred in dismissing Appellant's breach of fiduciary duty claim when he found that the complaint failed to plead due diligence in the discovery of the action against Respondent. To the contrary, the pleading detailed the steps Appellant took to recover the damage he suffered when he was not paid his portion of the proceeds due from the real estate commission. When viewed in the light most favorable to Appellant, the trial court should have allowed discovery on the issue instead of accepting Respondent's version of events that he did not commit any tortuous conduct.

By statute, the statute of limitation for a cause of action for breach of fiduciary duty is three years. SC Code § 15-3-530. The law clarifies the triggering date for such a time line indicating that the action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." SC Code § 15-3-535. The one seeking to impose the bar of the statute of limitations rests upon the one asserting it. *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 806 (D.S.C. 2011), on reconsideration in part (Jan. 11, 2012)(Internal quotations and citations omitted). If the material facts as to whether the statute of limitations is a bar are disputed, the issue is one for the jury. *Id.* When there is

conflicting evidence as to whether a claimant knew or should have known he had a cause of action, the question is one for the jury. *Id.*

To judge whether Appellant exercised due diligence, one must examine the steps taken by Respondent to breach the fiduciary duty owed Appellant and cover up this breach. As pled, Appellant was owed a portion of the proceeds from the commission of a sale of real estate. While the seller owed this money to the broker in charge of the realty company (Citadel Realty) for whom Appellant was working at the time of closing, Appellant originally took suit against this company for a claim of conversion. (R. p. 52, ¶¶ 9, 24-33).

At the mediation and despite previous discovery requests, Appellant learned for the first time that a third party attorney assured Citadel Realty that the commission would be paid. (R. p. 53, ¶¶ 33-35). Prior to the discovery of this document, Appellant believed that non-payment had been caused by the tortuous acts of Citadel in pursuing the money from the closing attorney. Appellant received this letter on May 11, 2016; 26 months before the filing of the suit against Respondent.

As pled, Appellant followed the discovery of this letter with requests to examine the closing documents to learn who did receive the commission money. (R. p. 53, ¶¶ 36-39). On July 19, 2017, Appellant learned for the first time that no commission had been paid at the closing. (R. pp. 53-54 ¶¶ 40-42). This letter also indicated that Respondent caused this non-payment through his affirmative act of misleading the closing attorney that no commission was due. (R. p. 54, ¶¶ 43-53).

Appellant had no reason to believe the commission had been withheld from everyone or that such withholding was caused by Respondent's statement. In fact, the statement of the

closing attorney implicating Respondent in a tort is not something which would be expected from any closing documents or other related items. It is just not normal to believe that an attorney would prevent payment where due because such a person is one in whom others trust to exercise fair dealings with third parties in real estate transactions. See Argument IA, above.

But more than being an abnormal action, Respondent and others contrived a cover story which clouded such conduct. As pled, Respondent and others created documents supporting an alternative payment arrangement through which the commission would be paid through the sale of home sites. This cover story was a smoke screen to conceal the truth from Appellant.

In fact, Respondent attempted to deflect liability prior to the filing of the suit by providing undersigned with the cover story in an email sent on January 23, 2018, less than six months before the filing of the instant suit. (R. pp. 54-55, ¶¶ 56-63). It would be illogical to believe that Appellant knew an action against Respondent had accrued when Respondent's assertions to undersigned suggest that the condition precedent for payment of the commission has not yet occurred. (R. p. 74, section 5 and R. p. 77, section 10). Appellant can not have both filed the suit too late and filed the suit too early.

Appellant also pled that this email was another act in the commission of the tort of breach of the fiduciary duty enlarging the time period of the commission of this tort. (R. p. 55, ¶ 69). Appellant filed this suit well within three years of the act of sending this email. At the pleading stage, that is all that is required of Appellant to surpass a challenge under SCRCP Rule 12(b)(6).

Thus, because Appellant exercised reasonable diligence and pled the same, the trial court erred in dismissing the matter on these grounds. Further, Respondent should not be able to assert

a cover story that the commission is not yet due and at the same time assert that the commission was due so long ago that the injury to Appellant through the non-payment of the commission triggered the statute of limitations years ago. Such inconsistent facts, viewed in the light most favorable to Appellant, mandate a reversal of the trial court's order in this regard.

C. Plaintiff's Efforts to Litigate a Controversy and Redress a Grievance of More than Twenty Dollars Did Not Violate Public Policy

The trial court erred when it dismissed Appellant's complaint for breach of fiduciary duty because it found that recovery of monetary damages would violate public policy<sup>2</sup>. No law preventing the recovery of monetary damages by a real estate agent in a tort claim was cited in the Order. (R. pp. 5-6, section 3). Instead, the Order merely indicates that the real estate commission itself could not be paid directly to Appellant at the closing; not addressing the issue of Appellant's right to bring suit to redress the injury caused by the tortuous acts of another.

In the complaint, Appellant pled that he was damaged by the non-payment of the commission due his broker because he did not received his portion. (R. p. 52 & 56, ¶¶ 15-18, & 82). Appellant pled that, while he could not be paid the commission directly, he had an equitable interest in seventy percent (70%) of the commission. (R. p. 52, ¶ 18). The commission amount serves as a yard stick by which a jury could judge the damage caused to Appellant by Respondent's actions in breach of the fiduciary duty owed Appellant.

Contrary to the trial court's reasoning, public policy in South Carolina asserts that the common law abhors a wrong without a remedy. *Page v. Winter*, 126 S.E.2d 570, 574 (SC

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<sup>2</sup>It is not clear that such a dismissal is appropriate in a motion made under SCRCP Rule 12(b)(6).

1962)(“It is the boast and a primary principle of the common law that there can be no wrong without a remedy.”) A dismissal for public policy reasons would deprive Appellant the opportunity to pursue redress from a tortfeasor who caused the injury. Denial of this opportunity would violate public policy more than the receipt of any award to Appellant.

Thus, the trial court erred in dismissing Appellant’s efforts to collect for a breach of fiduciary duty on public policy grounds.

D. Appellant had Standing to File Suit

The trial court erred by finding that Appellant did not have standing to bring the cause of action for breach of fiduciary duty against Respondent. Appellant suffered an injury which was causally related to the Respondent’s actions and it was likely that a favorable outcome in this suit would redress this injury. Nothing more is required to assert constitutional standing.

The United States Supreme Court has defined the principle of standing under the United States Constitution as “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court utilizes a three-part test to evaluate standing: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ ” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130 (internal citations omitted). The South Carolina Supreme Court utilizes

this same test when addressing issues of standing in suits brought in its state courts. *ATC S., Inc. v. Charleston Cty.*, 669 S.E.2d 337, 339 (SC 2008).

In the complaint, Appellant indicated that he was due a portion of a sales commission but had not received these proceeds. (R. p. 52 & 54, ¶¶ 9, 15, 18, 52 & 56). This is an injury in fact. Appellant possessed a legally protected interest in these proceeds and the withholding of these due funds actually injured Appellant by causing him to not receive the money he was due. (R. p. 56, ¶ 82).

Appellant indicated in the complaint that Respondent's actions caused the funds to be withheld and not disbursed at closing. (R. p. 54, ¶¶ 43- 45, 49, 50, & 51). Specifically, Appellant pled that "this commission was not paid because the [Respondent] informed [the closing attorney] not to pay any commission." (R. p. 54, ¶ 43). According to the closing attorney Respondent "advised (closing attorney CS and his staff) that no such amount remained due at the time of closing." (R. p. 54, ¶ 50).

Finally, Appellant pled that he was entitled to an award of money to make him whole for his loss in his prayer for relief. (R. p. 56, ¶ 82). It is likely that a monetary award would recoup the money lost when the commission was not paid. This satisfied the third prong of standing.

In comparison to the detailed pleadings addressing the standing concerns, the trial court's order merely stated a one sentence conclusion. (R. p. 6, section 4). This sentence does not include any citation to any law. Instead, this sentence merely restates an assertion that Appellant could not be paid a commission directly, not whether Appellant could receive an award of money from a jury of his peers.

Thus, the trial court erred in dismissing the pleading because Appellant lacked standing to

bring a claim of breach of fiduciary duty.

## **II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM FOR CONSPIRACY.**

### **A. An Expert Affidavit Was Not Required**

The trial court erred in dismissing the claim of conspiracy averred without an expert affidavit because this cause did not assert a claim of professional negligence.

As recounted above, one pleading a cause of action alleging professional negligence must incorporate into the complaint an expert witness affidavit. SC Code § 15-36-100. However, this requirement is limited to claims of professional negligence. A claim that an attorney conspired to commit a tort against a third party does not state a claim for professional negligence when such an act is outside of the professional relationship. *Stiles*, at 602.

In the complaint, Appellant alleged that Respondent and the seller agreed to not pay the sales commission. (R. p. 56, ¶¶ 84 and 85). Appellant averred that the reference to an alternative payment arrangement by Respondent in an email is an overt act in furtherance of the conspiracy. (R. p. 55, ¶ 68). As pled, this email and the alternative payment arrangement is an attempt to conceal the breach of the fiduciary duty pled in the first cause of action.

This agreement between Respondent and the seller is outside of a professional relationship as no such relationship existed between Respondent *and Appellant*. Further, Appellant alleged, unlike the plaintiff in *Stiles*, that Respondent breached an independent duty owed to Appellant. This is the fiduciary duty alleged in the first cause of action. (R. p. 54, ¶ 48). The trial court never found that such a duty did not exist as a matter of law. All the Appellant must do is plead that such a duty existed at this stage.

Further, Appellant pled that the suggested alternative payment arrangement was an attempt to conceal Respondent's acts causing the non-payment of the commission. (R. p. 55, ¶ 70). The concealment of tortuous conduct is not within a normal professional relationship. As indicated by the South Carolina Supreme Court, "attorneys have been held liable for fraud and conversion in conjunction with their representation of clients." *Stiles v. Onorato*, at 602; also see *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn.1989) (attorney who makes affirmative misrepresentations to an adversary or conspires with his or her client may be held liable for fraud); & *LaBarre v. Gold*, 520 So.2d 1327 (Miss.1987) (attorney liable for conversion for improperly paying real estate proceeds only to his client).

Thus, the trial court incorrectly dismissed this matter by erroneously finding that the conspiracy claim was one of professional negligence.

B. The Statute of Limitations Had Not Run

The trial court erred in finding that the statute of limitations had run as to the conspiracy cause of action.

As indicated above, the statute of limitations begins to run three years from the time that a plaintiff discovers through reasonable diligence that he has a cause of action against another. SC Code § 15-3-535. The commission of an overt act such as the promotion of a cover up email is an act committed in furtherance of the conspiracy. Appellant pled that Respondent engaged in an overt act within six months of the filing of this complaint in an effort to further this conspiracy when he presented Appellant's counsel with the sham alternative payment arrangement in a January 23, 2018 email. (R. p. 55, ¶ 68).

Further, Appellant pled that he could not have learned of this alternative payment

arrangement cover up except for the email from Respondent. (R. p. 55, ¶ 63).

Even if the statute of limitations ran as to other conspiracies, the email sent to Appellant was itself proof of an agreement to conceal the breach of the fiduciary duty *in 2018*. This agreement is actionable and was pled within three years of the email. Thus, the trial court erred in dismissing the second cause of actions as outside of the statute of limitations.

C. Plaintiff's Efforts to Litigate a Controversy and Redress a Grievance of More than Twenty Dollars Does Not Violate Public Policy

The trial court erred in dismissing the second cause of action for conspiracy as a violation of public policy.

An agreement to injure a plaintiff which causes special damages is all that is required to plead a cause of conspiracy. Appellant pled that Respondent and the seller entered an agreement. (R. p. 56, ¶ 84 & 85). Appellant pled that Respondent and seller entered this agreement to injure Appellant by depriving his company from receiving the funds to pay his portion of the fee. The special damages which arose from this agreement are pled as the time and expense pursuing suit against Citadel Realty and the loss of investment of the proceeds if in fact the commission is to be paid on a contingency. (R. p. 55, ¶¶ 70 & 71).

Thus, Appellant has sufficiently pled the second cause of action and the trial court's dismissal is erroneous.

D. Appellant had Standing to File Suit

The trial court erred in dismissing the second cause of action for a lack of standing.

As pled, Appellant suffered an actual injury- the non-payment of his portion of the commission, a delay in the payment of his portion if the alternative payment arrangement is

valid, and the time and resources spent pursuing Citadel Realty for non-payment of Appellant's portion of the fee. By the very assertion of Respondent that the alternative payment arrangement caused Citadel, and derivatively Appellant, to no longer be entitled to the commission, Respondent's actions can be linked casually to Appellant's damages. A verdict recompensing Appellant for the special damages pled in paragraphs 70 and 71 of the complaint would address this injury.

Thus, the trial court erred in dismissing the second cause of action for a lack of standing.

E. Appellant Pled Special Damages Separate from the Damages in the First Cause

The trial court erred in dismissing the second cause of action for a failure to plead special damages. Contrary to the court's Order, Appellant did plead special damages in two paragraphs in the body of the complaint and in a third paragraph within the section specifically discussing the second cause of action. Appellant pled damages for the second cause which were different from those asserted in the first cause of action.

To begin, a plaintiff must assert special damages in an action for civil conspiracy.

*Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 875 (SC Ct. App. 2009)(internal citations omitted). While general damages are inferred by the law as the immediate, direct, and proximate result of the act complained of, special damages are not implied at law because they do not necessarily result from the wrong. *Id.* Thus, a plaintiff must specifically allege special damages to avoid surprise to the other party. *Id.*

In the case at bar, Appellant pled that the special damages for the conspiracy included those incurred "because Plaintiff pursued suit against Citadel." (R. p. 55, ¶ 70). The Complaint also indicated that the special damages included the loss of investment created by the alternative

payment arrangement which by its terms delayed any payment of the commission from which Appellant would receive his due portion. (R. p. 55, ¶ 70). These two types of special damages were again reflected in the section of the complaint averring the elements of the conspiracy cause of action. (R. p. 57, ¶ 86).

The pleading of the general damages section for the first cause of action does not include any reference to the “loss of time and resources pursuing alternate legal remedies.” (R. p. 56, ¶ 82). Further, construed in the light most favorable to Appellant, the loss of investment pled as to the alternative payment arrangement in paragraph 71 differs from the loss of investment as to the non-payment of the commission engendered by the breach of the fiduciary duty pled in paragraph 82. While the measure of these two loss of investments might be similar, the alternative payment arrangement delays payment until a condition precedent occurs- the selling of certain parcels of property, while the loss of investment as to the non-payment of the commission is limited to the time the commission was due at the closing until the award by the jury. Thus, these are not the same loss of investment time periods.

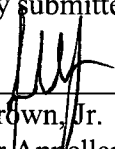
Nonetheless, the special damages suffered by pursuing a claim against Citadel Realty including the loss of time and resources is distinctly pled only as to the conspiracy cause of action and that is all that is required to pass a 12(b)(6) challenge. These damages are unique as to this tortuous conduct. Thus, the trial court erred in dismissing the conspiracy cause of action on this ground.

### **CONCLUSION**

Therefore, this Court should reverse the trial court’s dismissal of both of Appellant’s cause of action. At a minimum, this Court should remand the matter to allow discovery so that

Appellant may oppose what developed into a summary judgment hearing. Otherwise, the Court should remand the matter until the time that any summary judgment motion would be appropriate.

Respectfully submitted by:

  
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THE STATE OF SOUTH CAROLINA  
Court of Appeals

-----  
APPEAL FROM BEAUFORT COUNTY,  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

-----  
Common Pleas Number(s): 2018-CP-07-01449  
Appeal Court Number: 19-00941  
-----

Floyd Hargrove .....Appellant.

v.

Anthony E. Griffis, Sr., .....Respondent.

-----  
CERTIFICATE OF COUNSEL  
-----

I certify that this Final Brief complies with Rule 211(b) as it is identical to the brief previously served except for references to the record and corrections of typographical errors and misspellings.

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THE STATE OF SOUTH CAROLINA  
Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court Of Common Pleas

The Honorable Eugene C. Griffith, Jr.

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Trial Court Case No. 2018-CP-07-01449  
Appellate Case No. 2019-000941

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**RECEIVED**

JAN 30 2020

SC Court of Appeals

Floyd Hargrove.....Appellant,

v.

Anthony E. Griffis, Sr. ....Respondent.

---

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THE STATE OF SOUTH CAROLINA  
Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court Of Common Pleas

The Honorable Eugene C. Griffith, Jr.

---

Trial Court Case No. 2018-CP-07-01449  
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Floyd Hargrove.....Appellant,  
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Anthony E. Griffis, Sr. ....Respondent.

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BRIEF OF RESPONDENT

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Was the Motion to Dismiss converted to a Motion for Summary Judgment, so as to require further discovery?**
- II. Did the trial court err in dismissing Appellant's claims, because Appellant failed to obtain the expert affidavit as required by S.C. Code Ann. §15-36-100?**
- III. Did the applicable period of limitations for Appellant's claims expire and bar his claims?**
- IV. Were Appellant's claims illegal and void as against public policy and bar his claims?**
- V. Did Appellant have standing to bring his action?**
- VI. Did the Conspiracy claim also fail by not being a separate and distinct claim, and also because no special damages were alleged?**

## STATEMENT OF THE CASE

Appellant's Statement of the Case (Appellant's Brief, p. 2-3) is accepted except for the statement "The Court also considered the evidence attached as exhibits to the answer". (Appellant's Brief, p. 3). Respondent is disputing that the Court "considered" the exhibits as evidence, or any other "evidence" except the allegations of the Complaint, which might convert the Motion to Dismiss into a Motion for Summary Judgment. There is no such "consideration" of, or reference to, such exhibit evidence contained in the Order Granting the Motion to Dismiss. However, Appellant is arguing that the Motion to Dismiss was converted to a Motion for Summary Judgment, which would require further discovery. (Appellant's Brief, p. 6, 22). Therefore, this matter is contested and not appropriate for inclusion in the Statement of the Case, Rule 209(b)(1)(C), SCACR.

## STANDARD OF REVIEW

A motion to dismiss for failure to state a cause of action must be based solely on the allegations in the complaint, *Gessette v. SCE&G*, 635 S.E.2d 538 (S.C. 2006). On appeal, the standard for review is whether the Complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief, *Brazell v. Windsor*, 682 S.E.2d 824, 384 S.C. 512 (S.C. 2009). The only relevant "facts" in this appeal are to be found in the dismissed Complaint. (Complaint, R. pp. 51-57).

## ARGUMENT

**I. The Court considered only the unambiguous “facts” alleged in the Complaint, and the Motion to Dismiss was not converted to a Motion for Summary Judgment.**

In the preamble to his Argument, (Appellant’s Brief p. 6), Appellant makes two additional arguments: (1) that the Court did not view his Complaint averments in the light most favorable to him, and (2) that the Motion to Dismiss was converted to a Motion for Summary Judgment because the Judge had received the Answer and Exhibits to the Answer which Appellant argues were “considered” in the Order to Dismiss (thereby converting the Motion to one for Summary Judgment entitling Appellant to discovery).

First, Appellant has not even mentioned in his Brief, much less disputed, the damning admissions in his Complaint, which were cited, “considered” and relied upon by the Court in its Order to Dismiss, (Order, R. pp. 2-8). The undisputed facts “considered” in the Order are unambiguous and leave no room for interpretation (nor do they require a viewing “in the light most favorable” to Appellant, as he asserts). It is undisputed that (1) the Appellant did not attach an expert affidavit to his Complaint, as required by S.C. Code Ann. §15-36-100; (2) the Appellant knew that both closing attorneys failed to respond to the 15-day demand letter (for payment of the commission) sent on October 29, 2009 – thereby starting the clock for the statute of limitations, (Complaint ¶¶20-24, R. p. 52); (3) the Appellant knew that it was illegal to pay the commission directly to him, (Complaint ¶16, R. p. 52). Further, any such direct payment would breach the contract with the Seller regarding the commission. (Complaint ¶9, R. p. 52) (and arguably open the Seller to a breach of contract claim from the Broker should the commission be paid directly to the

salesman).

Appellant misquotes Rule 12(c) SCRCP which states when “matters are *presented to and not excluded by the Court*, the motion shall be treated as one for summary judgment...” (emphasis added to show Appellant’s misinterpretation of the rule). Here, the Court excluded everything but the allegations in the Complaint; nothing in the Order to Dismiss, (Order, R. pp. 2-8), goes outside of the four-corners of the Complaint.

Further, S.C. Code Ann. §15-36-100(F) requires that “the defendant raise the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading”. In order to comply with the statutory requirements, Respondent had to “present” his Answer to the Court when the Motion to Dismiss was filed. Using Appellant’s argument, the mere presenting of the Answer and Exhibits automatically converts the Motion to Dismiss to a Motion for Summary Judgment. This is not a correct interpretation of the statute and Rule 12(b)(6) SCRCP. Further, the Answer (first sentence, Answer p.1, R. p. 58), clearly states “*Subject to my Motion to Dismiss filed herewith*, I, Anthony E. Griffis, Sr., as Defendant, answer the Complaint...”

**II. The trial court did not err in dismissing Appellant’s claims for failing to obtain the expert affidavit as required by S.C. Code Ann. §15-36-100.**

South Carolina Code Ann. §15-36-100 mandates the filing of an affidavit of an expert witness contemporaneous with the filing of the complaint, if the complaint is alleging negligence against a licensed professional as listed in the statute. S.C. Code Ann. §15-36-100(G)(2) includes ‘attorneys at law’ in the professions covered by the

contemporaneous filing requirement. The statute does not require a direct “attorney-client” relationship—only that an attorney is accused of malpractice, whether it is by a client or someone claiming a “third party” beneficiary status.

In his Brief, Appellant concedes that an affidavit would be required for claims of professional negligence. “The sole issue addressed in this portion of the brief is whether the claims brought by a third party realtor seeking funds derivative to a listing agreement were claims of “professional negligence” when the alleged tortfeasor is an attorney. If so, then an affidavit would be required.” (Appellant’s Brief, p. 9, n.1). Appellant further argues that the affidavit statute should not apply to a claim involving breach of fiduciary duty brought by a third party for an act or omission arising outside of an attorney-client relationship between the plaintiff and the defendant. (Appellant’s Brief, p. 10).

Appellant is accusing Respondent of breaching a fiduciary duty to him. (Complaint ¶¶74-83, R. p. 56). However, he admits that this “duty” arose out of the attorney-client relationship between Respondent and the Seller. (Complaint ¶75, R. p. 56). Appellant further admits in his Brief: “While the professional relationship between Appellant and the seller was an important factor as to any joint liability, *the fiduciary duty arose out of the agency arrangement between Appellant’s brokerage and the seller.*” (Appellant’s Brief, p. 10-11),<sup>1</sup> Thus, the Appellant is arguing that his broker was in an agency relationship with the seller, which somehow arose from the listing agreement, and that this imposes a fiduciary duty on the Seller’s attorney to Appellant as a third-party beneficiary to such

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<sup>1</sup> While such an “agency” arrangement seems farfetched and lacks legal and factual support, Respondent assumes its legitimacy merely for purposes of argument.

agency arrangement. Assuming this scenario is true, then under agency law the broker would be the principal, and the seller an agent of the broker - and the logical result after the seller hires the attorney (Respondent herein) as his agent and closing attorney, the Respondent then becomes the agent of the broker! This would, under agency law, create an “attorney-client” relationship between the Respondent and the broker—which is the only way that such a fiduciary duty claimed by Appellant could be created (as a third-party beneficiary to this convoluted agency theory). Regardless, under the agency theory advanced by Appellant, the result is that any breach of fiduciary duty would have to arise under an attorney-client relationship (with the duty ultimately owed to the broker as the principal in the agency arrangement).

The Complaint does not allege that Respondent acted in any capacity other than as an attorney representing the Seller in the closing. (Complaint ¶¶74-83, R. p. 56). The Order to Dismiss, (Order, R. p. 3), correctly concluded that the affidavit was required because all claims against Respondent arose out of his legal representation of the Seller in the closing (and in no other capacity other than as an attorney).

As used in §15-36-100, “professional negligence” is a breach of a duty owed to the Plaintiff which proximately causes damage to the Plaintiff. Because of the nature of the attorney-client relationship, this duty is usually a “fiduciary duty.” In *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166 (2012), the Supreme Court held that *all* claims arising out of the “attorney-client” relationship should be merged with the malpractice claim (which would be subject to S.C. Code Ann. §15-36-100), even if pled as “breach of

fiduciary duty” against the attorney. This issue was further clarified in 2013 in the case of *H&H Johnston v. Old Republic National Title Co, and Henry Bufkin*, 405 S.C. 469, 748 S.E.2d 72 (S.C. App. 2013), wherein the Plaintiff alleged that the Defendant real estate closing attorney (Bufkin) breached his duties as a title insurance agent by failing to explain to Plaintiff what exceptions were in the title insurance policy. Bufkin filed a motion to dismiss based on §15-36-100(B); the Plaintiff argued that §15-36-100 did not apply because Plaintiff was suing Bufkin as a title agent, not as an attorney. However, the circuit court held that “insofar as the complaint attempts to assert any claim against Bufkin in his capacity as an attorney, the same is dismissed for failure to state a claim pursuant to section 15-36-100”. The Court of Appeals affirmed, finding that Bufkin was acting as an attorney at the closing, and that §15-36-100 applied.

Here, Appellant/Plaintiff was required to file an expert affidavit contemporaneously with the Complaint, because all claims against Respondent arose *solely* out of his legal representation of the Seller in the closing (and in no other capacity other than as an attorney).

The affidavit statute, S.C. Code Ann. §15-36-100(B), does not require privity, only that a professional listed in §15-36-100(G) is sued for negligence. If privity was a statutory requirement, then the purpose of the statute (to minimize frivolous lawsuits) would be frustrated. Among the listed professions are architects, land surveyors, professional engineers, etc. Certainly the purpose of the affidavit statute would be frustrated if injured parties not in privity (for example, a defective building design by an architect resulting in a

third party claim) did not have to comply with the affidavit rule.

The authority Appellant cites in his Brief does not support his position that, as he asserts, South Carolina “imposes a privity requirement as a condition to maintaining a ‘legal malpractice’ claim in South Carolina.” (Appellant’s Brief, p. 7). *See generally Fabian v. Lindsay*, 410 S.C. 475, 765 S.E2d 132 (2014) (cited by Appellant in his brief at pp. 6-7.) Appellant’s argument appears to be that, because of this alleged privity requirement, his claim as a third-party beneficiary, not in direct privity with Respondent, is somehow exempt from the affidavit requirement, in that it could not be deemed a “legal malpractice claim.” However, this is not consistent with his agency theory (wherein the breached duty to him arose from the agency arrangement between the broker, seller and Respondent, and, under agency law, the Respondent would be the agent of the broker, thereby establishing an attorney-client relationship), nor §15-36-100 (which does not require privity, only a negligence or malpractice action by a client or third party).

Moreover, the *Fabian* case does not support Appellant’s position. (Appellant’s Brief p. 7). *Fabian* recognizes a cause of action by a third-party beneficiary of a will or estate planning document against a lawyer whose drafting error defeats the client’s intent. *Fabian*, at 492. Throughout the *Fabian* decision, the Court (and the dissenting opinion) referred to an action by a third-party beneficiary as a “legal malpractice” action, which would certainly be subject to the expert affidavit statute (regardless of lack of privity).

Before *Fabian*, our Court recognized absolute immunity for attorneys (acting on behalf of a client) against third-parties not asserting an attorney-client

relationship—focusing instead on the attorney’s undivided loyalty to a client (and not the third-party). *See generally Rydde v. Morris*, 675 S.E.2d 431, 381 S.C. 643 (2009). In *L & H Airco v. Rapistan Corp*, 446 N.W.2d 372 (Minn. 1989), (cited by Appellant for his argument that an attorney may be held liable for conspiracy with his client), (Appellant’s Brief, p. 18), the court there actually held that the attorney was not liable to an alleged defrauded adversary party, stating: “the adversarial party is not without a remedy. He or she can pursue a fraud action against the person actually causing the loss: the attorney’s client... Personal liability against the attorney is not warranted.” *L & H Airco*, at 381.

The other cases cited by Appellant also fail to offer support for his position in this regard. In *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct.App.1986), the Court of Appeals held that “an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” The Court in *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995) did acknowledge that *Garr* does not apply to acts taken outside the scope of professional relationship of the client; however, the Court nevertheless found that the attorney was acting at all times in his capacity as Stiles’ attorney, and was therefore immune as to any activities conducted in his professional capacity, including any cited in the conspiracy claim (following *Garr*).

In the instant case, Respondent was acting at all times in his capacity as the seller’s attorney and is immune from Appellant’s claims, and nothing cited by Appellant imposes liability on Respondent or changes the expert affidavit requirement.

### **III. Appellant's claims are barred by the Statute of Limitations.**

Appellant is seeking to collect a real estate commission from a closing occurring on May 7, 2009. (Complaint ¶12, R. p. 52). Respondent was not served with the Complaint (filed July 18, 2018) until October 30, 2018.

The three-year statute of limitations period applies to these causes of action. S.C. Code Ann. §§ 15-3-530(1) & (5).

The “discovery rule” of S.C. Code Ann. §15-3-535 provides that “all actions must be commenced within 3 years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action”. Appellant alleges that he did not discover his claims against Respondent until receiving a letter dated July 19, 2017, from the Buyer’s attorney stating that Respondent had informed the Buyer’s attorney that no commission was payable at closing. (Complaint ¶53, R. p. 54). However, the Appellant knew, and certainly by the exercise of reasonable diligence, should have known, that he had a cause of action when no commission was paid at closing on May 7, 2009, and not paid after a formal 15-day demand letter for payment, dated October 29, 2009, went unanswered. (Complaint ¶20-21, R. p. 52).

Commencement of the period of limitations begins when Plaintiff “could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.” *Dorman v. Campbell*, 331 S.C. 179, 500

S.E.2d 786 (Ct. App. 1998). Although Plaintiff alleges he exercised “reasonable diligence,” (Complaint ¶53, R. p. 54), the *Dorman* court makes clear that:

The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed.

*Dorman*, at 789.

See also *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575-76, 593 S.E.2d 624, 627 (Ct. App. 2004) (stating under the discovery rule, “the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct”); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (explaining reasonable diligence means “simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party *might* exist”).

The Appellant’s ‘injury’ or ‘claim’ is the non-payment of the Sales Commission by the Seller at the closing on May 7, 2009. Appellant admits that his Broker-in-Charge sent a written demand to both attorneys for the Seller and Buyer on October 29, 2009, providing 15 days to pay the Commission, and admits that this demand was not met. (Complaint, ¶19-21, R. p. 52). Appellant also admits that he knew that the demand had not been met by the 15 day deadline. (Complaint, ¶22-24, R. p. 52). The latest date that

Appellant would have been put on notice that he had a claim against another party for the Commission would have been November 13, 2009, the 15-day deadline lapse of the October 29, 2009 demand letter. The three (3) year statute of limitations would have expired no later than November 13, 2012.

Further, Appellant's argument that Respondent "contrived a cover story which clouded such conduct" regarding the nonpayment of the commission is manifestly without merit. (Appellant's Brief, p. 13). Appellant knew there was no intention to pay the commission after lapse of the 15-day demand letter on November 13, 2009. (Complaint ¶20-21, R. p. 52). If Appellant had exercised "reasonable diligence" for payment of the alleged (\$100,000.00) commission, he should have been at the closing on May 7, 2009, with his hand out—and certainly he should have taken legal action against the Seller and/or closing attorneys before November 13, 2012.<sup>2</sup> However, the Seller's closing attorney was not sued until almost six years later (July 18, 2018), and the Seller (the only party contractually obligated to pay a commission) has never been sued at all.

#### **IV. Appellant's claims are illegal and void as against public policy.**

Any commission that was due in the underlying transaction would have to have been paid, by law, to the Broker in Charge for whom the Appellant worked, and he freely admits this in his Complaint.

By regulation and law, the Commission could not be paid directly to the Plaintiff but must instead had to be made to the Broker in Charge for the realty for whom he was

---

<sup>2</sup> The Appellant obviously knew the limitations period was about to expire on November 13, 2012, because he filed his action against the broker on November 12, 2012, *the day before* the expiration. (Complaint ¶26, R. p. 53).

working.

(Complaint ¶16, R. p. 52).

Further, the contract dated August 2, 2007, pursuant to which Appellant claims a commission, provided that any commission must be paid to the Broker in Charge and not to Appellant. (Complaint ¶9, R. p. 52).

Appellant cannot maintain this action to recover any commission, when the laws, regulations and contract forbid any direct payment to him of said commission.<sup>3</sup>

It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act, and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. Torts § 12 (1954). This rule applies at both law and in equity, and whether the cause of action is in contract or in tort. 1A C.J.S. Actions § 29 (1985). *See also Graham v. Graham*, 276 S.C. 341, 278 S.E.2d 345 (1981); *Nelson v. Bryant*, 265 S.C. 558, 220 S.E.2d 647 (1975); *Roundtree v. Ingle*, 94 S.C. 231, 77 S.E. 931 (1913); Restatement (Second) of Torts § 774 (1977).

The illegality doctrine was recognized by the U.S. Supreme Court which held, in the case of *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), that illegality is a defense to a contract action:

---

<sup>3</sup> It should be noted that **both** causes of action are barred because of the lack of expert affidavit, lapse of the statute of limitations, illegality of Appellant bringing an action for direct payment, and lack of standing. Any argument that the conspiracy claim does not violate public policy ignores (1) the admitted illegality of the claim in seeking direct payment, in contravention of the laws, regulations and contract in this matter, and (2) the fact that the "conspiracy" claim incorporates all of the preceding allegations of the Complaint (which admits the illegality of the underlying claim). (Complaint ¶83, R. p. 56).

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. *Id.* at 654, 19 S.Ct. at 845.

South Carolina courts have reached similar conclusions in refusing to aid plaintiffs who are themselves guilty of an illegal act. South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993). It is a well-settled principle of law that “a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice.” *McConnell v. Kitchens*, 20 S.C. 430, 437–38 (1884); *see also Pendarvis v. Berry*, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) (“Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.”) (*quoting Gilliland v. Phillips*, 1 S.C. 152 (1869)). As a general rule, both at law and in equity, a court will not aid either party to an illegal contract ... but leaves the parties where it finds them.” *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (S.C. 2012).

Appellant quotes the dissenting opinion in *Page v. Winter*, 240 S.C. 516, 574, 126 S.E.2d 570 (1962) to support his proposition that the “public policy in South Carolina is that the common law abhors a wrong without a remedy”. (Appellant’s Brief, p. 15). The *Page* case, however, is inapposite: *Page* involved only a public policy issue, the right of a

spouse to maintain an action for loss of consortium caused by an automobile accident. Contrary to Appellant's assertion, the court in *Page* actually **affirmed** on public policy grounds. More importantly, though, *Page* did not involve illegal conduct—a significant contrast to the instant case, wherein the Appellant freely admits his illegal acts (being paid his alleged commission directly).

Finally, notwithstanding Appellant's implication otherwise, legal remedies were available to the Appellant in his case, to wit: The broker could have sued the Seller and closing attorneys for the commission (which they failed to do, after the 15-day demand letter expired, for whatever reason). (Complaint ¶20-21, R. p. 52). Appellant also had a remedy—suit against the broker—which he exercised in his action filed on November 12, 2013. (Complaint ¶26, R. p. 53).

**V. Appellant did not have standing to bring his action.**

The Complaint states that any commission **MUST** be paid to the broker-in-charge (and not directly to the Plaintiff), pursuant to the South Carolina real estate laws and regulations, and the contract upon which the Appellant/Plaintiff's claims are based. (Complaint ¶16, 9, R. p. 52). Therefore, the proper Plaintiff in any action for the commission, or any claims based upon non-payment (such as breach of fiduciary duty and conspiracy), is the broker-in-charge, **not** the Appellant/Plaintiff salesman.

Our Supreme Court, in *Bank of Am. N.A. v. Todd et.al.*, 405 S.C. 214, 746 S.E.2d 478 (S.C. 2013) held that “standing refers to a party's right to make a *legal* claim”. Standing is a fundamental requirement for instituting an action, *Bank of Am. N.A.* at 480.

The Court further held:

Rule 17(a) SCRCR requires that every action be prosecuted “in the name of the real party in interest”.... The South Carolina rule with respect to the real party in interest requirement is patterned after the comparable federal rule, which has been regarded as embodying the concept that an action shall be prosecuted “in the name of the party who, by the substantive law, has the right sought to be enforced.” **It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property.** (bold emphasis added)

4 S.C. Jur. *Action* § 23 (1991) (footnotes omitted). “The requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct.App.2000) (internal quotation marks omitted).

Therefore, although Appellant may be claiming a substantial “ownership” in the commission, the “right” sought to be enforced is owned by the broker, pursuant to the admitted laws, regulations, and contract.

**VI. The Conspiracy claim also failed (1) by not being a separate and distinct claim, and also (2) by not alleging special damages.**

The Appellant alleged that the “allegations of the paragraphs above are hereby adopted and by express reference made a part of this cause of action.” (Complaint, ¶83, R. p. 56). Thus, the conspiracy claim is subject to dismissal on all the other grounds (i.e., no expert affidavit, expired statute of limitations, illegality of the claim in seeking direct payment, and no standing). However, the conspiracy claim is also defective on two additional independent grounds: (1) it was not a separate and distinct claim, and (2) no special damages were alleged. Both of these grounds must be shown for the conspiracy claim to survive dismissal.

The allegations of the Second Cause of Action, (Complaint, ¶¶84-86, R. pp. 56-57), contain the exact same acts contained in the First Cause of Action, (Complaint, ¶¶79-81, R. p. 56), with the exception of naming the Seller as a participant in the alleged actions that resulted in the purported damages (i.e., real estate commission) to Plaintiff. *Hackworth v. Greywood at Hammet, LLC*, 385 S.C.110, 682 S.E.2d 871 (Ct. App 2009) states that, if the plaintiff simply reiterates the allegations in its other causes of action in its civil conspiracy claim, without being separate and distinct from the other claims, then the civil conspiracy claim fails. C.F. *Todd v. S.C. Farm Bureau*, 276 S.C. 284, 278 S.E.2d 607 (1985).

*Hackworth* further explains:

In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim. *See id.* at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy claim because "the [civil conspiracy] action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead"); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct.App.2000); *Doe v. Erskine Coll.*, No. 8:04-23001RBH, 2006 WL 1473853, at \*17 (D.S.C. May 25, 2006); *James v. Pratt & Whitney*, 126 Fed.Appx. 607, 613, 2005 WL 670623 (D.S.C.2005).

*Hackworth* at 875.

*Hackworth* also holds that "if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Hackworth* at 875-876. *See also Vaught v. Waites*, 300 S.C. at 209, 387 S.E.2d at 95, which held that "because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred

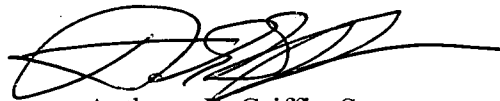
under *Todd*". Appellant's attempt to allege "special damages" by simply calling the same damages alleged in the First Cause of Action "special damages", does not make said damages "special." The only damages specified in both causes of action are money damages from non-payment of the commission and loss of investment. (Comparing Complaint ¶70, 71, and 86 with ¶81-82, R. pp. 55-57).

The conspiracy claim duplicates the damages of the first claim. The only other allegation of damages (which arguably could also be damages in the first claim) are the costs of pursuing another lawsuit against a "third party" (the broker). This ignores the fact that the lawsuit against the broker was the sole remedy of the Plaintiff according to the admitted SC laws, regulations and underlying contract.

## CONCLUSION

For the reasons stated, this Court should affirm the Order of the circuit court dismissing the Appellant's Complaint, because (1) an expert affidavit is required by S.C. Code Ann. §15-36-100 and was not filed with the Complaint; (2) the applicable statute of limitations for the Complaint expired; (3) Appellant's claims are illegal and void as against public policy, against the admitted laws and regulations of South Carolina, and against the underlying contract; (4) Appellant lacks standing to bring this action, and (5) the "Conspiracy" claim also fails by not pleading separate and distinct independent facts in support of the alleged conspiracy, and also by not showing "special damages".

Respectfully Submitted,



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January 27, 2020

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THE STATE OF SOUTH CAROLINA  
*Court of Appeals*

---

APPEAL FROM BEAUFORT COUNTY  
Court Of Common Pleas

The Honorable Eugene C. Griffith, Jr.

---

Trial Court Case No. 2018-CP-07-01449  
Appellate Case No. 2019-000941

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**RECEIVED**  
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SC Court of Appeals

Floyd Hargrove.....Appellant,  
v.  
Anthony E. Griffis, Sr. ....Respondent.

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**Rule 211 Certificate**

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I, Anthony E. Griffis, Sr., hereby certify that the Brief of Respondent complies with Rule 211(b), SCACR.

January 27<sup>th</sup>, 2020



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THE STATE OF SOUTH CAROLINA  
Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

---

Common Pleas Number(s): 2018-CP-07-01449  
Appeal Court Number: 19-00941

---

Floyd Hargrove ..... Appellant.

v.

Anthony E. Griffis, Sr., ..... Respondent.

---

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
**FLOYD HARGROVE** )  
 Plaintiff )  
 )  
 )  
 v. )  
 )  
**ANTHONY E. GRIFFIS, SR.,** )  
 Defendant )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2018-CP-07-01449

**ORDER GRANTING  
 MOTION TO DISMISS**

This matter came before the Court on January 8<sup>th</sup>, 2019 upon the Motion of Defendant Anthony E. Griffis seeking an Order pursuant to SCRCP 12(b)(6) dismissing the claims of Plaintiff. Present were Mr. Griffis, representing himself, and James A. Brown for the Plaintiff. After hearing argument by the parties, I find as follows:

**1) The Plaintiff's claims do not incorporate an affidavit of an expert as required by S.C. Code Ann. §15-36-100.**

South Carolina Code section 15-36-100(B) provides, in pertinent part:

[I]n an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) ..., the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

Here, the Plaintiff alleges in his first cause of action a claim for "breach of fiduciary duty" arising out of Defendant's representation of the Seller in a real estate closing. (Complaint # 75-81). The Complaint does not allege that Defendant acted in any capacity other than as an attorney representing the Seller in the closing.

The second cause of action incorporates and adopts the same allegations and "by express reference are made a part of this cause of action" (Complaint #83).

“Professional negligence” as used in §15-36-100, is a breach of a duty owed to Plaintiff which proximately causes damage to Plaintiff. Because of the nature of the attorney-client relationship, this duty is usually a “fiduciary duty”. In *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166 (S.C. 2012) our court held that all claims arising out of the “attorney-client” relationship should be merged with the malpractice claim (which would be subject to S.C. Code Ann. §15-36-100), even if pled as “breach of fiduciary duty” against the attorney. This issue was further clarified in 2013 in the case of *H&H Johnston v. Old Republic National Title Co, and Henry Bufkin* (405 SC 469). In this case the Plaintiff alleged that the defendant real estate closing attorney (Bufkin) breached his duties as a title insurance agent by failing to explain to Plaintiff what exceptions were in the title insurance policy. Bufkin filed a Motion to Dismiss based on 15-36-100(B), and the Plaintiff argued that 15-36-100 did not apply because they were suing Bufkin as a title agent, not as an attorney. However, the circuit court held that “insofar as the complaint attempts to assert any claim against Bufkin in his capacity as an attorney, the same is dismissed for failure to state a claim pursuant to section 15-36-100”. The Court of Appeals affirmed, finding that Bufkin was acting as an attorney at the closing, and that section 15-36-100 applied. Here, Plaintiff was required to file an expert affidavit with the Complaint, because all claims against Mr. Griffis arose solely out of his legal representation of the Seller in the closing (and in no other capacity other than as an attorney).

Therefore, Plaintiff’s failure to file an expert affidavit with the Complaint is fatally defective to the claims against Defendant, pursuant to S.C. Code Ann. §15-36-100(C)(1).

**2) The applicable period of limitations for Plaintiff's claims has expired.**

Plaintiff is seeking to collect a real estate commission from a closing occurring on May 7, 2009 (Complaint #12). Defendant was not served with the Complaint (filed July 18, 2018) until October 30, 2018.

The "discovery rule" of S.C. Code Ann. §15-3-535 provides that "all actions must be commenced within 3 years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action". Plaintiff alleges (Complaint #53) that he did not discover his claims against Defendant until receiving a letter dated July 19, 2017, from the Buyer's attorney stating that Defendant had informed the Buyer's attorney that no commission was payable at closing. However, this Court finds that the Plaintiff knew, and certainly by the exercise of reasonable diligence, should have known that he had a cause of action, when no commission was paid at closing on May 7, 2009, and not paid after a formal 15 day demand letter for payment on October 29, 2009. (Complaint # 20-21).

Commencement of the period of limitations begins when Plaintiff "could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Dorman v. Campbell*, 331 S.C. 179, 500 S.E.2d 786 (S.C. App. 1998) at page 789. Although Plaintiff alleges he exercised "reasonable diligence" (Complaint paragraph 53), *Dorman*, p.789, states:

The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed.

*See Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575-76, 593 S.E.2d 624, 627 (Ct. App. 2004) (stating under the discovery rule, "the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct"); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (explaining reasonable diligence means "simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist").

The "Injury or Claim" of Plaintiff is the non-payment of the Sales Commission by the Seller at the closing on May 7, 2009. Plaintiff admits that his Broker-in-Charge sent a written demand to both attorneys for the Seller and Buyer on October 29, 2009, providing 15 days to pay the Commission, and admits that this demand was not met (Complaint # 19-21). Plaintiff also admits that he knew that the demand had not been met by the 15 day deadline. (Complaint #22-24). The latest date that Plaintiff would have been put "on notice" that he had a claim against another party for the Commission would have been November 13, 2009, the 15 day deadline lapse of the October 29, 2009, demand letter. The three (3) year statute of limitations would have expired no later than November 13, 2012. However, no legal action was ever filed against the Seller or closing attorneys, until this lawsuit was filed on July 18, 2018, after expiration of the Statute of Limitations.

**3) Plaintiff's claims for a commission are illegal and void as against public policy.**

Plaintiff admits (Complaint paragraph 16) that:

"By regulation and law, the Commission could not be paid directly to the Plaintiff but must instead had to be made to the Broker in Charge for the realty for whom he was working".

Further, the Contract dated August 2, 2007 (Complaint #9), under which Plaintiff claims a commission, provided that any commission must be paid to the Broker in Charge and not to Plaintiff.

Plaintiff cannot maintain this action to recover any commission, when the laws, regulations and contract forbid any direct payment to him of said commission.

**4) Plaintiff lacks standing to bring this action.**

The proper party to bring an action for the sales commission, pursuant to the admitted laws and regulations, and the contract, must be the Broker-in-Charge of the realty company, not the Plaintiff.

**5) The Conspiracy claim also fails by not being a separate and distinct claim with “special damages”.**

The allegations of the Second Cause of Action (Paragraphs 84-86 of the Complaint) contain the exact same acts in the preceding Cause of Action (Paragraphs 79-81), with the exception of naming the Seller as a participant in the alleged actions which resulted in the purported damages (ie, omitting payment of the commission) to Plaintiff. *Hackworth v. Greywood at Hammet, LLC*, 385 S.C.110, 682 S.E.2d 871 (S.C. App 2009), states that, if the plaintiff simply reiterates the allegations in its other causes of action in its civil conspiracy claim, without being separate and distinct from the other claims, then the civil conspiracy claim would fail. c.f. *Todd v. S.C. Farm Bureau*, 276 S.C. 284, 278 S.E.2d 607 (1985).

Further, *Hackworth* holds that “if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed. See *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95, which held that “because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*”. Plaintiff’s attempt to allege “special damages” by simply calling the same damages alleged in the First Cause of Action “special damages”, does not make said damages “special”. The only damages specified in both causes of action are money damages from non-payment of the commission and loss of investment. (Comparing Paragraphs 70, 71, and 86 with Paragraphs 81-82).

Therefore, because Plaintiff has failed to allege facts for his civil conspiracy claim separate and distinct from his other claims, and because he has failed to plead special damages arising from the civil conspiracy, there is an additional ground to dismiss the conspiracy claim.

In summary, the Court finds that (1) an expert affidavit is required by S.C. Code Ann. §15-36-100 and was not filed with the Complaint; (2) the applicable statute of limitations for the Complaint expired; (3) Plaintiff's claims are void as against public policy, the laws and regulations of South Carolina, and the underlying contract; (4) Plaintiff lacks standing to bring this action, and (5) additionally, the "Conspiracy" claim fails by not pleading separate and distinct "special damages". Accordingly, the entire Complaint is hereby dismissed, with prejudice.

IT IS SO ORDERED:

\_\_\_\_\_, South Carolina  
\_\_\_\_\_, 2019

\_\_\_\_\_  
Honorable Eugene C. Griffith, Jr.  
Judge, Fourteenth Judicial Circuit



Beaufort Common Pleas

**Case Caption:** Floyd Hargrove VS Anthony E Griffis Sr

**Case Number:** 2018CP0701449

**Type:** Order/Dismissal

It is so ordered

Eugene C. Griffith, Jr. 2154

Electronically signed on 2019-03-15 12:10:36 page 7 of 7

|                                 |   |                                    |
|---------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS       |
|                                 | ) | FOURTEENTH JUDICIAL CIRCUIT        |
| COUNTY OF BEAUFORT              | ) |                                    |
|                                 | ) |                                    |
| <b>FLOYD HARGROVE</b>           | ) | CIVIL ACTION NO.: 2018-CP-07-01449 |
|                                 | ) |                                    |
| Plaintiff                       | ) |                                    |
|                                 | ) |                                    |
| v.                              | ) | <b>DEFENDANT'S NOTICE</b>          |
|                                 | ) | <b>AND</b>                         |
|                                 | ) | <b>MOTION TO DISMISS</b>           |
| <b>ANTHONY E. GRIFFIS, SR.,</b> | ) |                                    |
| Defendant                       | ) |                                    |
| _____                           | ) |                                    |

Defendant hereby moves the Court, pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and S.C. Code Ann. §15-36-100 (Supp. 2008), for an Order dismissing the Complaint against him because:

- 1. The Plaintiff's claims are fatally deficient in that they do not incorporate an affidavit of an expert.**

South Carolina Code section 15-36-100(B) provides, in pertinent part:

[I]n an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G)<sup>1</sup> ..., the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

Here, the Plaintiff alleges in his first cause of action a claim for negligence (specifically breach of fiduciary duty) arising out of an alleged attorney-client relationship with Defendant because of Defendant's representation of the Seller in a real estate closing. The second cause of action incorporates and adopts the same allegations and "by express reference are made a part of this cause of action".

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<sup>1</sup> Subsection (G)(2) lists "attorneys" among the "professionals" to which the statute applies.

In *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166 (S.C. 2012) our court held that all claims arising out of the “attorney-client” relationship should be merged with the malpractice claim (which would be subject to S.C. Code §15-36-100), even if pled as “breach of fiduciary duty” against the attorney. Thus, Plaintiff was required to file an expert affidavit with the Complaint.

Plaintiff did not attach to the Complaint an expert affidavit as required by Section 15-36-100, nor has he sought to file such an affidavit since filing the Complaint. Per South Carolina Code section 15-36-100(C)(1), Plaintiff’s failure to file an expert affidavit is fatally defective to the claims against Defendant.; that code section states:

If an affidavit is not filed [contemporaneously with the Complaint<sup>2</sup>] and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.

## **2. The applicable period of limitations for Plaintiff’s claims has expired.**

The three-year statute of limitations period applies to these causes of action. S.C. Code Ann. §§ 15-3-530 (1) & (5). See generally *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644 (S.C. App. 2010) at page 654.

The closing occurred on May 7, 2009 (Plaintiff’s Complaint paragraph 12) with the Deed recorded immediately, giving public notice of said closing. Defendant was not served with the Complaint until October 30, 2018.

However, Plaintiff argues that he did not “discover” his claims against Defendant until July 19, 2017, upon receiving a letter from the Buyer’s attorney alleging that Defendant had informed him not to pay any commission (Complaint paragraphs 43, 45, 53).

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<sup>2</sup> The statute also contains provisions regarding extension of the expert affidavit deadline; but, none apply because Plaintiff has not requested such an extension.

Commencement of the period of limitations begins when Plaintiff “could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.” *Dorman v. Campbell*, 331 .C. 179, 500 S.E.2d 786 (S.C. App. 1998) at page 789. Although Plaintiff alleges he exercised “reasonable diligence” (Complaint paragraph 53), *Dorman*, p.789, states:

The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed.

Plaintiff had record notice of the closing in May, 2009, and knew, or should have known, the attorneys who closed the transaction. Plaintiff admits that his Broker (Citadel Realty) made a written demand for payment on October 29, 2009 (Complaint paragraph 20). Plaintiff admits that he knew of such demand on October 29, 2009 (Complaint paragraph 22).

Therefore, Plaintiff knew, on date of closing (May 7, 2009) when no commission was paid, and in any event no later than October 29, 2009, that “some claim against another person might exist”. As stated in *Dorman*, the statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed. It is Defendant’s experience that the real estate broker is usually the first party waiting on a commission check at closing. Plaintiff did not act promptly, with reasonable diligence, to collect the alleged \$100,000 commission immediately following closing. He should have contacted Buyer’s closing attorney (Chuck Scarminach) and immediately discovered why the commission was not paid at closing - if he had acted promptly, with “reasonable diligence” as described in *Dorman*.

**3. Plaintiff's claims are illegal and void as against public policy.**

Plaintiff admits (Complaint paragraph 16) that "By regulation and law, the Commission could not be paid directly to the Plaintiff but must instead had to be made to the Broker in Charge for the realty for whom he was working". Further, the Contract dated August 2, 2007, under which Plaintiff claims a commission, provided that any commission must be paid to the Broker in Charge and not to Plaintiff. Plaintiff cannot maintain this action to recover any commission, when the laws, regulations and contract forbid any direct payment to him of said commission.

**4. Plaintiff lacks standing to bring this action.**

As discussed in (3) above, it is against the regulations, law, and sales contract for Plaintiff to bring this action. The proper Plaintiff should be the Broker in Charge, not Plaintiff.

**5. Plaintiff's Second Cause of Action, Civil Conspiracy, is also subject to dismissal (under *Hackworth* infra) for failure to state facts sufficient to constitute a cause of action, pursuant to SCRCP 12(b)(6) .**

The allegations of Paragraphs 84-86 of the Complaint contain the exact same acts in the preceding Cause of Action (Paragraphs 79-81), with the exception of naming the Seller as a participant in the alleged actions which resulted in the purported damages (ie, omitting payment of the commission) to Plaintiff. *Hackworth v. Greywood at Hammet, LLC*, 385 S.C.110, 682 S.E.2d 871 (S.C. App 2009), states that, if the plaintiff simply reiterates the allegations in its other causes of action in its civil conspiracy claim, without being separate and distinct from the other claims, then the civil conspiracy claim would fail. c.f. *Todd v. S.C. Farm Bureau*, 276 S.C. 284, 278 S.E.2d 607 (1985).

Further, *Hackworth* holds that "if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed. See *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95, which held that "because no special damages are alleged aside from the breach of contract damages, we

hold the conspiracy action is barred under *Todd*". Plaintiff's attempt to allege "special damages" by simply calling the same damages alleged in the First Cause of Action "special damages", does not make said damages "special". The only damages specified in both causes of action are money damages from non-payment of the commission and loss of investment. (Compare Paragraphs 70, 71, and 86 with Paragraphs 81-82).

Therefore, because Plaintiff has failed to allege facts for his civil conspiracy claim separate and distinct from his other claims, and because he has failed to plead special damages arising from the civil conspiracy, the conspiracy claim should be dismissed.

For the foregoing reasons, Defendant requests that the Court dismiss the Complaint with prejudice.

November 13<sup>th</sup>, 2018  
Aiken, SC

Respectfully Submitted:

s/ Anthony E. Griffis, Sr  
Attorney ID: 2285  
Anthony E. Griffis, Sr., Pro Se  
355 Park Ave SW  
Aiken, SC 29801  
(843) 368-5013  
Email: [tonygriffis@gmail.com](mailto:tonygriffis@gmail.com)

|                               |   |                                    |
|-------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS       |
|                               | ) |                                    |
| COUNTY OF BEAUFORT            | ) | FOURTEENTH JUDICIAL CIRCUIT        |
|                               | ) |                                    |
|                               | ) | CASE NO. 2018-CP-07-01449          |
| <br><b>FLOYD HARGROVE</b>     | ) |                                    |
|                               | ) |                                    |
| Plaintiff                     | ) |                                    |
|                               | ) | <b>PLAINTIFF'S OBJECTIONS TO</b>   |
| versus                        | ) | <b>PROPOSED ORDER OF DISMISSAL</b> |
|                               | ) |                                    |
| <b>ANTHONY E. GRIFFIS, SR</b> | ) |                                    |
|                               | ) |                                    |
| Defendant                     | ) |                                    |
| _____                         | ) |                                    |

**THE PLAINTIFF PROVIDES THIS COURT** the below listed objections to the proposed Order Granting Motion to Dismiss submitted to the Court by the Defendant. Should these objections arrive after the Court has signed this order, the Plaintiff asks that these objections be considered as a Motion to Alter or Amend pursuant to SCRCP Rule 59. The Plaintiff incorporates all arguments and exhibits reviewed by the Court during the hearing regarding the Defendant's motion.

#### General Objections

To begin, the Plaintiff objects to the fact that the proposed Order was drafted by the Defendant without any direction as to the factual findings made by the Court. See *Pruitt v State*, 423 SE2d 127, 128 (SC 1992). The Plaintiff also objects that the Order does not reflect that the Complaint was reviewed in the light most favorable to the Plaintiff and the Order does not even reference this standard. *Clearwater Trust v Bunting*, 626 SE2d 334 (SC 2006). The final general objection is that certain findings are actually made contrary to the face of the Complaint; converting the Defendant's Rule 12 Motion to a summary judgment motion without opportunity

for the Plaintiff to conduct discovery or submit competing factual information.

#### Expert

The Order incorrectly applies SC Code Section 15-36-100(B) to the causes of action pled by the Plaintiff. In the case at bar, while the Defendant is a professional, the Plaintiff makes no claim of “professional negligence” as envisioned by SC Code Section 15-36-100. Succinctly, the Defendant was not an attorney representing the Plaintiff or an attorney representing a party adverse to the Plaintiff during the breach at issue in this pleading.

Instead, the Plaintiff was a third party beneficiary due a portion of the commission owed by the Seller to the “broker in charge of the realty for whom [the Plaintiff] was working” at the time of the closing. The Defendant was the attorney for the seller. However, as pled, the Defendant told another attorney that the commission was not due anyone in this case.

The fiduciary duty pled in this case is a duty owed to a third party and not a duty owed out of an attorney-client relationship. No where in the Complaint or Answer is there any averment that the Defendant served as counsel for the Plaintiff. Because this was not a claim arising out of the attorney-client relationship, the Order incorrectly relies upon *RFT Mgmt Co. v Tinsley and Adams, et al*, 732 SE2d 166 (SC 2012) and *H & H Johnston v Old Republic National Title Co., et al*, 748 SE2d 72 (SC Ct App 2013).

Further, as to the Conspiracy cause, SC Code Section 15-36-100 does not apply at all and the Plaintiff objects to the Order dismissing this claim on this ground.

#### Statue of Limitations

As to the Breach of Fiduciary Duty, the Plaintiff averred that he asserted “reasonable diligence” as to the filing of this claim against the Defendant. Specifically, paragraphs 20-56 document the journey of the Plaintiff in search of the unpaid money owed the Plaintiff. When

reviewed in the light most favorable to the Plaintiff, the cause of Breach of a Fiduciary Duty would not be found to have been pled outside of the statute of limitations. See Clearwater Trust, supra.

Likewise, as to the claim of Conspiracy, the Plaintiff was not aware that the Defendant concocted a cover up of the non-payment by asserting an alternative payment arrangement. This fake and false payment arrangement was asserted by the Defendant to the Plaintiff's counsel for the first time in January, 2018 when the Defendant provided that mis-representation. Because this email's reference to this alternative payment arrangement is an overt act in the conspiracy, this date should be considered the triggering date for the purposes of the statute of limitations and the filing date of this suit in July, 2018 clearly falls within year years of the January, 2018 email.

#### Public Policy

As to the claim of Breach of a Fiduciary Duty, the Plaintiff is seeking to assert his equitable interest in the portion of the commission which represents his money. It is not against public policy for the Plaintiff to seek damages owed by a tortfeasor. It is not against public policy for a realtor to receive payment for his work.

This suit merely seeks to make the Plaintiff whole for his efforts.. The Plaintiff is entitled to seek a remedy for the wrong done to him. The law abhors a wrong without a remedy and the Order's holding in this regard perversely insulates the wrong from remedy.

As to the claim of Conspiracy, the claim is not against public policy in any way. To the extent that the Plaintiff suffered injury caused by the acts of the Defendant, the Plaintiff is entitled to litigated this claim in a court of law and before a jury. The Plaintiff seeks no more than the opportunity to pursue this claim.

### Lack of Standing

As to the claim of Breach of a Fiduciary Duty, this standing issue is identical to the issue raised in the "Public Policy" section of the proposed Order and the Plaintiff objects as referenced in the public policy section above.

As to the claim of Conspiracy, the proposed Order is silent as to the standing of the Plaintiff so the Plaintiff merely wishes to clarify that the proposed Order does not purport to dismiss the Conspiracy cause on this basis. To the extent the Order does purport to dismiss the Conspiracy cause because of a lack of standing, the Plaintiff would note that the cover up of the responsibility for the non-payment was made by misrepresentation of the Defendant to the Plaintiff in a January 18, 2018 email.

### Special Damages as to Conspiracy

In response to the assertion in the proposed Order that the Plaintiff did not plead any special damages related to the Conspiracy, succinctly, the Complaint indicates that the cover up which was the object of the Conspiracy caused the Plaintiff to pursue a suit against a third party and lose investment income which would have been realized had the proper parties been pursued in more timely fashion. These special damages are expressly pled on the face of the Complaint in paragraphs 70 and 71. These paragraphs call these damages "special damages."

The Plaintiff is not sure what more he could have pled as to specific damages which are separate from the "non-payment of the commission."

### Conclusion

To conclude, the Order conflates the review of the two claims into one analysis. Perversely, the order benefits the Defendant's cover up which delayed the Plaintiff's discovery of the Defendant's role in the non-payment of the commission and then insulates the Defendant

from liability for the Conspiracy to cover up by not analyzing the statute of limitations, standing, policy, and damages issues separately from the Breach of Fiduciary Duty claims. As an alternative, the Court should allow the Plaintiff to amend the complaint and conduct discovery and review these claims after better development.

Therefore, the Plaintiff respectfully requests that this Court not sign the Order of Dismissal and instead deny the Defendant's Motion and allow the Plaintiff to pursue a remedy for the wrongs he has suffered.

Respectfully submitted by:

/s/ James A. Brown, Jr.  
James A. Brown, Jr.  
Attorney for the Plaintiff

March 4, 2019  
Beaufort, SC

Law Offices of Jim Brown, PA  
1600 Burnside Street, Suite 100  
PO Box 592  
Beaufort, SC 29901-0592

**Jim Brown Law**

**From:** "tony griffis" <tonygriffis@gmail.com>  
**Date:** Monday, March 4, 2019 9:41 PM  
**To:** "Jim Brown Law" <jimbrownlaw@hargray.com>; "Griffith, Eugene Law Clerk (Whitney Yongue)" <egriffithlc@sccourts.org>  
**Subject:** RE: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

I am traveling (in Texas) and will not be back to Aiken until March 18. I am replying to Mr. Brown's Objections to the Proposed Order, but I do not have proper access to word processing, printer or legal research, etc., so I apologize for my lack of proper form.

If the Court requires, I can further address this matter when I return.

|                          |   |                                        |
|--------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS           |
|                          | ) | FOURTEENTH JUDICIAL CIRCUIT            |
| COUNTY OF BEAUFORT       | ) |                                        |
|                          | ) |                                        |
| FLOYD HARGROVE           | ) | CIVIL ACTION NO.: 2018-CP-07-01449     |
| Plaintiff                | ) |                                        |
|                          | ) |                                        |
|                          | ) | <b>DEFENDANT'S REPLY</b>               |
|                          | ) | <b>TO OBJECTIONS TO PROPOSED ORDER</b> |
| v.                       | ) |                                        |
|                          | ) |                                        |
| ANTHONY E. GRIFFIS, SR., | ) |                                        |
| Defendant                | ) |                                        |
|                          | ) |                                        |

**DIRECTIONS AS TO FACTUAL FINDINGS:**

There is no need for "directions from the Court as to factual findings" as this is a Motion to Dismiss, and "factual findings" are limited to the four corners of the Complaint. Although Plaintiff attempts to argue "facts" outside the scope of this Motion, the Proposed Order correctly cites relevant sections of the Complaint (i.e., "facts") in support of the proposed findings. Defendant has never argued facts outside the Complaint or otherwise asked the Court to convert the Motion to Dismiss into one of "summary judgment", as there is no need to go outside the "facts" alleged and admitted in the Complaint. All of the findings in the Proposed Order are supported by cites to relevant sections of the Complaint.

**EXPERT:**

Any "fiduciary duty" owed to Plaintiff by Defendant arose solely from Defendant's role as the Seller's closing attorney – there was no allegation in the Complaint to any "fiduciary duty" other than that which might have resulted from normal attorney duties. As the Court in *H & H Johnson* correctly points out, Section 15-36-100 applies to *any claim* against a closing attorney (as is the case in the instant case). As to the conspiracy claim, the Complaint incorporates all of the allegations of the fiduciary duty claim, making it also subject to Section 15-36-100.

**STATUTE OF LIMITATIONS:**

I reiterate the conclusions in the Proposed Order, pursuant to the cited well-settled law, that the period of limitations began no later than the lapse of the 15 day demand letter (when Plaintiff clearly knew that no commission would be paid).

I also object to the allegations that I (Defendant) “concocted a cover up of the non-payment...” This is not relevant in any way in determining “when Plaintiff had knowledge that no commission would be paid”, which starts the ticking of the period of limitations. The “non-payment” is the injury, not any alleged cover up. It is absurd to argue there was any “cover up of non-payment” when there was no payment after lapse of the 15 day demand letter!

#### **PUBLIC POLICY:**

The Complaint admits the illegality of any direct payment to Plaintiff, which is exactly what Plaintiff is seeking in the lawsuit. It is against public policy for this Court to entertain an illegal action, in contravention of our real estate laws, regulations, and the underlying contract.

Plaintiff also argues that his claims are equitable in nature. This does not save dismissal because his claims would still be illegal. Any claims of Plaintiff, equitable or otherwise, are derivative from the “Broker-in-Charge” claims, and cannot be directly raised by Plaintiff in this Court. Further, the Complaint is seeking money damages and a jury trial, which is contrary to any “equitable” claims. As our Supreme Court has held, there is no right to money damages and a jury trial in an equitable action, *Verenes v. Alanos* (citation omitted).

Therefore, argument that the conspiracy claim does not violate public policy ignores (1) the admitted illegality of the claim in seeking direct payment, in contravention of the laws, regulations and contract in this matter, and (2) the fact that the “conspiracy” claim incorporates all of the preceding allegations of the Complaint (which admits the illegality of the underlying claim).

#### **STANDING:**

The Complaint states that any commission MUST be paid to the broker-in-charge (and not directly to the Plaintiff), pursuant to the SC real estate laws and regulations, and the contract upon which the Plaintiff’s claims are based. Therefore, the proper Plaintiff in any action for the commission or any claims based upon non-payment (such as breach of fiduciary duty and conspiracy) is the broker-in-charge, not the Plaintiff salesman.

#### **SPECIAL DAMAGES:**

Calling the damages “special” in the Complaint does not make them “special”, so as to avoid duplicate damages. The conspiracy claim duplicates the damages of the first claim. The only other allegation of damages (which arguably could also be damages in the first claim) are the costs of pursuing another lawsuit against a “third party” (the broker). This ignores the fact that the lawsuit against the broker was the sole remedy of the Plaintiff according to the admitted SC laws, regulations and underlying contract.

THEREFORE, the Proposed Order correctly cites the well-settled law as applied to the admitted allegations of the Complaint, and the Motion to Dismiss should be granted.

Respectfully Submitted:

/s/ Anthony E. Griffis

March 4, 2019

Anthony E. Griffis, Pro Se Defendant  
355 Park Ave SW  
Aiken, SC 29801

---

**From:** Jim Brown Law

**Sent:** Monday, March 4, 2019 2:57 PM

**To:** Griffith, Eugene Law Clerk (Whitney Yongue)

**Cc:** tonygriffis@gmail.com

**Subject:** Re: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

Good afternoon,

Please see attached Objection to Proposed Order of Dismissal.

Sincerely,

Elizabeth Bufkin

**From:** Griffith, Eugene Law Clerk (Whitney Yongue)

**Sent:** Wednesday, February 13, 2019 11:51 AM

**To:** Jim Brown Law

**Subject:** RE: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

I apologize for neglecting to include Mr. Brown in the email I sent to Mr. Griffis asking for a proposed order. It was my unintentional mistake and I sincerely apologize.

Judge Griffith decided to grant Mr. Griffis' Motion to Dismiss the Complaint and instructed me to ask Mr. Griffis to prepare a proposed order to that effect. I just received the proposed order this morning for Judge Griffith's review. I will be sure to apprise both Mr. Brown and Mr. Griffis of any further developments once Judge Griffith reviews the proposed order and will let everyone know if anything further is needed.

Please let me know if you need anything further from me.

Sincerely,

Whitney Yongue

---

**From:** Jim Brown Law <jimbrownlaw@hargray.com>

**Sent:** Wednesday, February 13, 2019 11:43 AM

**To:** Griffith, Eugene Law Clerk (Whitney Yongue) <egriffithlc@sccourts.org>; tony griffis <tonygriffis@gmail.com>

**Subject:** Re: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

Good Morning,

Mr. Brown asked that you recognize that he was not included in any of the emails in the below thread. He would ask if there is further guidance from the judge as to the factual findings to be included in the proposed order. Thank you for your attention to this matter.

Thank you,  
Olivia Cooke

**From:** tony griffis  
**Sent:** Wednesday, February 13, 2019 10:22 AM  
**To:** Griffith, Eugene Law Clerk (Whitney Yongue)  
**Cc:** jimbrownlaw@hargray.com  
**Subject:** RE: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

Attached is a proposed Order for the referenced case. I am also copying Mr. Brown. Thank you,  
Tony Griffis

Sent from Mail for Windows 10

**From:** Griffith, Eugene Law Clerk (Whitney Yongue)  
**Sent:** Wednesday, February 13, 2019 9:11 AM  
**To:** tony griffis  
**Subject:** RE: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

You may email it to me and I will give it to the Judge for review and then let you know when he would like you to e-file it. Thank you!

---

**From:** tony griffis <tonygriffis@gmail.com>  
**Sent:** Tuesday, February 12, 2019 6:22 PM  
**To:** Griffith, Eugene Law Clerk (Whitney Yongue) <egriffithlc@sccourts.org>  
**Subject:** RE: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

I have prepared a proposed Order, but when I attempted to e-file it I got an error message, requiring an Order Cover Sheet with a \$25 filing fee. I then looked at the E-filing Court Rules, #8(c)(1) which says that proposed Orders prepared by a party upon a judge's instructions may not be E-Filed, but should instead be submitted by email to the requesting judge. I can email the proposed Order to you, and also copy opposing counsel with the email and proposed Order. Please let me know if this is OK. Thanks, Tony Griffis

Sent from Mail for Windows 10

**From:** Griffith, Eugene Law Clerk (Whitney Yongue)  
**Sent:** Friday, February 8, 2019 1:18 PM  
**To:** tonygriffis@gmail.com  
**Subject:** RE: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

Thank you. Have a great weekend!

**From:** Tony Griffis <tonygriffis@gmail.com>  
**Sent:** Friday, February 8, 2019 1:10 PM  
**To:** Griffith, Eugene Law Clerk (Whitney Yongue) <egriffithlc@sccourts.org>  
**Subject:** Re: Floyd Hargrove v. Anthony Griffis, Sr. (2018-CP-07-01449)

I will prepare and efile a proposed Order next week. Thank you, Tony Griffis

On Fri, Feb 8, 2019, 12:15 PM Griffith, Eugene Law Clerk (Whitney Yongue)  
<egriffithlc@sccourts.org> wrote:

Good Afternoon,

On January 8, 2019, Judge Griffith heard a Motion to Dismiss the above-captioned case. He has decided to grant the motion to dismiss the complaint. At your earliest convenience, would you mind please preparing and e-filing a proposed order? Thank you in advance and please let me know if you need anything further from me.

Thank you,

Whitney Yongue  
Law Clerk to the Honorable Eugene C. Griffith, Jr.  
P.O. Drawer 10  
Newberry, SC 29108

~~~~ CONFIDENTIALITY NOTICE ~~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.



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## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF Beaufort  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0701449

Floyd Hargrove  
PLAINTIFF(S)

Anthony E Griffis, Sr  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);  
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):  
☐ Affirmed; ☐ Reversed; ☐ Remanded;  
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter originally came before the Court on January 8, 2019 upon Defendant's Motion to Dismiss Plaintiff's claims. On March 15, 2019, this Court issued an order granting Defendant's motion. On March 25, 2019, Plaintiff filed its Motion to Alter or Amend Judgment, pursuant to SCRPC Rule 59. After review and consideration, Plaintiff's Motion to Alter or Amend Judgment is respectfully denied.

## ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/25/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Beaufort Common Pleas

**Case Caption:** Floyd Hargrove VS Anthony E Griffis Sr

**Case Number:** 2018CP0701449

**Type:** Order/Electronic Form 4

It is so ordered

Eugene C. Griffith, Jr. 2154

Electronically signed on 2019-04-25 09:35:09 page 3 of 3

|                               |   |                                |
|-------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS   |
|                               | ) |                                |
| COUNTY OF BEAUFORT            | ) | FOURTEENTH JUDICIAL CIRCUIT    |
|                               | ) |                                |
|                               | ) | CASE NO. 2018-CP-07-01449      |
|                               | ) |                                |
| <b>FLOYD HARGROVE</b>         | ) |                                |
|                               | ) |                                |
| Plaintiff                     | ) |                                |
|                               | ) | <b>PLAINTIFF'S MOTION TO</b>   |
| versus                        | ) | <b>ALTER OR AMEND JUDGMENT</b> |
|                               | ) |                                |
| <b>ANTHONY E. GRIFFIS, SR</b> | ) |                                |
|                               | ) |                                |
| Defendant                     | ) |                                |
|                               | ) |                                |

---

**THE PLAINTIFF BRINGS THIS MATTER BEFORE THE COURT** seeking an order altering and amending the judgment filed on March 15, 2019. SCRCP Rule 59. The Plaintiff incorporates all arguments and exhibits reviewed by the Court during the hearing resulting in the Order of Dismissal.

#### General Objections

To begin, the Plaintiff objects to the fact that the Order was drafted by the Defendant without any direction as to the factual findings made by the Court. See *Pruitt v State*, 423 SE2d 127, 128 (SC 1992). The Plaintiff also objects that the Order does not reflect that the Complaint was reviewed in the light most favorable to the Plaintiff and the Order does not even reference this standard. *Clearwater Trust v Bunting*, 626 SE2d 334 (SC 2006). The final general objection is that certain findings are actually made contrary to the face of the Complaint; converting the Defendant's Rule 12 Motion to a summary judgment motion without opportunity for the Plaintiff to conduct discovery or submit competing factual information.

Expert

The Order incorrectly applies SC Code Section 15-36-100(B) to the causes of action pled by the Plaintiff. In the case at bar, while the Defendant is a professional, the Plaintiff makes no claim of “professional negligence” as envisioned by SC Code Section 15-36-100. Succinctly, the Defendant was not an attorney representing the Plaintiff or an attorney representing a party adverse to the Plaintiff during the breach at issue in this pleading.

Instead, the Plaintiff was a third party beneficiary due a portion of the commission owed by the Seller to the “broker in charge of the realty for whom [the Plaintiff] was working” at the time of the closing. The Defendant was the attorney for the seller. However, as pled, the Defendant told another attorney that the commission was not due anyone in this case.

The fiduciary duty pled in this case is a duty owed to a third party and not a duty owed out of an attorney-client relationship. No where in the Complaint or Answer is there any averment that the Defendant served as counsel for the Plaintiff. Because this was not a claim arising out of the attorney-client relationship, the Order incorrectly relies upon *RFT Mgmt. Co. v Tinsley and Adams, et al*, 732 SE2d 166 (SC 2012) and *H & H Johnston v Old Republic National Title Co., et al*, 748 SE2d 72 (SC Ct App 2013).

Contrary to the analysis in the Order, The *RFT Mgmt Co* case holds that the Breach of Fiduciary Duty claim does not merge with a legal malpractice claim where “it arises out of a duty other than one created by the attorney-client relationship.” *Id.*, at 173. Again, there is no attorney-client relationship between the Plaintiff and the Defendant in any way shape or form. And there was no such claim pled to merge with. The Order, *sub judice*, presents the exactly converse set of facts such that denial of the Motion to Dismiss is appropriate.

Further, as to the Conspiracy cause, SC Code Section 15-36-100 does not apply at all and

the Plaintiff objects to the Order dismissing this claim on this ground.

Finally, because of the unprecedented nature of this ruling, in which the Plaintiff is held to produce an expert affidavit to sue a lawyer who was not related by an attorney client relationship and in which no legal malpractice claim was pled, and, without waiving objection to the application of SC Code Section 15-36-100 to the case at bar, a dismissal without prejudice and with leave to provide the expert Affidavit would be a more appropriate remedy.

#### Statue of Limitations

As to the Breach of Fiduciary Duty, the Plaintiff averred that he asserted “reasonable diligence” as to the filing of this claim against the Defendant. Specifically, paragraphs 20-56 document the journey of the Plaintiff in search of the unpaid money owed the Plaintiff. When reviewed in the light most favorable to the Plaintiff, the cause of Breach of a Fiduciary Duty would not be found to have been pled outside of the statute of limitations. See Clearwater Trust, supra.

Likewise, as to the claim of Conspiracy, the Plaintiff was not aware that the Defendant concocted a cover up of the non-payment by asserting an alternative payment arrangement. This fake and false payment arrangement was asserted by the Defendant to the Plaintiff’s counsel for the first time in January, 2018 when the Defendant provided that mis-representation. Because this email’s reference to this alternative payment arrangement is an overt act in the conspiracy, this date should be considered the triggering date for the purposes of the statute of limitations and the filing date of this suit in July, 2018 clearly falls within year years of the January, 2018 email.

#### Public Policy

As to the claim of Breach of a Fiduciary Duty, the Plaintiff is seeking to assert his equitable interest in the portion of the commission which represents his money. It is not against

public policy for the Plaintiff to seek damages owed by a tortfeasor. It is not against public policy for a realtor to receive payment for his work.

This suit merely seeks to make the Plaintiff whole for his efforts. The Plaintiff is entitled to seek a remedy for the wrong done to him. The law abhors a wrong without a remedy and the Order's holding in this regard perversely insulates the wrong from remedy.

As to the claim of Conspiracy, the claim is not against public policy in any way. To the extent that the Plaintiff suffered injury caused by the acts of the Defendant, the Plaintiff is entitled to litigated this claim in a court of law and before a jury. The Plaintiff seeks no more than the opportunity to pursue this claim.

#### Lack of Standing

As to the claim of Breach of a Fiduciary Duty, this standing issue is identical to the issue raised in the "Public Policy" section of the proposed Order and the Plaintiff objects as referenced in the public policy section above.

As to the claim of Conspiracy, the proposed Order is silent as to the standing of the Plaintiff so the Plaintiff merely wishes to clarify that the proposed Order does not purport to dismiss the Conspiracy cause on this basis. To the extent the Order does purport to dismiss the Conspiracy cause because of a lack of standing, the Plaintiff would note that the cover up of the responsibility for the non-payment was made by misrepresentation of the Defendant to the Plaintiff in a January 18, 2018 email.

#### Special Damages as to Conspiracy

In response to the assertion in the proposed Order that the Plaintiff did not plead any special damages related to the Conspiracy, succinctly, the Complaint indicates that the cover up which was the object of the Conspiracy caused the Plaintiff to pursue a suit against a third party

and lose investment income which would have been realized had the proper parties been pursued in more timely fashion. These special damages are expressly pled on the face of the Complaint in paragraphs 70 and 71. These paragraphs call these damages "special damages."

The Plaintiff is not sure what more he could have pled as to specific damages which are separate from the "non-payment of the commission."

#### Conclusion

To conclude, the Order conflates the review of the two claims into one analysis. Perversely, the order benefits the Defendant's cover up which delayed the Plaintiff's discovery of the Defendant's role in the non-payment of the commission and then insulates the Defendant from liability for the Conspiracy to cover up by not analyzing the statute of limitations, standing, policy, and damages issues separately from the Breach of Fiduciary Duty claims. As an alternative, the Court should allow the Plaintiff to amend the complaint and conduct discovery and review these claims after better development.

Therefore, the Plaintiff respectfully requests that this Court alter or amend the judgment and vacate the Order of Dismissal or, alternatively, vacate the portion dismissing the matter with prejudice pursuant to SC Code Section 15-36-100 and instead allow the Plaintiff to pursue a remedy for the wrongs he has suffered.

Respectfully submitted by:

/s/ James A. Brown, Jr.  
James A. Brown, Jr.  
Attorney for the Plaintiff

March 25, 2019  
Beaufort, SC

Law Offices of Jim Brown, PA  
1600 Burnside Street, Suite 100  
PO Box 592  
Beaufort, SC 29901-0592

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )  
**FLOYD HARGROVE** )  
Plaintiff )  
v. )  
**ANTHONY E. GRIFFIS, SR.,** )  
Defendant )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2018-CP-07-01449

**DEFENDANT'S REPLY  
TO PLAINTIFF'S MOTION TO ALTER OR  
AMEND JUDGMENT**

The Court has previously dismissed all of the issues raised in Plaintiff's Motion To Alter or Amend Judgment", being the identical issues raised in "Plaintiff's Objections To Proposed Order of Dismissal" submitted on March 4, 2019. Therefore, Defendant is re-submitting his "Reply to Objections to Proposed Order" submitted to the Court on March 4, 2019. Defendant requests that the Court reject the duplicative Motion by Plaintiff and deny the Motion.

Respectfully Submitted:

/s/ Anthony E. Griffis March 26, 2019

Anthony E. Griffis, Pro Se Defendant  
355 Park Ave SW  
Aiken, SC 29801  
843-368-5013  
[tonygriffis@gmail.com](mailto:tonygriffis@gmail.com)

|                                 |   |                                    |
|---------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS       |
|                                 | ) | FOURTEENTH JUDICIAL CIRCUIT        |
| COUNTY OF BEAUFORT              | ) |                                    |
|                                 | ) |                                    |
| <b>FLOYD HARGROVE</b>           | ) | CIVIL ACTION NO.: 2018-CP-07-01449 |
|                                 | ) |                                    |
| Plaintiff                       | ) |                                    |
|                                 | ) |                                    |
| v.                              | ) | <b>DEFENDANT'S MOTION</b>          |
|                                 | ) | <b>FOR</b>                         |
|                                 | ) | <b>SANCTIONS</b>                   |
| <b>ANTHONY E. GRIFFIS, SR.,</b> | ) | (SC Code Ann. §15-36-10 et seq.)   |
| Defendant                       | ) | <b>FRIVOLOUS LAWSUIT</b>           |
|                                 | ) |                                    |

Defendant hereby moves the Court, pursuant to S.C. Code Ann. §15-36-10 et seq. and under Rule 11(a) SCRCP, for an Order awarding Defendant all costs, including attorneys fees, and other sanctions as this Court deems appropriate.

On March 15, 2019, the Court granted Defendant's Motion to Dismiss, finding that (1) an expert affidavit is required by S.C. Code Ann. §15-36-100 and was not filed with the Complaint; (2) the applicable statute of limitations for the Complaint expired; (3) Plaintiff's claims are void as against public policy, the laws and regulations of South Carolina, and the underlying contract; (4) Plaintiff lacks standing to bring this action, and (5) additionally, the "Conspiracy" claim fails by not pleading separate and distinct "special damages".

#### **FAILURE TO COMPLY WITH S.C. CODE ANN. §15-36-100 IS *PER SE* FRIVOLOUS**

S.C. Code Ann. §15-36-100 is an integral part of Title 15, Chapter 36 of the South Carolina Frivolous Civil Proceedings Act. Section 15-36-100(B) requires the filing of an expert affidavit with the Complaint (to avoid frivolous lawsuits), providing:

[I]n an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) ..., the plaintiff **must** file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

The failure to comply with S.C. Code Ann. §15-36-100 of the South Carolina Frivolous Civil Proceedings Act is *per se* a frivolous action entitling Defendant to sanctions under the Act.

**PLAINTIFF'S ATTORNEY DID NOT CONDUCT A REASONABLE INVESTIGATION  
PRIOR TO FILING THE LAWSUIT**

In a series of emails prior to the commencement of the lawsuit (attached hereto as an Exhibit), Defendant asked Plaintiff's attorney "Can you explain how the Statute of Limitations will not bar any actions vs me?" (email dated January 19, 2018). In the email dated January 20, 2018, Defendant disputed the essential allegations of Plaintiff's claims and offered documentation as proof. Then, on January 23, 2018, Defendant stated to Plaintiff's attorney "I will be glad to discuss this with you, 8433685013, and provide you with documentation of Chuck Scarminach's arrangement re the commission".

However, Plaintiff's attorney failed to discuss this matter with Defendant prior to filing the lawsuit. He clearly had time to investigate (lawsuit was not filed until July 18, 2018), but failed to do so. Had he done so, he would have learned that there was no basis for the lawsuit. He never even followed up with Defendant's offer to provide documentation regarding the payment of the commission, or discuss any other issues (such as the Statute of Limitations) with Defendant. See generally *Ex Parte: George W. Gregory, Jr.*, 663 S.E.2d 46, 378 S.C.430 (2008).

**THE CLAIMS WERE FRIVOLOUS BECAUSE THEY WERE NOT WARRANTED  
UNDER EXISTING LAW**

As noted in the Court's "Order Granting Motion to Dismiss", the well-settled law in this case, along with the admitted facts in the Complaint, required dismissal of the Complaint on five (5) independent grounds. Any one of the grounds for dismissal (such as Statute of Limitations) would give rise to sanctions for a frivolous lawsuit, much less the other independent grounds.

For the foregoing reasons, Defendant requests that the Court impose sanctions against Plaintiff and Plaintiff's attorney for filing a frivolous lawsuit. Pursuant to S.C. Code Ann. §15-36-10(G), such sanctions should include reimbursement of all costs and attorney's fees to Defendant, and any other sanction which the Court considers just, equitable and proper under the circumstances (§15-36-10(B)(2)).

March 21<sup>st</sup>, 2019  
Aiken, SC

Respectfully Submitted:

s/ Anthony E. Griffis, Sr  
Attorney ID: 2285  
Anthony E. Griffis, Sr., Pro Se  
355 Park Ave SW  
Aiken, SC 29801  
(843) 368-5013  
Email: [tonygriffis@gmail.com](mailto:tonygriffis@gmail.com)

**From:** Tony Griffis  
**Sent:** Friday, January 19, 2018 4:56 PM  
**To:** Jim Brown Law  
**Subject:** Re: Hargrove v Citadel et al

Can you please send me a copy of the July 19, 2017 letter? Thanks

On Jan 19, 2018 2:37 PM, "Tony Griffis" <[tonygriffis@gmail.com](mailto:tonygriffis@gmail.com)> wrote:

I don't recall ever being served with your 2013 Complaint. I also don't recall anything about this matter, and probably do not have a file, since I retired several years ago. Can you explain how the Statute of Limitations will not bar any action vs me? Did Chuck Scarminach represent the Buyer on this transaction?

On Jan 19, 2018 2:15 PM, "Jim Brown Law" <[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)> wrote:

Mr. Griffis,

Good afternoon. Please see attached letter and document referenced therein.

Respectfully,

Law Offices of Jim Brown

**From:** Tony Griffis  
**Sent:** Saturday, January 20, 2018 1:33 PM  
**To:** Jim Brown Law  
**Subject:** Re: Hargrove v Citadel et al

Jim, I will be representing myself in this matter. I will be glad to accept service of your amended Complaint. However, my wife and I are planning a cross-country trip in our motorhome, to Alaska, for about 4 months, leaving the first week of April. Can you have your Complaint served in about 30 days, so I can file my responsive pleadings by the end of March? Tony Griffis

On Jan 19, 2018 2:15 PM, "Jim Brown Law" <[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)> wrote:

Mr. Griffis,

Good afternoon. Please see attached letter and document referenced therein.

Respectfully,

Law Offices of Jim Brown

**From:** Tony Griffis  
**Sent:** Saturday, January 20, 2018 4:05 PM  
**To:** Jim Brown Law  
**Subject:** Re: Hargrove v Citadel et al

Jim, I have reviewed your proposed Complaint and your allegations about my non-disclosure of the sales commission to Chuck Scarminach is false. I have proof that Chuck Scarminach not only knew about the commission, but agreed to get consent from the broker that it be paid from the release payments to Simmons over the first 10 lot sales. I am surprised that the "closing attorney" whom I assume was Chuck Scarminach is throwing me under the bus. If you want any documentation let me know, otherwise I stand ready to defend your lawsuit.

Tony

On Jan 20, 2018 1:33 PM, "Tony Griffis" <[tonygriffis@gmail.com](mailto:tonygriffis@gmail.com)> wrote:

Jim, I will be representing myself in this matter. I will be glad to accept service of your amended Complaint. However, my wife and I are planning a cross-country trip in our motorhome, to Alaska, for about 4 months, leaving the first week of April. Can you have your Complaint served in about 30 days, so I can file my responsive pleadings by the end of March? Tony Griffis

On Jan 19, 2018 2:15 PM, "Jim Brown Law" <[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)> wrote:

Mr. Griffis,

Good afternoon. Please see attached letter and document referenced therein.

Respectfully,

Law Offices of Jim Brown

**Law Offices of Jim Brown, P.A.**

1600 Burnside St., Suite 100 • P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)

[www.attorneyjimbrown.com](http://www.attorneyjimbrown.com)

January 23, 2018

**VIA E-MAIL: tonygriffis@gmail.com**

Anthony Griffis

Griffis Law Office

355 Park Ave. SW

Aiken, SC 29801

Re Hargrove v Citadel Realty, et al.

Mr Griffis:

I read your email about the arrangement to have my client's commission paid through the sale of the first 10 lots. While this is the first I have heard of this arrangement, security of this commission with appropriate interest through this arrangement would likely satisfy the goal of my client's suit without the need for further litigation. Please let me know the best way to proceed with the execution of this arrangement.

Sincerely,

/s/Jim Brown

**From:** Tony Griffis  
**Sent:** Tuesday, January 23, 2018 12:16 PM  
**To:** Jim Brown Law  
**Subject:** Re: Hargrove v Citadel Realty

You misunderstood my email. Chuck Scarminach and his clients were supposed to pay the commission out of the first 10 lot sales deducted by the Buyer from my client's lot release payments. Apparently this was not done. I have nothing to do with the payment of the commission, and please do not threaten me with litigation anymore. I will be glad to discuss this with you, 8433685013, and provide you with documentation of Chuck Scarminachs arrangement re the commission.

Tony Griffis

On Jan 23, 2018 11:55 AM, "Jim Brown Law" <[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)> wrote:  
Good Morning,

Please read attached letter.

Thank you,

Olivia Cooke  
Secretary to Jim Brown

|                               |   |                              |
|-------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS |
|                               | ) |                              |
| COUNTY OF BEAUFORT            | ) | FOURTEENTH JUDICIAL CIRCUIT  |
|                               | ) |                              |
|                               | ) | CASE NO. 2018-CP-07-01449    |
| <br><b>FLOYD HARGROVE</b>     | ) |                              |
|                               | ) |                              |
| Plaintiff                     | ) |                              |
|                               | ) | <b>PLAINTIFF'S COUNSEL'S</b> |
| versus                        | ) | <b>RESPONSE TO MOTION</b>    |
|                               | ) | <b>FOR SANCTIONS</b>         |
| <b>ANTHONY E. GRIFFIS, SR</b> | ) |                              |
|                               | ) |                              |
| Defendant                     | ) |                              |
| _____                         | ) |                              |

**UNDERSIGNED COUNSEL FOR THE PLAINTIFF** hereby provides this response to Defendant Griffis' Motion for Sanctions which became ripe on April 25, 2019 when the circuit court denied Plaintiff's Motion to Alter or Amend an order of dismissal in this action.

Undersigned counsel reserves the right to supplement this response as allowed by the court and by law. Undersigned counsel notes that Plaintiff has retained separate counsel to argue his position regarding Defendant's motion.

To begin, undersigned counsel respectfully incorporates by reference the arguments and exhibits presented to the circuit court on January 8, 2019 in argument against Defendant's Motion to Dismiss pursuant to SCRCP Rule 12(b) as well as the arguments presented in the objections to the proposed order and the Motion to Alter or Amend. Further, undersigned counsel would note that the order dismissing this matter is pending appeal to the SC Court of Appeals.

The Plaintiff served a suit against the Defendant on or about November 8, 2018 alleging two causes of action: Breach of Fiduciary Duty and Conspiracy. The Defendant filed an answer

and moved for a dismissal on or about November 14, 2018. The Court granted the motion to dismiss on or about March 15, 2019 and denied a motion to alter or amend on or about April 25, 2019.

The Defendant requests sanctions against both the Plaintiff and undersigned counsel.

### **SANCTIONS NOT CONTEMPLATED BY STATUTE AS TO 12(b) MOTIONS**

First, undersigned counsel notes that SC Code Section 15-36-10( C ) does not reference a dismissal on the pleadings as a triggering mechanism for sanctions under this section of law. Instead, the section specifically mentions a) “[a]t the conclusion of a trial” and “after a verdict of or a verdict against damages has been rendered” or “a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict.” SC Code Section 15-36-10. This case did not reach any of these points in the proceedings and, thus, no mechanism exists to bring sanctions in the position in which this case not sits.

In contrast, undersigned counsel suggests that the legislature envisioned any case dismissed at this level would be eligible for amendment of the pleading or resolution at such an early stage that sanctions was not contemplated. However, to the extent that counsel must rely upon information outside the pleadings to prove reasonableness as this case has not proceeded to discovery, undersigned counsel requests leave to conduct discovery to argue against a claim of unreasonableness. Specifically, such discovery would illuminate the court as to the nature of any fiduciary relationship or resolve any issues such as assignment of claims between brokerage and Plaintiff or date of discovery of the type of injury suffered by Plaintiff. Again, such discovery is lacking in this case as it has not proceeded to the stage in which discovery would have been due<sup>1</sup>.

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<sup>1</sup>Plaintiff has propounded discover requests to the Defendant which were due in January, 2019 but the dismissal of this matter ended the case without the opportunity to compel any responses.

Opposing counsel has attached exhibits outside the pleadings in support of his motion for sanctions but undersigned counsel has not been privy to any discovery to rebut such evidence.

### **THE COURT ERRED IN GRANTING THE MOTION TO DISMISS**

Undersigned counsel respectfully asks that this court hold any ruling on the motion for sanctions in abeyance pending the resolution of the current appeal. Alternatively, undersigned resubmits the below reasons that the court should have ruled differently regarding the motion to dismiss. These grounds are listed below.

#### General Objections to Order Granting Motion to Dismiss

The Plaintiff objects to the fact that the order of dismissal was drafted by the Defendant without any direction as to the factual findings made by the Court. See *Pruitt v State*, 423 SE2d 127, 128 (SC 1992). The Plaintiff also objects that the Order does not indicate that the Complaint was reviewed in the light most favorable to the Plaintiff and, in fact, the order does not even reference this standard. *Clearwater Trust v Bunting*, 626 SE2d 334 (SC 2006). The final general objection is that certain findings are actually made contrary to the face of the Complaint; converting the Defendant's Rule 12 Motion to a summary judgment motion without opportunity for the Plaintiff to conduct discovery or submit competing factual information.

#### Expert

The Order incorrectly applies SC Code Section 15-36-100(B) to the causes of action pled by the Plaintiff. In the case at bar, while the Defendant is a professional, the Plaintiff makes no claim of "professional negligence" as envisioned by SC Code Section 15-36-100. Succinctly, the Defendant was not an attorney representing the Plaintiff or an attorney representing a party adverse to the Plaintiff during the breach at issue in this pleading.

Instead, the Plaintiff was a third party beneficiary due a portion of the commission owed

by the Seller to the “broker in charge of the realty for whom [the Plaintiff] was working” at the time of the closing. The Defendant was the attorney for the seller. However, as pled, the Defendant told another attorney that the commission was not due anyone in this case.

The fiduciary duty pled in this case is a duty owed to a third party and not a duty owed out of an attorney-client relationship. No where in the Complaint or Answer is there any averment that the Defendant served as counsel for the Plaintiff. Because this was not a claim arising out of the attorney-client relationship, the Order incorrectly relies upon *RFT Mgmt Co. v Tinsley and Adams, et al*, 732 SE2d 166 (SC 2012) and *H & H Johnston v Old Republic National Title Co., et al*, 748 SE2d 72 (SC Ct App 2013).

Further, as to the Conspiracy cause, SC Code Section 15-36-100 does not apply at all and the Plaintiff objects to the Order dismissing this claim on this ground.

#### Statute of Limitations

As to the Breach of Fiduciary Duty, the Plaintiff averred that he exercised “reasonable diligence” as to the filing of this claim against the Defendant. Specifically, paragraphs 20-56 document the journey of the Plaintiff in search of the unpaid money owed the Plaintiff. When reviewed in the light most favorable to the Plaintiff, the cause of Breach of a Fiduciary Duty would not be found to have been pled outside of the statute of limitations. See Clearwater Trust, *supra*.

Likewise, as to the claim of Conspiracy, the Plaintiff was not aware that the Defendant and others agreed to an alternative payment arrangement as suggested by the Defendant as the reason Plaintiff did not receive monies he earned. This alternative payment arrangement was asserted by the Defendant to the Plaintiff’s counsel for the first time in January, 2018 when the Defendant provided that correspondence to the Plaintiff, as detailed in the Complaint. Because

this email's reference to this alternative payment arrangement is an overt act in the conspiracy, this date should be considered the triggering date for the purposes of the statute of limitations and the filing date of this suit in July, 2018 clearly falls within year years of the January, 2018 email.

#### Public Policy

As to the claim of Breach of a Fiduciary Duty, the Plaintiff is seeking to assert his equitable interest in the portion of the commission which represents his money. It is not against public policy for the Plaintiff to seek damages owed by a tortfeasor. It is not against public policy for a realtor to receive payment for his work or to recover damages if he pleads a tort in which he can satisfy the necessary elements.

This suit merely sought to make the Plaintiff whole for his efforts. The Plaintiff is entitled to seek a remedy for the wrong done to him. The law abhors a wrong without a remedy and the Order's holding in this regard perversely insulates the wrong from remedy.

As to the claim of Conspiracy, the claim is not against public policy in any way. To the extent that the Plaintiff suffered injury caused by the acts of the Defendant, the Plaintiff is entitled to litigated this claim in a court of law and before a jury. The Plaintiff seeks no more than the opportunity to pursue this claim.

#### Lack of Standing

As to the claim of Breach of a Fiduciary Duty, this standing issue is identical to the issue raised in the "Public Policy" section of the proposed Order and the Plaintiff objects as referenced in the public policy section above.

As to the claim of Conspiracy, the proposed Order is silent as to the standing of the Plaintiff so the Plaintiff merely wishes to clarify that the proposed Order does not purport to dismiss the Conspiracy cause on this basis. To the extent the Order does purport to dismiss the

Conspiracy cause because of a lack of standing, the Plaintiff would note that the cover up of the responsibility for the non-payment was made by misrepresentation of the Defendant to the Plaintiff in a January 18, 2018 email.

Special Damages as to Conspiracy

In response to the assertion in the proposed Order that the Plaintiff did not plead any special damages related to the Conspiracy, succinctly, the Complaint indicates that the cover up which was the object of the Conspiracy caused the Plaintiff to pursue a suit against a third party and lose investment income which would have been realized had the proper parties been pursued in more timely fashion. These special damages are expressly pled on the face of the Complaint in paragraphs 70 and 71. These paragraphs call these damages “special damages.”

The Plaintiff is not sure what more he could have pled as to specific damages which are separate from the “non-payment of the commission.”

Conclusion as to the Ruling on the Motion to Dismiss

To conclude, the Order conflates the review of the two claims into one analysis. The order benefits the Defendant’s cover up which delayed the Plaintiff’s discovery of the Defendant’s role in the non-payment of the commission and then insulates the Defendant from liability for the Conspiracy to cover up by not analyzing the statute of limitations, standing, policy, and damages issues separately from the Breach of Fiduciary Duty claims. As an alternative, the Court should allow the Plaintiff to amend the complaint and conduct discovery and review these claims after better development.

Thus, for the reasons stated above, the undersigned counsel asserts that the court erred in granting the motion to dismiss.

## UNDERSIGNED'S ACTIONS WERE NOT UNREASONABLE

Undersigned respectfully requests that the court deny sanctions even if the court correctly granted the motion to dismiss. Succinctly, there is no case on point as to the issues resolved by the court in the order granting the motion to dismiss. Even if undersigned was wrong in the assertion of the claims, this wrong was not unreasonable because “[a]n attorney has an ethical obligation zealously to pursue any lawful claim of his client” and such sanctions otherwise might “prohibit attorneys from pursuing and developing new causes of action, and could hinder development of new legal theories.” *Gaar, v. N. Myrtle Beach Realty Co.*, 339 S.E.2d 887, 889–90 (Ct. App. 1986) (Internal citations omitted).

There is no South Carolina case which address affidavits for licensed professionals involving the claim of breach of fiduciary duty for a lawyer’s duty to a third party *outside* of those in which that cause merged with a claim for legal malpractice. Plaintiff never asserted any privity of relationships between which would trigger the potential for a legal malpractice claim and one does not exist. This removes this alleged fiduciary relationship outside of one in which licensing is the issue. The authority cited by the court’s order dismissing the case is not similar in that regard to Plaintiff’s situation and it would be unreasonable to hold undersigned counsel to a standard of clairvoyance in which he would have to predict such an extension of the law.

Likewise, undersigned’s belief that the discovery rule, particularly as applied to the July, 2017 letter in which another attorney expressed that Defendant was the cause of Plaintiff’s damages, was reasonable. Such reasonableness is apparent when one considers that Plaintiff first filed a claim against his former brokerage firm for conversion of his funds until he learned that no such commission had ever been paid to the brokerage during the discovery process in that predecessor case. See *Hargrove v Citadel Realty*, 2018-CP-07-00619.

Also, as to the statute of limitations, according to the new payment plan referenced by Defendant, the time for receipt of payment might not yet have occurred. Attached to Defendant's answer, and considered by the dismissing court notwithstanding the posture of the motion as one on the pleadings, were emails indicating that payment of the commission was not due until the sale of certain lots. This uncertainty, at a minimum, defeats a claim of unreasonableness on the part of undersigned.

Further, there are no cases in which public policy bars a realtor from recovering for damages he suffered. In a breach of fiduciary duty setting, if the duty was owed to the Plaintiff and it was breached, he would have standing as a matter of public policy. Even if some other policy overrides these general pleading rules, undersigned was not unreasonable for asserting such a cause of action on behalf of Plaintiff. There is no law which holds anything remotely similar to the analysis used by the court.

Finally, undersigned was reasonable in his pleadings as to the conspiracy charge. Paragraphs 70 and 71 of the complaint use the language "special damages" to describe the conspiracy damages. These damages, as argued in the court hearing in January, were the time and expense lost pursuing a different suit when a side agreement was made, outside of the knowledge of Plaintiff, which deprived him of the portion of the commission to which he was owed and delayed payment until a time which has not yet occurred.

**NO ENTITLEMENT TO ATTORNEY FEES AS A SANCTION  
AWARDED TO A *PRO SE* LITIGANT**

Even if undersigned counsel was wrong and unreasonable, attorney fees should not be awarded to a party who appears *pro se*. The purpose of the statute is not to make one whole as to damage but instead to cover the costs of litigation. This is consistent with other rulings from

South Carolina in which attorneys who appear pro se are not awarded attorney fees. See *Calhoun v Calhoun*, 529 SE2d 14 (SC 2000).

## CONCLUSION

Therefore, undersigned respectfully requests that this court find that sanctions are not contemplated by the statute as an order dismissing a matter at the pleading stage does not trigger the sanctioning authority. Further, undersigned asks that this matter be held in abeyance pending the appeal. Also, undersigned requests that the court find his actions reasonable and if not consider undersigned's good standing with the South Carolina Bar, the US District Court of South Carolina, the United States Court of Appeals for the Fourth Judicial Circuit, his lack of prior sanctions by any court or citation at any court proceedings or any other disciplinary event from any court as reason to deny sanctions.

Respectfully submitted by:

/s/ James A. Brown, Jr.

James A. Brown, Jr.

May 28, 2019

Beaufort, SC

Law Offices of Jim Brown, PA  
1600 Burnside Street, Suite 100  
PO Box 592  
Beaufort, SC 29901-0592

|                               |   |                              |
|-------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS |
|                               | ) |                              |
| COUNTY OF BEAUFORT            | ) | FOURTEENTH JUDICIAL CIRCUIT  |
|                               | ) |                              |
|                               | ) | CASE NO.: 2018-CP-07-        |
| <b>FLOYD HARGROVE,</b>        | ) |                              |
|                               | ) |                              |
| Plaintiff                     | ) |                              |
|                               | ) |                              |
| versus                        | ) | <b>SUMMONS</b>               |
|                               | ) |                              |
|                               | ) |                              |
| <b>ANTHONY E. GRIFFIS, SR</b> | ) |                              |
|                               | ) |                              |
| Defendant                     | ) |                              |
|                               | ) |                              |

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TO THE DEFENDANT NAMED ABOVE:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint on the Law Offices of Jim Brown, P.A. at 1600 Burnside Street, Suite 100, PO Box 592, 29901, Beaufort, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgement by default will be rendered against you for the relief demanded in the Complaint.

Respectfully Submitted,

By: /s/James A. Brown, Jr.  
James A. Brown, Jr.

July 18, 2018  
Beaufort, SC

Law Offices of Jim Brown, P.A.  
1600 Burnside Street, Suite 100  
P.O. Box 592  
Beaufort, South Carolina 29901-0592  
(843) 470-0003  
Attorney for the Plaintiff  
SC Bar Number: 12213

|                               |   |                              |
|-------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS |
|                               | ) |                              |
| COUNTY OF BEAUFORT            | ) | FOURTEENTH JUDICIAL CIRCUIT  |
|                               | ) |                              |
|                               | ) | CASE NO. 2018-CP-07-         |
|                               | ) |                              |
| <b>FLOYD HARGROVE</b>         | ) |                              |
|                               | ) |                              |
| Plaintiff                     | ) |                              |
|                               | ) |                              |
| versus                        | ) | <b>COMPLAINT</b>             |
|                               | ) | (Jury Trial Demanded)        |
| <b>ANTHONY E. GRIFFIS, SR</b> | ) |                              |
|                               | ) |                              |
| Defendant                     | ) |                              |
|                               | ) |                              |

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The Plaintiff, by and through his undersigned attorney, respectfully alleges the following against the Defendant:

#### JURISDICTION AND VENUE

- 1) All of the acts of the Defendant about which the Plaintiff complains occurred within the geographical limits of Beaufort County in the State of South Carolina;

#### PARTIES

- 2) The Plaintiff, Floyd Hargrove, is a resident of Richland County, South Carolina.
- 3) The Defendant, Anthony E. Griffis, Sr., is a resident of Aiken County, South Carolina and has been for more than one year.

#### STATEMENT OF FACTS

- 4) Plaintiff worked as a real estate agent.
- 5) Plaintiff arranged for the sale of property (Property) with tax ID numbers of R510 010 000 0015 0000; R510 010 000 015A 0000; and R510 010 000 015B 0000 and located in the vicinity of Spanish Wells Road, Hilton Head Island, South Carolina.
- 6) Plaintiff arranged for Charles E. Simmons, Jr. (Seller), to sell this Property to BGD of HHI, LLC (Buyer) or its assigns.
- 7) The purchase price was \$4,000,000.00 (Four Million Dollars).

- 8) The Seller agreed to pay 2.5% of the purchase price as the commission (Commission) on this sale.
- 9) It was agreed that "At closing, Seller shall pay a commission of 2.5% of the purchase price to the Broker in Charge of the company for which Floyd Hargrove is working."
- 10) The purchase rights were assigned from BGD to Diane The Runner, LLC (DTR) before closing.
- 11) DTR purchased the property from the Seller under the same terms negotiated by the Plaintiff.
- 12) The closing occurred on May 7, 2009.
- 13) The Plaintiff worked for the Citadel Realty (Citadel) on May 7, 2009 .
- 14) Billy Gavigan (Gavigan) was owner of Citadel Realty on May 7, 2009.
- 15) Under arrangements with Citadel, Plaintiff was due 70% of the Commission and Citadel was due the other 30%.
- 16) By regulation and law, the Commission could not be paid directly to the Plaintiff but instead had to be made to the Broker in Charge for the realty for whom he was working.
- 17) Citadel, care of the Broker in Charge, possessed a legal claim to the Commission.
- 18) The Plaintiff had an equitable interest in the Citadel's claim.
- 19) Citadel, through legal counsel, attempted to obtain the Commission through correspondence with counsel for the Seller and the Buyer.
- 20) On October 29, 2009, Citadel made a written demand for payment providing 15 days in which to meet this demand.
- 21) This demand was not met.
- 22) Citadel informed the Plaintiff that it (Citadel) would continue to pursue the commission.
- 23) Citadel continued to inform the Plaintiff that it would pay his portion of the Commission when received.
- 24) Plaintiff, through counsel, then made a demand of Citadel Realty for the Commission on November 13, 2012 date.

- 25) This demand was not met.
- 26) On November 12, 2013, Plaintiff filed suit (Citadel Suit) against Citadel and its owner, Gavigan, and Jane Doe as the Broker in Charge.
- 27) The Citadel suit alleged three causes of action.
- 28) In June 2014, the Plaintiff filed for a default judgment in the Citadel Suit.
- 29) By Order dated November 17, 2014, the circuit court accepted the Defendants' answer in the Citadel Suit.
- 30) By Order dated February 13, 2015, the circuit court granted a 12(b)(6) motion brought by the Defendants as to two of the claims in the Citadel Suit.
- 31) By Order dated June 4, 2015, the circuit court granted summary judgment as to the third claim in favor of the Defendants in the Citadel Suit.
- 32) By Order dated February 26, 2016, the circuit court granted the Plaintiff's Rule 59 Motion and reinstated the Citadel Suit as to one cause of action.
- 33) The case against Citadel (Citadel Case) was mediated on May 11, 2016.
- 34) At the mediation, Citadel provided the Plaintiff a letter in which a third party attorney involved in the closing assured Citadel that the commission would be paid.
- 35) The Plaintiff was not aware of this letter until mediation despite previously made discovery requests and attempts to enforce these requests.
- 36) On January 28, 2016, DTR filed documents with the SC Secretary of State making David A. Brown the agent for service of process and making other corporate changes including changing the name from Diane the Runner, LLC to Silver Moss, LLC.
- 37) Plaintiff then sought to depose the owner of DTR and obtain documents from this company by subpoena.
- 38) Counsel for DTR and the attorney who conducted the closing work for the same firm (Firm).
- 39) On July 19, 2017, counsel for this Firm provided copies of the requested documents to the Plaintiff.
- 40) Attached to these documents was a cover letter from the closing attorney, Charles Scarminach (CS).

- 41) CS conducted the closing in this case.
- 42) CS admitted that no commission had been paid during the closing.
- 43) CS informed the Plaintiff that he believes this commission was not paid because the Seller's counsel informed CS not to pay any commission.
- 44) Defendant Griffis was counsel for the seller.
- 45) The Plaintiff learned that the commission was not paid because of the actions of Defendant Griffis for the first time by the receipt of this July 19, 2017 letter.
- 46) The Defendant Griffis is an attorney licensed to practice law in the State of South Carolina.
- 47) The Defendant Griffis represented the Seller of the property listed above.
- 48) The Defendant Griffis owed a fiduciary duty to the Plaintiff to see that the Commission owed the Plaintiff was properly paid at the time of closing.
- 49) Based upon the July 19, 2017 letter, the Defendant Griffis failed to disclose and/or concealed the fact that the Commission was owed the Plaintiff when providing the closing information to the closing attorney.
- 50) Specifically, Defendant Griffis "advised (closing attorney CS and his staff) that no such amount remained due at the time of closing."
- 51) Through the July 19, 2017 letter, closing attorney advised the Plaintiff that the closing attorney "relied upon the Seller and his attorney to advise us of his expenses which did not represent recorded liens against the property."
- 52) No Commission was ever paid to Citadel, or its Broker in Charge or the Plaintiff.
- 53) Despite the exercise of reasonable diligence, the Plaintiff did not learn of Defendant Griffis' concealment and tortuous conduct until after the receipt of a letter from the closing attorney dated July 19, 2017.
- 54) Following receipt of this information, the Plaintiff contacted Defendant Griffis.
- 55) The Plaintiff informed Defendant Griffis about his intent to file suit for Defendant Griffis' actions which prevented the Plaintiff's receipt of his funds.
- 56) In a written response sent by email on January 23, 2018, Defendant Griffis acknowledged that no funds were allocated for the commission at closing.

- 57) Defendant Griffis asserted that alternate arrangements for the payment of the commission was made.
- 58) These alternate arrangements involved payment from funds generated by the future development of the property at issue in this case.
- 59) The Plaintiff has no knowledge whether these future acts have occurred.
- 60) No payment has been received by either Citadel, its Broker in Charge, or the Plaintiff from this alternate payment arrangement.
- 61) The Plaintiff was not aware of any alternate payment arrangement.
- 62) The Plaintiff did not consent to any alternate payment arrangement.
- 63) The Plaintiff could not have learned of the alternate payment arrangement but for Griffis' email.
- 64) Defendant Griffis' reference to an alternate payment arrangement is an admission of Griffis' duty to see that the Commission was properly paid
- 65) Defendant Griffis' reference to an alternate payment arrangement is an admission by Griffis of non-payment of the Commission.
- 66) Defendant Griffis' reference to an alternate payment arrangement is an admission that the commission was withheld from the Plaintiff by Griffis' actions in agreement with the actions of others.
- 67) Defendant Griffis' reference to a alternate payment arrangement not discussed with or agreed to by the Plaintiff is evidence of the concealment of Griffis' responsibility for the non-payment.
- 68) Defendant Griffis' email is a step in furtherance of the conspiracy.
- 69) Defendant Griffis' email is another act towards the breach of the fiduciary duty.
- 70) The Plaintiff suffered special damages from the concealment of Griffis' involvement in the nonpayment of the commission because the Plaintiff pursued suit against Citadel.
- 71) The Plaintiff suffered special damages including loss of investment as the result of this alternate arrangement of payment.
- 72) The Plaintiff continues to suffer from the loss of payment of the Commission and the loss of investment of this Commission.

- 73) The Plaintiff is entitled to a partial ownership in the development built on the property at issue in this case.

**FOR A FIRST CAUSE OF ACTION**  
**Breach of Fiduciary Duty**

- 74) The allegations of the paragraphs above are hereby adopted and by express reference made a part of this cause of action.
- 75) The Plaintiff reposed a special confidence in the Defendant Griffis because he was the Seller's attorney.
- 76) The Plaintiff reposed special confidence in Defendant Griffis with regard to the Plaintiff's fiduciary interests in the Commission.
- 77) Specifically, Defendant Griffis accepted the confidence of the Plaintiff when Griffis acted on behalf of the Seller regarding the real estate transaction referenced above.
- 78) Defendant Griffis was bound in equity and good conscience to act in good faith towards the interests of the Plaintiff in the Commission owed by the Seller.
- 79) Defendant Griffis acted in bad faith and without regard to the interests of the Plaintiff by omitting to inform the closing attorney of the moneys due the Plaintiff.
- 80) Defendant Griffis breached the fiduciary duty, and acted in bad faith when he informed the closing attorney that no money was due the Plaintiff at closing.
- 81) Defendant Griffis breached the fiduciary duty and acted in bad faith by failing to ensure that the Plaintiff was paid the Commission he was due from the Seller.
- 82) The acts and omissions of Defendant Griffis caused the Plaintiff to suffer damages including money damages and loss of investment.

**FOR A SECOND CAUSE OF ACTION**  
**Conspiracy**

- 83) The allegations of the paragraphs above are hereby adopted and by express reference made a part of this cause of action.
- 84) The Defendant Griffis and the Seller agreed to omit payment of the Commission owed the Plaintiff from the information sent to the closing attorney.
- 85) The Defendant Griffis and the Seller made such omission with the purpose of depriving the Plaintiff of the money he was due.

- 86) The actions of the Defendant Griffis and the Seller caused the Plaintiff to suffer special damages including but not limited to money damages, loss of investment, and loss of time and resources pursuing alternate legal remedies.

**WHEREFORE**, the Plaintiff prays that the Court enter judgement in his favor against the Defendant for actual and punitive damages and interest as proven at trial as well as any other such relief as the Court deems just and proper.

Further not sayeth the Plaintiff.

/s/James A. Brown, Jr.  
James A. Brown Jr.  
Attorney for the Plaintiff

July 18, 2018

Law Offices of Jim Brown, PA  
1600 Burnside Street, Suite 100  
PO Box 592  
Beaufort, SC 29901  
(843) 470-0003

|                                 |   |                                    |
|---------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS       |
|                                 | ) | FOURTEENTH JUDICIAL CIRCUIT        |
| COUNTY OF BEAUFORT              | ) |                                    |
|                                 | ) |                                    |
| <b>FLOYD HARGROVE</b>           | ) | CIVIL ACTION NO.: 2018-CP-07-01449 |
|                                 | ) |                                    |
| Plaintiff                       | ) |                                    |
|                                 | ) |                                    |
| v.                              | ) | <b>ANSWER</b>                      |
|                                 | ) | OF ANTHONY E. GRIFFIS, SR.         |
|                                 | ) |                                    |
| <b>ANTHONY E. GRIFFIS, SR.,</b> | ) |                                    |
| Defendant                       | ) |                                    |
|                                 | ) |                                    |

TO: Floyd Hargrove, Plaintiff  
C/O James A. Brown, Jr., Esq.

Subject to my Motion to Dismiss filed herewith, I, Anthony E. Griffis, Sr., as Defendant, answer the Complaint (herein "Complaint") as follows:

1. To the extent not otherwise answered, I deny all of the allegations of the Complaint.
2. I admit the allegations of the Complaint contained in paragraphs 1, 3, 10, 16, 38, 41, 44, 46, 47, 57, and 58.
3. I deny all other allegations of the Complaint and demand strict proof thereof.

**ANSWER TO BOTH CAUSES OF ACTION**  
**(Denial of Plaintiff's Factual Allegations)**

4. Answering the allegations of the Complaint, my answers of Paragraph 1-3 are incorporated herein as if re-stated.
5. As admitted by Plaintiff in Complaint paragraph 10, the original sales contract to BGD was assigned to DTR. I dispute the allegations of Complaint paragraphs 5-9 and 11, as follows:
  - (a) the original contract terms are void because the purchaser, BGD, defaulted on said terms and did not close on the sale according to the terms of said contract;
  - (b) Seller had to consent to the assignment of the contract from BGD to DTR. The "Consent to Assignment Agreement", attached hereto as Exhibit 1, paragraph 3, states "The Assignee by execution hereof agrees to assume all obligations of Assignor under the Contract from and after the date of execution hereof except as otherwise herein provided". (emphasis added).

(c) Paragraph 11 of the "Consent to Assignment Agreement" omits any rights of Plaintiff (and his broker, Citadel) to a commission by stating "Seller agrees that payment of the Brokerage Fee in the amount of One Hundred Two Thousand Three Hundred and NO/100 (\$102,300.00) described in the Contract shall continue to be payable by Seller to Southern Lifestyle Group. Said amount, however, to be paid in equal installments of Ten Thousand and NO/100 (\$10,000.00) Dollars simultaneously with the Release Payments described in Paragraph 8 above. Assignor may deduct said amount from each Release Payment and pay said amount to the Broker until paid in full." Paragraph 8 provides that the "Assignor and its principals, David Brown and Robert Denckhoff, Jr. shall be responsible for the payment of the Release Prices..."

6. As admitted by Plaintiff in Complaint paragraph 38, "Counsel for DTR and the attorney who conducted the closing work for the same firm".

7. Upon information and belief, said Buyer's counsel (Chuck Scarminach, herein "CS") also represented the original buyer (BGD) in some of the negotiations with Seller.

8. CS prepared all closing documents in this closing, including the assignment and consent to assignment, and was responsible for all disbursements, including any commission, at closing.

9. Pursuant to an email dated February 19, 2009 in response to CS's proposed "Consent to Assignment Agreement", (attached hereto as Exhibit 2), I expressed my concerns regarding the proposal, including in paragraph 11 of said email:

"On page 4, #10 – we should get the broker's written consent to the payment of his \$100,000 in \$10000 increments; I assume that the \$100,000 release price to Simmons will be reduced by \$10000 for the first 10 units."

10. By letter dated February 25, 2009, (attached hereto as Exhibit 3), CS responded to my email of February 19, 2009. Specifically in the letter, paragraph 10, CS states "We will obtain approval from the Broker to the installment payments of the commission and yes, the amount of these payments will be deducted from the Release Payments to Mr. Simmons."

11. As to Plaintiff's allegations in Complaint paragraph 13 (that he worked for Citadel Realty) on date of closing (May 7, 2009), attached is a letter from Citadel Realty dated May 22, 2008 (Exhibit 4) which states that "Mr. Floyd Hargrove is no longer associated with our company..."

#### ANSWER TO FIRST CAUSE OF ACTION

##### (No Fiduciary Duty to Plaintiff)

12. Answering the allegations of the Complaint, my answers of Paragraphs 1-11 are incorporated herein as if re-stated.

13. I never had any contact with Plaintiff during the time period of this closing, or at any other time, and have never been retained by Plaintiff in any matter.

14. Under the terms of "his contract" (for the sale to BGD) dated August 2, 2007, paragraph 7, it would have been a *breach of said contract terms* to directly pay Plaintiff any commission. Further, it would have been *illegal* to make or arrange for any such direct payment to Plaintiff, as admitted by Plaintiff in his Complaint, Paragraph 16, which states "By regulation and law, the Commission could not be paid directly to the Plaintiff but instead had to be made to the Broker in Charge for the realty for whom he was working".

15. I was unaware that Plaintiff was still working for Citadel Realty on May 7, 2009, as he alleges in his Complaint, Paragraph 13. By letter dated May 22, 2008, from Citadel Realty (Exhibit 4) I was notified that Plaintiff was "no longer associated with our company".

16. Citadel Realty, by law and contract, was solely responsible for collection and disbursement of any commission to Plaintiff.

17. Plaintiff's right to a commission pursuant to the Contract dated August 2, 2007, were voided by the default of the Purchaser (BGD) under that contract.

18. The "Consent to Assignment Agreement" dated on or about May 7, 2009, (Paragraph 11) does not provide for payment of any commission to Citadel (Plaintiff's broker), nor does it mention any claim of Plaintiff to a commission. Said consent agreement further provides (Paragraph 8) that the Assignor (BFG) and its principals (David Brown and Robert Denckhoff, Jr.) shall be responsible for payment of the Release Prices from which any commission would be paid.

19. During negotiations by me with CS regarding the "Consent to Assignment Agreement", I specifically stated that "we should get broker's written consent to the payment of his \$100,000 in \$10,000 increments (Paragraph 11 of Exhibit 2). CS replied in his letter dated February 25, 2009 (Exhibit 3), paragraph 10, "We will obtain approval from the Broker to the installment payments of the commission and yes, the amount of these payments will be deducted from the Release Payments to Mr. Simmons".

20. I have never represented anyone, in particular the Seller (Mr. Simmons), in the payment, disbursement or receipt of any Release payments, and have never prepared any such Release documents.

21. I deny all of the allegations of the Complaint paragraphs 74-82 and demand strict proof thereof.

ANSWER TO SECOND CAUSE OF ACTION  
(No Special Damages)

22. Answering the allegations of the Complaint, my answers of Paragraphs 1-20 are incorporated herein as if re-stated.
22. The damages alleged in the Complaint paragraph 86, are the same damages alleged by Plaintiff in paragraphs 70, 71, 72 and 82 and are not "special damages" as required for the tort of "civil conspiracy".
23. I deny all of the allegations of the Complaint paragraphs 83-86 and demand strict proof thereof.

ANSWERS TO BOTH CAUSES OF ACTION

24. Plaintiff has failed to comply with S.C. Code Ann. Section 15-36-100(B) by failing to file an affidavit of an expert witness with the Complaint, rendering said Complaint subject to dismissal for failure to state a claim.
25. The Complaint and causes of action thereof are time barred, in violation of the applicable statute of limitations.
26. The Complaint and the causes of action thereof are illegal and void as against public policy. Plaintiff admits in his Complaint, paragraph 16, that "By regulation and law, the Commission could not be paid directly to the Plaintiff but instead had to be made to the Broker in Charge for the realty for whom he was working." Plaintiff cannot sue for direct damages which are forbidden by our laws and regulations, as well as his supporting "contract", but must look solely to his Broker in Charge for any commission payment.
27. Plaintiff has no standing to bring the Complaint.
28. Plaintiff admits that he has sued and mediated his claims against Citadel Realty (Complaint paragraph 33), which is an "accord and satisfaction" of all claims that Plaintiff may have in this transaction.

WHEREFORE, Anthony E. Griffis, Sr. requests that this Honorable Court grant him relief as follows:

1. Dismiss the instant Complaint of Floyd Hargrove v. Anthony E. Griffis, Sr.;
2. For an award of attorney's fees and costs;
3. For an award of punitive damages and sanctions pursuant to S.C. Code Ann. Section 15-36-10;
4. For such other relief as this Honorable Court deems just and proper.

November 13<sup>th</sup>, 2018  
Aiken, SC

Respectfully Submitted:

s/ Anthony E. Griffis, Sr

Attorney ID: 2285

Anthony E. Griffis, Sr., Pro Se

355 Park Ave SW

Aiken, SC 29801

(843) 368-5013

Email: tonygriffis@gmail.com

# EXHIBIT 1

STATE OF SOUTH CAROLINA )  
COUNTY OF BEAUFORT )

## CONSENT TO ASSIGNMENT AGREEMENT

THIS CONSENT TO ASSIGNMENT AGREEMENT made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2009, by and between **CHARLES E. SIMMONS, JR.** (the "Seller"); **BGD OF HHI, LLC**; a South Carolina limited liability company (the "Assignor"); and **DIANE THE RUNNER, LLC**, a South Carolina limited liability company (the "Assignee").

WHEREAS, Assignor entered into that certain **Contract for Purchase and Sale of Real Estate** dated August 2, 2007 by and between the Assignor as Purchaser and the Seller, as amended by the First Addendum dated August 2, 2007 (the "First Addendum"), and the Second Addendum dated \_\_\_\_\_, 2008 (the "Second Addendum") which are attached as **Exhibit "A"** hereto (hereinafter, collectively, referred to as the "Contract") for the purchase and sale of approximately Ten (10) acres of real property located on Hilton Head Island, South Carolina as more particularly described in the Contract (hereinafter referred to as the "Property"); and

WHEREAS, the Assignor intends to develop the Property as a Forty (40) single story attached residences and carriage home (the "Residences") subdivision together with certain amenities including but not limited to a clubhouse, exercise facilities, entertaining area and swimming pool, which will be incorporated into either a condominium regime under the South Carolina Horizontal Property Act or a townhouse subdivision with a recorded homeowners declaration to be known as Abbey Glen at Spanish Wells (hereinafter referred to as the "Project"); and

WHEREAS, the Assignor has paid under the Contract to Seller, to date, a total of Seventy Thousand and NO/100 (\$70,000.00) Dollars (the "Earnest Money"), which has been released to the Seller and owes an additional Thirty Thousand and NO/100 (\$30,000.00) Dollars in Earnest Money for extensions to the Closing Date, to date; and

WHEREAS, the Assignor has assigned the Contract to the Assignee by that certain Assignment of Contract and Repurchase Agreement of \_\_\_\_\_, 2009 (the "Assignment") pursuant to which the Assignee has agreed to acquire the Property, pursuant to the Contract as herein amended, complete the horizontal development, therein, to include infrastructure construction and subdivision at Assignee's sole expense ("Development and Subdivision"), offer the Lots back to the Assignor or its assignees for construction of residences on the Lots upon sale to the general public as Abbey Glen at Spanish Wells (the "Project"); and

WHEREAS, this Assignment is contingent upon the Seller consenting thereto and agreeing to the terms and conditions of the within Agreement.

**NOW, THEREFORE**, for and in consideration of the payment of One and NO/100 (\$1.00) Dollars paid to the Seller by the Assignor and for other good and valuable consideration between the parties hereto (the "**Parties**"), the receipt and adequacy, whereof, are hereby acknowledged, the Parties covenant and agree as follows:

1. The above "Whereas" clause are incorporated herein as if repeated verbatim.
2. The Seller does hereby consent to and approve Assignor's assignment of the Contract to the Assignee.
3. The Assignee by execution hereof agrees to assume all obligations of the Assignor under the Contract from and after the date of execution hereof except as otherwise herein provided.
4. The Assignee agrees to fund the costs required by Assignor to complete the Development and Subdivision as provided in the Assignment at Assignee's sole cost and expense and without using the Property as collateral for borrowed funds necessary to complete the Development and Subdivision. Development and Subdivision shall be completed by Assignor one (1) year after Closing unless extended by reasons beyond the control of Assignor.
5. This Agreement shall not be constructed to modify, amend, or otherwise alter any of the terms, conditions, or provisions of the Contract except as herein provided.
6. The Seller shall waive any and all defaults which may exist as of the date of the execution of this Agreement upon Closing.
7. The Seller hereby unconditionally warrants and represents to the Assignee that it has the full authority to consent to the Assignment and that it has not previously assigned or pledged all or any portions of the Contract or the right to any proceeds thereunder.
8. The Assignment of the Contract and Assignee's acceptance thereof is contingent upon Seller's agreement to an amendment of the Contract to provide for the payment of the Purchaser Price of Four Million and NO/100 (\$4,000,000.00) Dollars as follows:
  - (a) Seventy Thousand and NO/100 (\$70,000.00) Dollars, already received by the Seller to be credited to the Purchase Price and the balance of the Earnest Money in the amount of Thirty Thousand and NO/100 (\$30,000.00) Dollars in certified funds or by wire transfer. The aforesaid amount shall be credited to the Purchase Price at Closing;
  - (b) A Promissory Note from the Assignee in the form attached hereto at

**Exhibit "B"** (the "**Acquisition Note**") in the principal amount of Three Million Nine Hundred Thousand and NO/100 (\$3,900,000.00) Dollars or as adjusted hereunder payable without interest except as herein provided in installments, as follows:

- (i) Periodic installments of principal in the amount of Eighty Thousand and NO/100 (\$80,000.00) Dollars (the "**Release Payment**") upon the closing of the sale of each of the first twenty-six (26) Residences built in the Project. The Release Payment shall be increased to One Hundred Thousand and NO/100 Dollars for each of the fourteen (14) remaining Residences in the Project.
- (ii) In the event Assignor fails to purchase and sell a minimum of sixteen (16) Residences prior to December 31, 2011, the Assignor, on behalf of Assignee, shall pay Seller an amount equal to interest on the Release Payment due for each Residence less than sixteen (16) not sold prior to December 31, 2011 at the prime interest rate charged by Bank of America plus one (1%) percent (the "**Rate**"), which shall accrue from January 1, 2012 until said sixteen (16) Residences are sold and be paid upon closing of each Residence.
- (iii) In addition to the foregoing, in the event all forty (40) Residences in the Project are not sold within thirty-six (36) months from the date which is ninety (90) days after completion of Development and Subdivision, but not later than twelve (12) months from Closing (the "**Commencement Date**"), the unpaid balance due under the Acquisition Note shall begin to accrue interest until paid in full at the Rate.
- (iv) The balance of the principal due under the Acquisition Note shall be due upon the earlier of the sale of the last unsold Residence in the Project or forty-eight (48) months from the Commencement Date (the "**Maturity Date**") in a single balloon payment of principal and accrued interest. If all Residences have not been sold the Maturity Date can be extended for the two (2) successive increments of twelve (12) months by the Assignee with interest only to be due monthly during said extensions.

- (v) Prior to release of any Residence the Seller upon request of the Assignee shall subordinate the lien of the Acquisition Mortgage to mortgages securing the construction loans obtained by the Assignor to construct Residences on the Property upon presentation, by the Assignor, of an executed Sales Contract with an unrelated buyer and a commitment for construction loan or other reasonable evidence of availability of construction financing.
- (vi) the Assignee shall receive a credit to the first Release Payment and subsequent Release Payments for any amount required to be paid to remove monetary liens or encumbrances on the Property at Closing or thereafter and for any Beaufort County Roll Back Taxes assessed thereon. Seller acknowledges the existence of certain tax and judgment liens on the Property in an amount not to exceed Eighty Thousand and NO/100 (\$80,000.00) Dollars as more particularly described at Schedule I hereof (the "Recorded Liens") in the approximate amount shown thereon. The Seller shall have until Closing to arrange for reduction or satisfaction of said Recorded Liens. Any Recorded Lien not removed or otherwise satisfied by the Seller to the satisfaction of the Assignee shall be paid by the Assignee and credited to the Purchase Price. All monetary obligations for recorded liens and roll back taxes shall be paid by the Assignee and Seller shall not be required to fund said obligations out of pocket rather they shall be credited to future Release Payments to reduce the Purchase Price.
- (vii) The Seller will execute a mortgagee joinder when requested to permit the Assignee or Assignor to submit the Property to a condominium regime or townhouse subdivision. At such time, the Seller will release portions of the Property which are designated as common property by recorded instrument, at no cost.
- (viii) The Acquisition Note will be secured by a Mortgage and Security Agreement in the form attached hereto at Exhibit "C" (the "Acquisition

**Mortgage**”) which shall include the aforesaid release and subordination provisions.

- (ix) The Assignee shall be responsible for the cost of recording the Deed in the Registrar of Deeds Office for Beaufort County in the approximate amount of Fourteen Thousand Eight Hundred and NO/100 (\$14,800.00) Dollars. The Seller shall pay all such other costs and expenses customarily paid by sellers of real estate on Hilton Head Island, Beaufort County, South Carolina including without limitation Seller’s attorney’s fees and costs and the recording fee for the general warranty deed provided for in title 12 of the Code of Laws of South Carolina (1976), as amended. The Assignee shall pay such costs and expenses customarily paid by purchasers of real estate on Hilton Head Island, Beaufort County, South Carolina including without limitation, its own attorney, fees and costs, the Town of Hilton Head Island transfer taxes, costs and expenses incurred for title examination and an owner’s title policy in the amount of the Purchase Price and all recording costs to include the recording costs for Seller’s lien releases. Taxes, assessments, utility charges and other expenses of ownership shall be prorated as of the Closing Date. Seller shall be responsible for any roll back taxes which may be assessed to the Property because of changed use.

8. Notwithstanding the Assignment and the within Consent, the Assignor shall continue to be solely responsible for and Seller shall look only to Assignor for the performance of the following provisions of the Contract:

- (a) The payment of Ninety Two Thousand and NO/100 (\$92,000.00) Dollars (“Additional Purchase Price”) to the Seller for the acquisition of the property due upon sale of all Residences as described in paragraph Two (2) of the Second Addendum, said amount to accrue interest at the same rate as the Acquisition Note commencing at the same time interest begins to accrue on the Acquisition Note as provided above; and
- (b) The retaining of Palmer Simmons as a consultant to the Project and payment of the amount set forth in paragraph Three (3) of the Second Addendum.

The Seller and the Assignor shall enter into an agreement in the form attached hereto at **Exhibit "D"** hereof (the "**Assignor/Seller Agreement**") pursuant to which the Assignor and its principals, David Brown and Robert Denckhoff, Jr., shall be responsible for the payment of the Release Prices under the Acquisition Note and above excepted provisions in the Second Addendum.

In addition to the foregoing, paragraphs 13, 14, and 18 of the Contract are not included in the Assignment and are hereby removed from the Contract with the Assignee being held safe and harmless from any liability therefrom by the Seller and the Assignor.

9. Closing shall occur on or before April 30, 2009 in the office of Novit & Scarminach, P.A., 52 New Orleans Road, Suite #400, Hilton Head Island, South Carolina. Assignee shall have the right to extend the Closing to April 20, 2009 if Closing does not occur on or before March 27, 2009. Any other extension must be by mutual agreement, in writing, of the Parties.

10. Closing shall be contingent upon and in Assignee's sole discretion as follows:

- (a) Seller's ability to convey marketable title by General Warranty Deed of the Property to the Assignee free and clear of liens, encumbrances, easements and/or restrictions except as otherwise approved by the Assignee and a reserved right of ingress and egress to Seller's retained property (the "**Retained Property**") over a roadway to be constructed by the Assignor through the Project (the "**Reserved Easement**");
- (b) Evidence satisfactory to Assignee that Assignor has obtained all permits and approvals from applicable governmental authorities necessary for development of the Project;
- (c) Seller filing of record, at Closing, the Declaration of Covenants for Simmons Family Tract in the form attached hereto at **Exhibit "E"** (the "**Retained Property Restriction**") which shall limit future use of the Retained Property by the Seller to residential for a maximum of two (2) residential lots or dwellings for Seller and his issue as defined in the Retained Property Restrictions or a maximum of four (4) residential units, per acre, if developed for sale. The Retained Property Restriction shall also include other restrictions on the Retained Property including but not limited to prohibit commercial development, prohibit the maintaining on the Retained Property of trailers, trucks, temporary buildings or other unsightly and incompatible activities and reserve to the Assignee or its assigns a right of architectural review on any future development on the Retained Property and a right of first refusal in the

event the Retained Property or any part thereof is sold. As long as Seller uses the Retained Property for two (2) or less residential units for Declarant and his issue as described in the Retained Property Restriction, Seller shall not be required to contribute to Project property owners association (the "POA") for maintenance fees and assessments and shall have complimentary access to the Project clubhouse and pool areas. If Retained Property is used for more than two (2) residences, continued access through the Project and to the Project clubhouse and pool shall require annual contribution to of maintenance fees and assessments, to include special assessments to the POA. Seller and Seller's issue use of the Clubhouse and pool shall not be limited by age restrictions imposed by the POA or Assignor but shall be subject to all other rules and regulations of the POA; and

- (d) Removal of all easements and roadways currently existing on the Property except as otherwise approved by the Assignee.

11. Seller agrees that payment of the Brokerage Fee in the amount of One Hundred Two Thousand Three Hundred and NO/100 (\$102,300.00) Dollars described in the Contract shall continue to be payable by Seller to Southern Lifestyle Group. Said amount, however, to be paid in equal installments of Ten Thousand and NO/100 (\$10,000.00) Dollars each simultaneously with the Release Payments for the first ten (10) Residences and Two Thousand Three Hundred and NO/100 (\$2,300.00) Dollars upon payment by the Assignor of the Additional Purchase Price described in paragraph 8 above. Assignor may deduct said amount from each Release Payment and pay said amount to the Broker until paid in full. In the event a Release Payment is not due upon the sale of a Residence, the commission due shall be deducted from future Release Payments. Any portion of the Brokerage Fee remaining unpaid on the Maturity Date of the Note shall be paid at that time by the Seller from the proceeds therefrom. Assignee shall not be responsible for the payment of any brokerage fees under the Contract.

12. All claims, consents, designations, notices, waivers, and other communications in connection with this Agreement will be in writing. Such claims, consents, designations, notices, waivers, and other communications will be considered received (a) on the day of actual transmittal when transmitted by facsimile with written confirmation of such transmittal, (b) on the next business day following actual transmittal when transmitted by a nationally recognized overnight courier, or (c) on the third business day following actual transmittal when transmitted by certified mail, postage prepaid, return receipt requested; in each case when transmitted to a Party at its address or location set forth below (or to such other address to which such Party has notified the other Parties in accordance with this Section to send such claims, consents, designations, notices, waivers, and other communications).

**Assignor:**

BGD of HHI, LLC  
300 WatersEdge  
Hilton Head Island, SC 29928  
Attn: David Brown

**With Copy To:**

Terry A. Finger, Esquire  
Finger & Andrews, P.A.  
35 Hospital Center Commons, Suite #300  
Hilton Head Island, SC 29926

**Assignee:**

DIANE THE RUNNER, LLC  
14 Wells St  
Hilton Head Island, SC 29928  
Attention: Diane DesLauries  
Its: Manager

**With Copy To:**

Charles A. Scarminach, Esquire  
Novit & Scarminach, P.A.  
P.O. Drawer 14  
Hilton Head Island, SC 29938

**Seller:**

Charles E. Simmons, Jr.  
584 Spanish Well Road  
Hilton Head Island, SC 29926

**With Copy To:**

Anthony E. Griffis, Esquire  
8 Fording Island Road  
Hilton Head Island, SC 29926

13. This Agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto.

14. This Agreement shall be governed and construed under the laws of the State of South Carolina.

15. All terms and words used in this Agreement, regardless of the number or gender in which they are used, shall be deemed to include any other number any other gender as the context may require.

16. From and after the date of this Agreement at the request of the Assignee, the

Assignor and/or the Seller shall execute and deliver or cause to be executed and delivered to the Assignee or its designee, such instruments and other documents as the Assignee may request in order to implement the transactions contemplated by this Agreement and/or any document executed in connection herewith.

17. Except as otherwise herein provided the Assignor shall be responsible for the payment of all Assignee's expenses in connection with the execution, delivery and performance of this Agreement and any document executed in connection herewith to include but not be limited to Assignee's closing costs on the Property and resale of the Lots, attorney fees, accounting fees and administrative expenses.

18. The rights and obligations of the Assignor under this Agreement may not be assigned without the prior written consent of the Assignee. The Assignee may, without the consent of the Assignor or the Seller, assign its rights and obligations under this Agreement.

19. This Agreement, together with the Exhibits or other instruments delivered with this Agreement or executed in connection herewith, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior understandings between the Parties. No supplement modification or amendment of this Agreement will be binding unless executed in writing by the Assignee. No waiver of any provisions of this agreement will be deemed to be or will constitute a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver.

20. The Parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. The word "including" which is used herein shall mean without limitation. Any reference to the singular in this Agreement shall also include the plural and vice-versa.

21. If any provision of this Agreement or the application of any provision of this Agreement to any party or circumstance is, to any extent, adjudged invalid or unenforceable, the application of the remainder of such provision to other parties and circumstances, and the application of the remainder of this Agreement will not be affected thereby.

22. **JURY TRIAL WAIVER.** EACH PARTY TO THIS DOCUMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OR ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER OR UNDER ANY OTHER DOCUMENT OR IN ANY WAY CONNECTED WITH OR INCIDENTAL TO THE DEALINGS OF THE PARTIES WITH RESPECT TO THIS AGREEMENT OR THE OTHER DOCUMENTS EXECUTED IN CONNECTION HERewith OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY, WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM OR CAUSE OF ACTION SHALL BE

DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENTS OF THE PARTIES TO THE WAIVER OF THEIR RESPECTIVE RIGHTS TO TRIAL BY JURY.

IN WITNESS WHEREOF, the Assignor and Assignee have caused this Assignment to be executed the date first above written.

WITNESSES:

ASSIGNOR:

**BGD OF HHI, LLC**

a South Carolina limited liability company

By: \_\_\_\_\_

**David Brown**

Its: Managing Member

ASSIGNEE:

**DIANE THE RUNNER, LLC**

a South Carolina limited liability company

By: \_\_\_\_\_

**Diane DesLauriers**

Its: Manager

SELLER:

By: \_\_\_\_\_

**Charles E. Simmons, Jr.**

Luke Griffin  


# EXHIBIT 2

Tony Griffis

**From:** Tony Griffis [griffis@hargray.com]  
**Sent:** Thursday, February 19, 2009 10:37 AM  
**To:** 'Birdie Sargent'; cscarminach@ns-lawfirm.com  
**Cc:** pesfsu@hotmail.com  
**Subject:** RE: BGD of HHI, LLC  
**Attachments:** D Brown proposal.pdf

(Birdie, please give this email to Chuck )

Chuck, I met with the Simmons' yesterday to review the proposed "Consent to Assignment Agreement". I have attached a letter from David Brown dated 1/9/2009 which outlines the Simmons' understanding of the new arrangement. There are some differences and concerns which are raised by the new assignment agreement.

The general terms of the 1/9/09 proposal are that the Simmons' would receive a "first mortgage" on all of the property (vs the new proposal of requiring subrogation for construction loans, and release of the common elements), and get a \$100000 release price (vs \$80000, plus \$10000 for the \$100000 sales commission). Also, the new proposal deletes the commission to Palmer Simmons (8(b)) and also the additional \$92000 for the additional acreage (8(a)). There is also no mention of the commitment of the new investors to pay the development costs of \$1,800,000, without requiring a "bank loan". The following are our specific concerns/responses to the new proposal:

1. On page 2, #5 --- David Brown/BGD is currently in default -- we will not represent otherwise, but we are willing to forgive any default if we can reach an acceptable alternative.
2. On page 2, #7 -- our primary concern is that the Simmons are not "caught" short of money at the closing; the original contract calls for \$1,180,000 cash at closing, which was more than enough to cover any unforeseen title problems or other Seller obligations. The initial title search revealed that there were some tax liens (IRS and SC) and a (alimony) judgment against Palmer Simmons. Palmer owned 1 acre, which has subsequently been deeded/merged into this deal with his father, Charles. I do not know if we could now limit Palmer's problems to only his 1 acre (where his house sits) or if now his title problems affect the entire project. Palmer assures me that he has a pending "Offer in Compromise" which has been accepted by the IRS, provided they receive \$20000 in April. However, he is still negotiating with SC (liens of about \$15000). He says he has a release on his alimony obligation. His father has agreed that he can use the \$30000 to settle the IRS lien and the SC lien -- but at this point I am unwilling to commit his father to any payments other than the money received at closing. This should be a contingency at closing, and if the cash at closing is not enough to cover any title problems (in the opinion of the Buyer), then the Buyer can rescind the deal without any further liability to Seller. Again, this would not be an issue under the original contract, because the Seller would have adequate cash to address any title concerns.
3. On page 2, #7 --- the new proposal deletes the payment of the \$92000 for the additional property (8(a)) -- this is unacceptable. The sales price must remain as in the original contract.
4. On page 2, #7(a) -- the \$30,000 to Seller must be a "net to Seller", exclusive of Seller's closing costs (doc stamps, sales commission, attorneys fees, etc)
5. On page 2, #7(b) -- Terms of the promissory note for \$3,900,000 -- release price should be \$100,000 not \$80000 (or \$100000, less the \$10000 payable for the sales commission until it is paid)
6. On page 3, top of page -- in my discussions with Jonathon Mullin, we had proposed that (i) minimum of \$600000 to be paid by end of 2009, or 10% interest would be paid on the amount not paid (shortfall in \$600000); (ii) end of 2010, minimum of \$1,000,000 for the year 2010, or 10% interest on the cumulative shortfall for 2009 and 2010 (interest on the difference between \$1,600,000 and actual payments); (iii) end of 2011, total due, or 10% interest on the balance due until paid, with entire amount due no later than 12/31/2012. Mr Charles Simmons is willing to negotiate these payments and corresponding interest -- but he has other financial obligations which causes him concern. Basically, he needs to be assured that he will receive an additional \$400,000 by the end of 2010; if so, I think he will be more flexible in working out the other payment terms.

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7. On page 3, #7(b)(ii) - we need more detail on the "subrogation" of Simmon's first mortgage for construction loans. He is willing to work with your clients, to a limited extent. Our initial reaction is that your client may want to build a "model" home (4 units on 1 pad) - and Mr Simmons would be willing to subrogate his mortgage to a construction loan for this purpose (say \$600,000), provided certain other requirements are met (such as assurances that the bank will be monitoring all draws, an agreement that your clients will not be receiving any of the construction loan proceeds either directly or indirectly (for management fees or overhead, etc), that all construction loan proceeds go directly in the construction, and that Simmons has a right to an accounting for the construction loan proceeds). So, we need more detail (how many houses, how much, when, etc) about this "subrogation" proposal.
8. On page 3, #7(b)(ii), bottom of page - "Seller will release portions of the Property, which are designated as common property ... at no cost" --- this is unacceptable - Mr Simmons may agree to subrogate his first mortgage upon acceptable terms, or else he should be paid for the property when it is committed to "common property".
9. On page 4, top - OK, except I believe the doc stamps on the Deed (not mortgage) will be \$14800.
10. On page 4, #8 - this paragraph should be deleted -- unless Mr Simmons and Palmer are adequately assured by David Brown that these obligations are to be met.
11. On page 4, #10 - we should get the broker's written consent to the payment of his \$100000 in \$10000 increments; I assume that the \$100,000 release price to Simmons will be reduced by \$10000 for the first 10 units.
12. On page 5 - my address is "8 Fording Island Road Extension, Hilton Head Island, SC 29926"
13. There should be a representation by your clients, somewhere in the assignment, that they will pay all development costs (in the 1/9/2009 letter of \$1,800,000) in an estimated amount of \$\_\_\_\_\_, without a bank loan (or at least without requiring any mortgage for the development costs, on the subject property).

Chuck, please call me to discuss,

Tony

**From:** Birdie Sargent [mailto:BSargent@ns-lawfirm.com]  
**Sent:** Monday, February 16, 2009 5:34 PM  
**To:** Griffis@hargray.com  
**Subject:** BGD of HHI, LLC

Chuck Scarminach asked me to forward you the attached document. Thanks, Birdie Sargent

***Birdie Sargent***  
***Novit & Scarminach, P.A.***  
***P. O. Drawer 14***  
***Hilton Head Island, SC 29938***  
***(Mailing)***  
***52 New Orleans Road, Suite #400***  
***Hilton Head Island, SC 29928***  
***(Physical)***  
***Telephone Number: 843-785-5850***  
***Facsimile Number: 843-785-2090***  
***email: bsargent@ns-lawfirm.com***

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**NOVIT &  
SCARMINACH, P. A.**

*Attorneys at Law*

CHARLES A. SCARMINACH\*  
DANIEL A. SAXON  
PETER J. STRAUSS

OF COUNSEL  
ELIZABETH B. MAYO +  
HERBERT L. NOVIT

Charles A. Scarminach  
Email: cscarminach@ns-lawfirm.com

HILTON HEAD ISLAND:  
THE JADE BUILDING, SUITE 400  
52 NEW ORLEANS ROAD  
POST OFFICE DRAWER 14  
HILTON HEAD ISLAND, SC  
29938  
(843) 785-5850  
FAX: (843) 785-2090

ALSO MEMBER NEW YORK BAR\*  
ALSO MEMBER OHIO BAR\*

February 25, 2009

SENT VIA EMAIL [griffis@hargray.com](mailto:griffis@hargray.com)

Anthony E. Griffis, Esquire

322 Moss Creek

Hilton Head Island, SC 29926

Re: Acquisition from BGD of HH; Our File No.: 19994-5

Dear Tony:

I have reviewed your comments with Mr. Brown and his investor, the Assignee referred to in the Consent to Assignment Agreement. My general reaction is of one of surprise. Many of your comments reflect issues Mr. Brown discussed with Mr. Simmons directly and he thought were resolved. My response to your comments are as follows:

1. We will need representation in the Consent that all previous defaults if any are waived by closing of the transaction.
2. The numerous liens revealed in our title examination are of significant concern. We have discovered that in addition to the tax liens there also exists the mortgage we discussed.. You have informed me that the mortgage was incorrectly placed n the property and will be removed prior to closing. We must also determine how the other liens will be handled. You have advised me you would confirm the status of Mr. Palmer Simmons "Offer in Compromise" and the status of the South Carolina tax liens. The IRS liens are substantial and must be dealt with.
3. The Assignor would continue to be responsible for the payment of the \$92,000 – see paragraph 9 of the Consent.
4. The \$30,000 will be "net" only to the extent that the Assignee will be responsible for cost of recording of the mortgage see paragraph 7(b) (iii). Seller must pay his own attorney fees and other standard Seller costs of closing.
5. Charles Simmons in discussions with Mr. Brown has previously agreed to the \$80,000.00 Release Payments and the structure provided for under paragraph 7. The realities of Mr. Brown's deal with the Assignee and the economic conditions of the time we are all enduring makes any structure you may have discussed in the past with Mr. Mullen impossible. Mr. Brown cannot

NOVIT & SCARMINACH, P.A.  
Attorneys at Law

Anthony E. Griffis, Esquire  
February 25, 2009  
Page 2

"guarantee" any payments other than those received from the sale of the Residences. Mr. Brown believes he can comply with the new schedule and, if he cannot, he is willing to accrue interest after December 31, 2011 on the deficiency but payment of principal is out the question. If he could do that, we would not have to propose the deal structure we have. We cannot make any assurances on the payment of \$400,000.00 before December 31, 2010. All of this, according to Mr. Brown, was explained in detail to Mr. Simmons.

6. We can discuss the subrogation provision included in subparagraph 7(b)(ii) but we need it for every Residence not just the "model" home. Mr. Brown does not make any money until a Residence is built and sold. The construction lender will not permit funds to be disbursed to pay off the mortgage. The Assignee/Investor may receive a disbursement out of the initial draw of the construction loans but that has not been approved by the construction lender. It is a condition of the investment, however, if approved by the construction lender. The subrogation will apply to all Residences until the Note to Simmons is paid in full. We can talk about what restrictions you may want to include.
7. Mr. Brown's current plan is to develop the property as a townhome subdivision pursuant to a recorded declaration of covenants which will provide for subdivision of the property into lots and designation of acres for roadways, sidewalks and amenities (pool and club house) as common property to be owned by the POA. We will require a Mortgage Joinder that will result in Mr. Simmons' mortgage be subordinated to the Declaration. The development of the common property and amenities increases value to the lots (Mr. Simmons' collateral). The mortgage will be subordinated to the Declaration as a result of the Mortgagee Joinder, thus, cannot be used for anything else. And will have no value other than the value created in the lots by their existence. Mr. Brown would have a difficult time offering Residence for sale if buyers could not be comfortable in the fact that the common properties could be taken from them. This is something institutional lenders do in the regular course of business once improvements to the common property have been completed.
8. The Assignee has agreed to pay the Mortgagee's recording cost whatever it is.
9. The provisions included in paragraph 8 are a condition of Mr. Brown's agreement with the investor. Tell us what assurance you want from the Assignor?
10. We will obtain approval from the Broker to the installment payments of the commission and yes, the amount of these payments will be deducted from the Release Payments to Mr. Simmons.

NOVIT & SCARMINACH, P.A.  
*Attorneys at Law*

Anthony E. Griffis, Esquire  
February 25, 2009  
Page 3

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11. The fourth "Whereas" clause on the first page of the Consent can be amended to reflect the appropriate amount of the Assignee's agreed contribution but his obligation will be to the Assignor not Mr. Simmons.

Tony, we are open to discussing these issues further but Mr. Brown does not have much flexibility with our client, the Assignee/Investor. The terms agreed to for the availability of this very favorable investment have been set. In this economic climate, there are few alternatives to the financing of a project like this. The structure incorporated in the Consent gives your client an opportunity to recover the pre-recession value of his property. We urge your cooperation and assistance in resolving these issues as quickly as possible. Our investor wants to move on this project immediately or investigate alternative opportunities. Mr. Brown suggests we meet with Mr. Simmons and work out the issues fact-to-face due to the interest of time. Please attempt to schedule that as soon as possible.

Also, in the interest of time, we have enclosed the Promissory Note and the Mortgage and Security Agreement referenced in the Consent Agreement for your review.

Very truly yours,

NOVIT & SCARMINACH, P.A.

[emailed]

Charles A. Scarminach

Enclosures [Promissory Note and Mortgage and Security Agreement]

c: Mr. David Brown [dbrown@southernlifestylegroup.com]  
Jonathan A. Mullen, Esquire [jmullen@fingerlaw.com]  
Diane The Runner, LLC [dianetherunner@hotmail.com]  
Daniel A. Saxon, Esquire

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EXHIBIT 4



PO Box 1756, Beaufort, SC 29901

May 22, 2008

Anthony E. Griffis  
322 Moss Creek Drive  
Hilton Head Island, SC 29926

Re: Transaction between Charles Simmons and BGD of HHI, LLC

Dear Sir:

This letter is to inform you that Mr. Floyd Hargrove is no longer associated with our company. In regards to the transaction between Mr. Charles Simmons and BGD of HHI, LLC for the transfer of property on Spanish Wells Road. Citadel Realty is still entitled to the 2.5% commission based on a \$4,000,000 sale price (approx \$100,000) at the time of closing per the contract dated August 2, 2008 signed by the aforementioned parties. Mr. Hargrove's commissions will be disbursed according to our prior agreement.

We have made several attempts to contact your office in regards to the status of this transaction but have never received a reply. Our last update from Mr. Hargrove, prior to our separation, stated that the closing was moved to mid-May 2008. I would appreciate an update from your office on this matter and expect full cooperation. I can be reached at (843) 524-7253 or by email [billy@citadelrealtyllc.com](mailto:billy@citadelrealtyllc.com).

Sincerely,

  
Billy Gavigan  
Owner/CEO

ELECTRONICALLY FILED - 2018 Nov 14 2:22 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0701449

State of South Carolina., )  
 )  
 )  
County of Beaufort )

In the Court of Common  
Pleas for Beaufort  
Case No.: 2018-CP-07-01449

Floyd Hargrove., )  
 )  
Plaintiff., )  
 )  
-vs- )  
 )  
Anthony Eric Griffis, Sr., )  
 )  
Defendant. )  
\_\_\_\_\_ )

Transcript of Record  
Defendant's Notice  
And Motion to Dismiss

January 8, 2019  
Beaufort, South Carolina

B-E-F-O-R-E:

The Honorable Eugene Griffith, judge.

B-E-F-O-R-E:

Mr. James Arthur Brown  
Law Offices of Jim Brown, P.A.  
1600 Burnside St. Suite 100  
P.O. Box 592  
Beaufort, South Carolina 29901-0592  
843-470-0003  
[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)  
Attorney for the Plaintiff

Mr. Anthony Eric Griffis, Senior  
Griffis Law Office  
355 Park Ave SW.  
Aiken, SC 29801  
[tonygriffis@gmail.com](mailto:tonygriffis@gmail.com)  
Pro Se

Wanda S. Nelson, CVR-M  
Official Court Reporter  
Sixteenth Judicial Circuit  
Union and York Counties  
To the Honorable Daniel D. Hall

ORIGINAL

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

No Witnesses were called to testify.

Court Reporter's Certificate Page . . . . . P.42

I-N-D-E-X

E-X-H-I-B-I-T-S

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>ID.</u> | <u>EVD.</u> |
|------------|--------------------|------------|-------------|
|------------|--------------------|------------|-------------|

|     |                                         |  |  |
|-----|-----------------------------------------|--|--|
| No. | Exhibits were received into the record. |  |  |
|-----|-----------------------------------------|--|--|

ORIGINAL

1 (COURT IN SESSION TUESDAY, JANUARY 8TH, 2019 IN THE  
2 MATTER OF FLOYD HARGROVE VERSUS ANTHONY GRIFFIS AT 11:00  
3 A.M.)

4 MR. GRIFFIS: May it please the Court.

5 THE COURT: Yes, sir.

6 MR. GRIFFIS: I'm Tony Griffis the defendant in this  
7 case acting pro se. I filed a Motion to Dismiss  
8 contemporaneous with my answer in the law suit, which I  
9 denied of course the allegations of the complaint, and I  
10 understand for purposes of my motion we have to assume that  
11 the allegations in the complaint are true.

12 THE COURT: Yes, sir.

13 MR. GRIFFIS: So, just a little bit of a background of  
14 the case. It involves the real estate closing that  
15 occurred on May 7th, 2009 in which I represented the seller  
16 in the transaction. The plaintiff Mr. Hargrove was a real  
17 estate salesman that is seeking a commission, a sales  
18 commission related to that transaction.

19 Now, in his complaint, paragraph 16, he admits that by  
20 law and regulation -- and I'll just read this -- by law and  
21 regulation that the sales commission could not be paid  
22 directly to him, the plaintiff, but instead had to be made  
23 to the broker in charge for the realty for whom he was  
24 working.

25 Also in his complaint paragraphs 19 to 23 he states

1 that on October 29, 2009 the broker in charge sent a 15-day  
2 demand letter for payment of the commission to the buyer's  
3 attorney and to me as seller's attorney and the demand was  
4 not met.

5 No legal action that I know of was ever taken to sue  
6 the seller, my client, for the commission until they  
7 brought this action that was served on me October 30th,  
8 2018.

9 So, in the complaint he's alleging that he first  
10 became aware of a cause of action against me on July 19th,  
11 2017 when he received a copy of a letter dated July 19,  
12 2017 from Chuck Scarminach who represented the buyer in  
13 that transaction, and Chuck stated in the letter, which I  
14 haven't seen, but he supposedly stated that he would have  
15 collected the commission if I had told him the commission  
16 was due at closing.

17 And so based on that letter the plaintiff is suing me  
18 for two causes of action: breach of fiduciary duty to him  
19 because I represented the seller and this was a seller  
20 obligation that was supposed to be paid at the closing.

21 And then the second cause of action he's alleging that  
22 the seller, and I, conspired to not pay the commission to  
23 him.

24 And in my Motion to Dismiss I have five independent  
25 grounds. The first is based on Section 15-36-100 which

1 basically mandates the filing of an expert affidavit when a.  
2 licensed professional -- in this case an attorney -- is  
3 sued for professional negligence. That's my first ground  
4 for dismissal.

5 The second ground is lapse of the statute of  
6 limitations.

7 The third ground is for the plaintiff's attempting to  
8 pursue an illegal action because he's admitting that by law  
9 and regulation it was illegal for him to be paid directly  
10 the commissions.

11 THE COURT: In other words clean hands?

12 MR. GRIFFIS: Well unclean hands, I didn't allege  
13 that.

14 THE COURT: But it sounds like it.

15 MR. GRIFFIS: Yeah, but he could not be paid directly  
16 the commission. He admits in his complaint that under the  
17 laws and regulations the commission had to be paid directly  
18 to the broker in charge and not to him, so it would be  
19 illegal for him to maintain an action to recover directly  
20 for a commission.

21 My fourth grounds for dismissal is that the plaintiff  
22 clearly lacks standing. The proper plaintiff in this case  
23 should be the broker in charge; that under laws and  
24 regulation is the only party properly charged with the  
25 rights to a commission which he admits in his complaint.

1           And then my last ground for dismissal on the pleadings  
2 relates to this conspiracy claim, and that's based on the  
3 fact that he's not really suing for special damages under a  
4 conspiracy cause of action. He's basically reasserting  
5 damages for non-payment of the commission, loss of  
6 investment income, and so forth.

7           Now, I will address each one of these grounds  
8 independently starting with Section 15-36-100. 15-36-  
9 100(b) states -- and I'll read the relevant portion -- that  
10 in an action for damages alleging professional negligence  
11 against a licensed professional -- and I note that that  
12 also includes attorneys -- the plaintiff must file an  
13 expert affidavit and if that expert affidavit is not filed  
14 with the complaint then the complaint is subject to  
15 dismissal; dismissal for failure to state a proper claim of  
16 action under Rule 12(6)(b) or (b)(6). And that's in  
17 Section 15-36-100 (c)(1).

18           Now the statute says damages alleging professional  
19 negligence. And here in this case he's alleging a breach  
20 of fiduciary duty arriving out of my actions as an attorney  
21 representing the seller in this real-estate closing. So, I  
22 guess from a legal standpoint the argument is is that a  
23 breach of a fiduciary duty might not come within the  
24 ambient of this statute which calls for damages alleging  
25 professional negligence instead of breach of fiduciary

1 duty.

2 I cite the case in my motion of *RFT Management Company*  
3 *versus Tinsley and Adams*, that's a 2012 case.

4 THE COURT: I heard that case.

5 MR. GRIFFIS: Pardon?

6 THE COURT: I was the trial judge.

7 MR. GRIFFIS: Well good. And in that case your Honor  
8 held merge the two causes of action, breach of fiduciary  
9 duty and the professional malpractice law suit, because  
10 they're one in the same if they arise out of an attorney  
11 acting in his capacity as an attorney.

12 There is another case that I did not cite in my  
13 motion. It's *H&H Johnson versus Old Republic National*  
14 *Title Company and Henry Bufkin*, 405 S.C. 469, and I have  
15 copies of that and you probably heard it.

16 THE COURT: I didn't hear that one. Mr. Bufkin and I  
17 are friends. He practices in Prosperity. I practiced in  
18 Newberry but I've known Bufkin a long time.

19 MR. GRIFFIS: But in that case Mr. Bufkin did a real-  
20 estate closing and he issued the title pending, and the  
21 purchaser in that case later sued the title insurance  
22 company and Mr. Bufkin based on the grounds that Mr. Bufkin  
23 did not explain to him at closing the title exceptions and  
24 requirements. I think it was two. There was a right of  
25 repurchase and there were some covenants and restrictions

1 that kind of affected the title to the property.

2 So, there was a case that was sued and in that case  
3 there were some causes of action one of which was in his  
4 role as a closing attorney and the other cause of action  
5 was in his role as a title agent issuing the policy.

6 Mr. Bufkin filed a Motion to Dismiss based on 15-36-  
7 100 because they did not supply the expert affidavit and,  
8 of course; then they argued, the plaintiff argued that they  
9 were suing him in his role as the title agent, not in his  
10 role as an attorney.

11 The Circuit Court ruled, and I'll read you the  
12 relevant portions, the Circuit Court held that quote "in so  
13 far as the complaint attempts to assert any claim against  
14 Bufkin in his capacity as an attorney, the same is  
15 dismissed for failure to state a claim pursuant to Section  
16 15-36-100."

17 That quote -- that case went to the Court of Appeals  
18 and the Court of Appeals held that Mr. Bufkin was acting as  
19 an attorney even though he signed in two roles as a title  
20 agent and also as the closing attorney and they affirmed  
21 the lower court's case. So I think that's the most  
22 relevant.

23 And I have a personal case too that I took to the  
24 Court of Appeals and it's not to be cited as precedence so  
25 I won't, unless your Honor wants me to get into that, but

1 it was also pretty relevant in this incident.

2 Okay. That's all I have to say on that particular  
3 ground. You want me to proceed to statute of limitations?

4 THE COURT: Yes, sir.

5 MR. GRIFFIS: Okay. 15-3-530 provides the 3-year  
6 statute of limitations and then the discovery rule which is  
7 contained in 15-3-535 states that all actions must be  
8 commenced within 3 years after the person -- and then the  
9 relevant portion of course is, knew or by the exercise of  
10 reasonable diligence should have known that he had a cause  
11 of action.

12 And I cited -- there are several cases, I cited one in  
13 particular *Dorman versus Campbell* in my motion, and at page  
14 789 that case states that the statute of limitations begins  
15 to run from the point of where the facts and circumstances  
16 of an injury would put a person of common knowledge and  
17 experience on notice of the injury or claim against another  
18 person.

19 And there is another case *Moriarty versus Garden*  
20 *Sanctuary Church* which was a repressed memory tolling of  
21 the statute of limitations type case. And the cite on that  
22 is 341 S.C. 340 -- I mean 320. And at page 333 that case  
23 the court says that the focus is upon the date of discovery  
24 of the injury not the date of discovery of the wrong doer.

25 But the definition of what is the exercise of due

1 diligence was further laid out in *Dorman*. What the court  
2 said that that means that an injured party must act  
3 promptly where the facts and circumstances of an injury  
4 would put a person of common knowledge and experience on  
5 notice, the sum right of his has been invaded, or, that  
6 some claim against another party might exist. The statute  
7 of limitations begins to run from this point and not when  
8 advice of counsel is sought or a full blown theory of  
9 recovery developed.

10 And I point out again that the injury or claim of the  
11 plaintiff in this case is non-payment of the commission  
12 which should be a purely contractual matter. If the  
13 salesman has a right to a contract to the commission it  
14 should have been based on a sales contract or a listing  
15 agreement or something which should have been a simple  
16 breach of contract between the salesman and the seller who  
17 I was representing. But that case was never -- I don't  
18 think the seller was ever sued in this matter.

19 THE COURT: Give me the background on that again.

20 The gentleman looking for the commission is a real  
21 estate agent and he worked for a realty broker agency,  
22 correct?

23 MR. GRIFFIS: Correct.

24 THE COURT: How did he not know the building got sold  
25 or the property got sold? How did he miss that?

1 MR. BROWN: It was a suit against the broker. There  
2 is a different suit that was instituted years ago which is  
3 gonna go -- a quite a few of these you see he's brought up.

4 THE COURT: Okay. So he's sued the broker that he  
5 says owned him money but had standing to get -

6 MR. BROWN: And that's still a live suit.

7 MR. GRIFFIS: I don't know. I don't have any -

8 MR. BROWN: That's actually pled in this suit. He  
9 does know that. That is pled in our suit -

10 THE COURT: Okay.

11 MR. BROWN: --- that there is another suit.

12 MR. GRIFFIS: Well he pled the suit but that case had  
13 been settled.

14 MR. BROWN: That case has not been settled. That is  
15 still pending.

16 MR. GRIFFIS: All right. I thought -

17 MR. BROWN: But it has been mediated.

18 MR. GRIFFIS: --- that has nothing to do with ---

19 MR. BROWN: --- but not this motion.

20 MR. GRIFFIS: --- this motion.

21 THE COURT: Don't interrupt. Y'all making a bad  
22 record when you interrupt each other, I'm telling you.

23 MR. BROWN: I apologize. But that was something I  
24 think the Court needed to know at this point but t it's  
25 suit is -- that claim is live.

1 THE COURT: Ms. Nelson calls y'all out y'all on your  
2 own. You understand? All right, keep going.

3 MR. GRIFFIS: Okay. The injury of course is non-  
4 payment of the sales commission. Okay. The notice which  
5 would start the running of the statute of limitations, the  
6 notice that the commission was not paid, my argument is the  
7 date of closing he knew or should have known. I mean  
8 within two days the sales contract -- I mean the deed was  
9 recorded giving public notice of the closing. In most  
10 cases the salesman is the first one there with his hand out  
11 wanting the commission.

12 THE COURT: Okay.

13 MR. GRIFFIS: Okay. But in his complaint paragraphs  
14 19 and 20 he states that the broker in charge sent a  
15 written demand to the counsel for the seller and buyer on  
16 October 29, 2009 providing 15 days to pay the commission  
17 and no commission was paid, so that clearly provides notice  
18 for starting the statute of limitations. And in paragraph  
19 21 the plaintiff admits that he knew that the demand was  
20 not met.

21 So there again they haven't filed -- I do know he's  
22 talking about this law suit between his client and the  
23 broker. It appears to me that right at the lapse of the  
24 statute of limitations his client did in fact file suit  
25 against the broker. He evidently knew there was a 3-year

1 statute of limitation.

2 But in this case he knew there was a -- that the  
3 commission was not going to be paid and a demand letter was  
4 sent. It's been clearly nine and a half years since this  
5 closing and now all of a sudden out of the blue I get sued  
6 because he's alleging that he got a letter from the buyer's  
7 attorney saying that the commission wasn't paid because of  
8 me. I was merely the agent for the seller. It seems to me  
9 it would be a simple breach of contract action but somehow  
10 now I'm in this breach of fiduciary duty and conspiracy law  
11 suit.

12 My next ground is the illegality claim. As your Honor  
13 knows the Court has no jurisdiction to enforce any kind of  
14 illegal act. In this case he's admitting in his complaint  
15 paragraph 16 that by regulation and law he had no right to  
16 get a commission paid to him directly. He has to go  
17 through the broker. So, his whole action here is to get  
18 recovery of commission that is forbidden by law and by the  
19 regulations which is illegal.

20 THE COURT: But he's pursuing that against the broker.

21 Okay.

22 MR. GRIFFIS: Well he's suing me. The broker is not  
23 suing me.

24 THE COURT: I know that. But he's pursuing an action  
25 against the broker, as he should, as far as we know.

1 MR. GRIFFIS: I guess so.

2 THE COURT: Okay.

3 MR. GRIFFIS: But I don't know. I don't know about  
4 that.

5 THE COURT: Okay.

6 MR. GRIFFIS: But the next point that I want to make,  
7 or the next ground is, he has no standing, legal standing  
8 to bring this action as a plaintiff against me. It should  
9 be the broker; if there is actually a claim based on a  
10 valid contract and or a listing agreement showing that  
11 there was a commission due.

12 And then my final claim goes merely to the civil  
13 conspiracy claim and I cited the cases *Hackworth* and *Todd*  
14 which states that if they are duplicative damages, the same  
15 damages that are alleged in the prior cause of action, and  
16 no special damage asserted, then the case for -- the cause  
17 of action for civil conspiracy must fail. And if you look  
18 at the two damages their both alleging the damage from non-  
19 payment of the commission and loss of the investment income  
20 from the commission.

21 I do note that in the civil conspiracy law suit he  
22 mentions that he was caused to pursue alternate legal  
23 remedies and the time and expense for that. And I'm  
24 assuming that it's the law suit that he's talking about  
25 that he sued the broker for which from my case that's his

1 only legal remedy anyway so that's irrelevant and  
2 immaterial to what he's trying to recover from me directly.  
3 So, the civil conspiracy would fail because of statute of  
4 limitations and the illegality as well as failure to  
5 specify special damages.

6 THE COURT: Okay.

7 MR. BROWN: May it please the Court.

8 THE COURT: Yes, sir.

9 MR. BROWN: Your Honor, Jim Brown for the plaintiff  
10 Floyd Hargrove. If I may, does your Honor have a copy of  
11 the complaint and answer? I made a copy for your Honor as  
12 well as the law suit against the broker. If you all would  
13 like copies?

14 THE COURT: I've got it on line.

15 MR. BROWN: Yes, sir. And the case against Citadel  
16 Realty?

17 THE COURT: I don't have that.

18 MR. BROWN: Yes, sir. I've got a copy of that as well  
19 if that is of some interest to your Honor because that did  
20 come up. But I do have those copies if your Honor would  
21 like it. And if I just may address the issues he raised  
22 starting with the professional liability portion related to  
23 only, for what it's worth, the claim of fiduciary duty is  
24 my understanding. They're not saying a conspiracy I don't  
25 believe. He's saying his plead is rising out of his

1 professional practice.

2 And so addressing just the professional negligence  
3 issue that he raised for lack of an affidavit. First, our  
4 courts have established that a lawyer can owe a duty which  
5 would be fiduciary to a non-party. And in that setting  
6 *Moore versus Winburg* that case did not involve the lawyers  
7 actions as a lawyer but it involved the disbursement of  
8 funds from escrow to a beneficiary and they allowed that to  
9 be maintained. Now that issue involved whether there can  
10 be a fiduciary duty owed to a third party outside privity  
11 of contract and I think that's of importance because *RFT*  
12 *Management* which he cited was the case that your Honor was  
13 the trial judge and it was affirmed under the theory of  
14 merger of legal malpractice with breach of a fiduciary  
15 duty.

16 THE COURT: That was tried right before the Fourth of  
17 July holiday because the jury went out and I ask them, I  
18 remember doing this, all right, what do you all want to do?  
19 Friday afternoon late you want to do it today, do it  
20 tomorrow? And they said can we talk about -- they sent  
21 back and they came up with a great resolution as to how to  
22 when they wanted to deliberate. Said let us go home eat.  
23 We'll come back and then you instruct us and we'll  
24 deliberate tonight and we'll get it done and they did.

25 MR. BROWN: Your Honor, we don't dispute the claim of

1 merger because as the court says in the *RFT* case, if I may,  
2 when it addresses the fiduciary duty being separate it  
3 says, *RFT* now argues that it could be distinguishable but  
4 they don't set forth any distinguishing facts, so  
5 essentially each element tracked the same. There is no  
6 similar element for legal malpractice here. My client was  
7 not in privity of contract or a client of the defendant  
8 period.

9 So we can't be merged because for what it's worth,  
10 your Honor, that's exactly what your Honor did and that's  
11 what was affirmed was a merger. There is no cause of  
12 action to merge it with. My client has no legal  
13 malpractice claim. He couldn't bring one. He never hired  
14 Mr. Griffis. Okay. And that's why we don't believe his  
15 affidavit required this is that narrow exception where a  
16 fiduciary duty was owed to a third party not arising out of  
17 the legal relationship. That's the difference.

18 Mr. Griffis left the closing and ran into somebody by  
19 running a stop sign he would be leaving a closing in the  
20 performance of his professional practice and training and  
21 that tort would have nothing to do with that. And the fact  
22 that a fiduciary duty can be the same as legal malpractice  
23 doesn't mean that it is every time. In the *RFT* case more  
24 or less it says that. It says it was merged because they  
25 did not distinguish any facts of that and so we don't

1 believe -- we believe that covers the affidavit portion of  
2 it, your Honor.

3 And I say that that would be what I consider an open  
4 question of law in South Carolina. Otherwise is whether a  
5 fiduciary duty owed only to a third party not in legal  
6 privity would still have to have the affidavit. Certainly,  
7 your Honor, the case shouldn't be thrown out on prejudice  
8 for that when there is no guided thought because this is  
9 not a legal malpractice claim.

10 And factually speaking, your Honor, I need to kind of  
11 tell your Honor our version of the facts at this point.  
12 There was a contract for sale of a four million dollar  
13 piece of property on Hilton Head Island. It was  
14 undeveloped. My client was merely the realtor. The  
15 contract said -- and this is pled -- that at -- excuse me,  
16 that 2.5 percent of the sales price shall be paid to the  
17 broker in charge for which -- the realty for which Floyd  
18 Hargrove worked at the time of closing.

19 Now the time that that agreement was signed the buyer  
20 was DGB, David Brown, and some other folks, and that's pled  
21 in there. And David Brown also owned Southern Life Styles  
22 for which he was a broker in charge. So David Brown was  
23 essentially buying a four million dollar piece of property  
24 giving a hundred thousand dollars for which -- or giving  
25 four million to the seller for which a hundred thousand was

1 coming back to his brokerage even though they are separate  
2 legal entities.

3 Before it closed David Brown assigned his rights to  
4 Diane the Runner DTR. We did not have any access to those  
5 documents at that time.

6 MR. GRIFFIS: Your Honor, may I just comment. These  
7 are new facts outside the pleading of the complaint. I  
8 mean I've never known this. It's not contained in --

9 MR. BROWN: Actually that's in -

10 THE COURT: I'm reading the complaint, it's in there.

11 MR. BROWN: Thank you.

12 MR. GRIFFIS: Your Honor, its not in there so far as  
13 the relationship of David Brown and the real estate company  
14 and all that.

15 MR. BROWN: That's true. That's true.

16 MR. GRIFFIS: I mean this is certainly new to me as to  
17 the --

18 THE COURT: Okay.

19 MR. BROWN: None the less - -

20 MR. GRIFFIS: He's going outside what the complaint  
21 says and outside the scope of -

22 MR. BROWN: And I don't want to do that so let me go  
23 back. The long story short, the buyer assigned it to  
24 another buyer and Mr. Hargrove at the time of the closing  
25 did not work for the original broker in charge. He worked

1 for Citadel Realty and that's pled.

2 All right. We sued Citadel Realty. Citadel Realty  
3 made a demand and so when it appeared three years was  
4 running and there was no money coming, because we got them  
5 writing letters to lawyers, and we have to put in here  
6 lawyers writing -- this is in the complaint -- lawyers  
7 writing back to Citadel you're gonna get paid at closing.

8 Okay.

9 Short version, they make a demand, it's not met. My  
10 client then makes a demand and within the three years of  
11 that demand not being met he filed suit for three causes of  
12 action against Citadel Realty. And now this is outside the  
13 complaint, but short version, that suit is still alive but  
14 and I will say it is live not as to conversion because  
15 there has been no commission paid. Citadel's demand was  
16 not met, Mr. Hargrove's demand of Citadel was not met, so  
17 there are two causes of action in the Citadel complaint.  
18 One for failing to get the money and one for failing to  
19 tell my client that they stopped going after it because no  
20 one wrote him up and said we're not going after it any  
21 more.

22 THE COURT: I mean why is that his fault?

23 MR. BROWN: That's not his fault.

24 THE COURT: Okay.

25 MR. BROWN: That's the Citadel suit.

1 THE COURT: Okay.

2 MR. GRIFFIS: That's not even part of -

3 MR. BROWN: So, so, so we're filing that suit along  
4 and for what it's worth it took over a year to get an  
5 answer from him. He was pro se; we never got an answer, it  
6 got kicked on 12(b)(6) and summary judgment on all three  
7 and then two of them were brought back. Only the  
8 conversion was left out of a Rule 59.

9 And that brings us essentially to 2016. That's how  
10 long it took to have his demand not met, our demand not  
11 met, filed the suit, get the answer with the pro se guy;  
12 have it tossed, have it brought back and this is all.  
13 We're asking for discovery, its not being answered, et  
14 cetera, short version. We get a letter from the closing  
15 lawyer saying because the real questions well where's the  
16 money. We're looking for the money because we don't know.  
17 All we know is Citadel never got it. We don't know where  
18 it is. Its supposed to be paid by the seller.

19 We get a letter from the closing lawyer saying -- and  
20 this is pled and it's pled in a quotation, your Honor, that  
21 the letter came in and says that defendant Griffis advised  
22 -- a quote is advised closing attorney and his staff is in  
23 parentheses -- this is line 50 of the complaint, that no  
24 such amount remained due at the time of closing.

25 Now, that is separate than the non-payment of

1 commission. We're saying that that false statement was a  
2 breach of fiduciary duty. That tort, that tort is what  
3 we're suing Mr. Griffis for, not non-payment of the  
4 commission. We're saying that that statement led or caused  
5 my client to be damaged.

6 Now, in other words we just thought maybe the money  
7 was sitting somewhere else. We couldn't turn around and  
8 sue directly in privity of contract because we're only in  
9 privity of contract with Citadel Realty because that's the  
10 arrangement with Citadel. And Citadel was very clear in  
11 their letters this is not a duplicitous claim.

12 And your Honor, it may be that at the end of the day  
13 Citadel was partially at fault for not pursuing it more  
14 because there were some equitable interest. My client for  
15 what's it's worth is plead had a 70 percent equitable  
16 interest in it. He was gonna get 70 percent and the  
17 brokerage gets a third for the sale. And so short version  
18 we're fighting over giving the money that has been  
19 disbursed. In 2017 we find out -- well it never got  
20 disbursed because somebody told us not to pay it or it  
21 wasn't owed. And the exact quotation is in here.

22 Now, that gets us to a second thing. So when we end  
23 up in discussions with Mr. Griffis and his part is pled he  
24 writes back -- and this is pled -- wait there's an  
25 alternative payment arrangement where the fee will be paid

1 from the sale of the first 10 lots for 10,000 dollars a  
2 lot.

3 But we don't know that those lots have been sold at  
4 all. Right now as I understand it my client's claim for  
5 the money under their payment arrangement hasn't even  
6 become ripe yet except for the fact that my client never  
7 knew about that.

8 Now, your Honor, it's hard to believe that I should  
9 have known that the cause of action for a breach of a  
10 fiduciary duty had already arisen for a statement that's  
11 not recorded anywhere at all. And mind you the recording  
12 of the deed would be in a third party buyer not in the  
13 original buyer's name. My client wasn't originally  
14 involved -- I mean wasn't involved in that assignment part.

15 Now, he's still the one who arranged for the sale. It  
16 was a sale through assignment so my client's still  
17 equitably would be entitled to the sale, the commission for  
18 the sale. It just got reassigned. He didn't go down to  
19 the deed office and pull up the deed to Diane the Runner  
20 because he didn't know Diane the Runner at that time was  
21 the purchaser. He's out.

22 THE COURT: But he knew the seller.

23 MR. BROWN: He did know the seller.

24 THE COURT: And then he worked with the seller. He's  
25 tied to the seller.

1 MR. BROWN: He did know the seller but he didn't know  
2 that the seller's lawyer had told him to pay it.

3 THE COURT: No, no, no, no, no. The deed recorded  
4 from the seller today and the runner your guy knew that.  
5 That would be notice to him.

6 MR. BROWN: But he didn't know -- he did not know that  
7 it had been sold to Diane the Runner not back at the  
8 beginning.

9 THE COURT: I mean if the property is listed by  
10 whomever, who owed this property?

11 MR. BROWN: Charles Simmons.

12 THE COURT: Simmons. Simmons sold the piece of  
13 property and he's representing seven somehow on the real  
14 estate deal as the real estate agent Simmons has a piece of  
15 property sold that's notice of something.

16 MR. BROWN: That's notice it was sold.

17 THE COURT: Yeah.

18 MR. BROWN: And that's when my client makes the  
19 demand.

20 THE COURT: To whomever.

21 MR. BROWN: And Mr. Griffis admits a timely demand to  
22 Citadel give us the money. Give us my part of the  
23 commission.

24 And so in 2017 we find out it hadn't been -- it wasn't  
25 paid because of an act. There was an act. Somebody told

1 him not to pay it and that's -- and then Mr. Griffis  
2 attaches some information about this alternative payment  
3 arrangement on his answer.

4 Now, if the payment has not yet come due how will we  
5 not exercising due diligence in pursuing the payment then  
6 if its not even due yet because they changed the  
7 arrangements. And we didn't know that until Mr. Griffis  
8 told us which we put in here the date. In fact it was less  
9 than a year ago. And under that one, your Honor, we're  
10 still due the money. I mean which is something we didn't  
11 agree to. Now you'll see attached to his answer, your  
12 Honor, in that answer itself he attaches three documents  
13 that are relevant to the alternative payment arrangement.

14 Paragraph 11 -

15 MR. GRIFFIS: Your Honor, your Honor, this is going  
16 way beyond the scope of my motion. If he wants to try this  
17 case I'm willing to try the case. But its going beyond the  
18 scope of his complaint.

19 MR. BROWN: He attached these documents to his answer.

20 MR. GRIFFIS: My answer has nothing to do with this.  
21 I mean I'll be glad to get into my answer and refute all of  
22 his wrong allegations of the facts, but that's not subject  
23 -- that's not what we're here today for. Its whether or not  
24 I was acting within the scope of my duties within the scope  
25 of representing the seller and whether or not he had proper

1 notice to start the statute of limitations.

2 THE COURT: Okay. I understand.

3 MR. BROWN: And I would just point out that there are  
4 attachments onto his answer which we believe are part of  
5 his -- because he incorporates them into it. And so if you  
6 read those they discuss -- and again for the record I will  
7 proffer this even if he objects to it -- on the first  
8 exhibit paragraph 11 discusses the brokerage fee and the  
9 change in who gets it and it's not Citadel Realty.

10 MR. GRIFFIS: I have no problem whatsoever with your  
11 Honor looking at my answer and the attachments. That's no  
12 problem. So I would point out though that the terms of the  
13 original deal which called for 1.2 million dollars in cash  
14 to be paid to my client up front at closing, I would -- the  
15 first thing, at closing there was a different purchaser and  
16 he's claiming some right to a commission. The original  
17 deal was in 2007. This thing went on for two years before  
18 it actually closed.

19 In the meantime the original purchaser defaulted on  
20 the deal and his client is thinking he's due a commission  
21 for a deal that fell though. But anyway based on the terms  
22 it says or it's assigns. In the renegotiated deal, and in  
23 my role as representing the seller, we wanted to make sure  
24 we have enough funds at closing to pay whatever was due at  
25 closing including any sales commission which he says it was

1 a 100,000.

2 They changed the terms under the terms of the  
3 assignment agreement to their new purchaser provided for  
4 only thirty thousand dollars. Seventy thousand had already  
5 been paid for it states in the agreements his client or his  
6 buyer that was in default didn't close the transaction.  
7 The new buyer came in and basically my client seller  
8 financed the whole deal. He didn't get 1.2 million dollars  
9 up front. The seller's -- I mean the buyer's attorney Mr.  
10 Chuck Scarminach agreed to get consents from everybody  
11 involved including the broker as to the payment of the  
12 sales commission over time from release prices. I mean  
13 that's my answer and that's what actually happened.

14 And certainly I wasn't going to close a transaction  
15 for my client and he's gonna have to come out of pocket at  
16 closing to close the transaction and he's selling. That's  
17 ridiculous. But at any rate he's making a broad leap  
18 alleging that the commission was in fact owed to start off  
19 with. I mean that's an issue that -- I mean we can assume  
20 that for purposes of this motion but I would object to that  
21 legal conclusion.

22 He's essentially alleging a legal conclusion that the  
23 commission was owed in the first place. But anyway -

24 MR. BROWN: That's true. I am alleging that there was  
25 a commission owed in the first place. That is true.

1           So, your Honor, as to the statute, this is a claim  
2           regarding that statement that was made stopping the payment  
3           of the commission. It is our current belief that no  
4           commission was paid to anyone at all. And why would --  
5           under this scenario why would the buyer pay a 100,000 and  
6           get it right back because he's list is No. 11.

7           But, your Honor, succinctly put, we litigated this  
8           case and the list of the litigation in the Citadel case is  
9           put in here. The date relevant, dates for each thing we  
10          did. And I will tell you it was molasses slow to get the  
11          court to do anything. Refused to default the pro se  
12          defendant in the Citadel case. Thirteen months without an  
13          answer and I couldn't get that. And so it's hard to turn  
14          around and fault us for not being able to put the screws  
15          down on a guy that comes in and says hey, it's just me, you  
16          know I have a lawyer.

17          And so we litigated. That's where we ended up. We  
18          didn't mediate it until 2016. That's the first time we got  
19          the document from another lawyer -- not the buyer or  
20          seller's lawyer -- saying you're going to get paid. That's  
21          pled in here. They were saying you're gonna get paid in  
22          closing. So we get that document in 2016 and 2017 is the  
23          first time we've seen it. It was not paid, no commission  
24          was paid and we were told not to do it by Mr. Griffis.

25          That is not the non-payment of commission. That is a

1 fiduciary duty that was breached. The damage that was  
2 caused is the same damage relatively speaking.

3 Now I would like to talk about the special damages on  
4 the conspiracy if I may because that claim is not subject  
5 at least to No. 1. So the No.1 which is the professional  
6 liability affidavit.

7 THE COURT: Okay.

8 MR. BROWN: Now we don't believe it's tied at all to  
9 the statute of limitations either and here's why.

10 The conspiracy involved in part this alternative  
11 payment arrangement that they construed without my client  
12 being involved. The payment arrangement in the real estate  
13 contract was my client would get paid at closing. Then we  
14 find out through an email January 23rd -- no allegation  
15 that we got that anywhere else -- January 23rd, 2018 pled  
16 in here we found out there was an alternative payment  
17 arrangement. His attachments discuss that. My client's  
18 name is not in that document at all. A hundred thousand  
19 dollars paid, ten thousand per sale the first ten parcels  
20 of land. We don't even know we pled. We don't know  
21 whether that's even happened yet for the purposes of this  
22 plea.

23 THE COURT: Y'all sure don't talk much do you?

24 MR. BROWN: Well, your Honor, it's a little difficult  
25 for a lawyer to talk to a non-represented party without

1 becoming a witness. And so we did write about it. That's  
2 when we heard this alternative payment arrangement and we  
3 stopped at that point. And so for what it's worth that is  
4 the conspiracy we're alleging is to stop the payment of the  
5 commission and come up with some alternative payment  
6 arrangement which it effectively cuts my guy out. But  
7 short version, what is the special damage? We spent all  
8 this time litigating this case against Citadel Realty.

9 He owes me the lawyers fees and expense for pursuing  
10 the wrong rabbit down the wrong hole. Because but for that  
11 side secret agreement if that wouldn't a been secret we  
12 would have gone after the payment through the first ten lot  
13 sales if that's the new one. My client never got his  
14 seventy percent of a hundred thousand dollars plus interest  
15 or investment.

16 I mean he never got period. I mean he's supposed to  
17 get his money. I will tell you a fact that probably played  
18 into this. My client went to federal prison at some point  
19 in time for auto loan scams. That was about the time that  
20 I assume that nobody was gonna cut him a check. He's not  
21 in prison. For what it's worth a new criminal defense  
22 lawyer that's how he came to me with this. So we went  
23 after this commission as diligently as we could. The truth  
24 is the commission was either not paid, or paid to the wrong  
25 person, or to be paid in some future event and we still

1 don't know because every time we turn over a rock here we  
2 get something else. And so at a minimum that conspiracy  
3 involves allegation of alternative payment arrangement.  
4 We've heard no way that we were supposed to know about  
5 that. That would not have been recorded that there was an  
6 alternate brokerage payment arrangement.

7 The first time we heard it was Mr. Griffis told us  
8 that, which by the way is an admission that the commission  
9 was never paid to anyone because he's not saying, oh, that  
10 was paid to Joe. He tells us no, it was gonna be paid some  
11 other way which I don't know that my client agrees that  
12 that was the arrangement. He doesn't agree that it was an  
13 arrangement with him. Nobody said hey, Floyd, we're gonna  
14 postpone your payment of your hundred thousand until some  
15 other period of time. And so we believe that touches the  
16 statute of limitations issues on conspiracy as well as the  
17 special damages issue on conspiracy.

18 Now that gets me to I think what would be his third  
19 issue the legality claim. I'm only going to say one thing,  
20 your Honor, pointed out. I'm not seeking payment of a  
21 commission. I'm seeking damages for the tort. The tort --  
22 the money may be the same amount but that money damages can  
23 be awarded by a jury paid by a lawyer into a trust account  
24 and disbursed. That is not illegal against public policy.

25 I would agree my client could not receive the fee from

1 the closing lawyer as a realtor fee directly. We agree  
2 with that. That does not mean he doesn't have an equitable  
3 interest in that seventy thousand dollars plus. And so  
4 part four is standing. This is not standing under a legal  
5 malpractice claim. My client would not have standing under  
6 that. This is not standing under a contract claim. My  
7 client would not have standing under that.

8 If my client is the beneficiary, to use the legal  
9 word, of the relationship from the fiduciary, which is Mr.  
10 Griffis, then he has standing for that breach. That is  
11 standing. He has to meet the fact -- he has to meet the  
12 element or plead it that there was a fiduciary obligation.  
13 And for what that's worth, your Honor, and I just printed  
14 up a case that discusses generally the broad nature of  
15 fiduciary relationships *Pitts versus Jackson National Life*  
16 *Insurance*. I've got copies of it if your Honor would like  
17 that ---

18 THE COURT: Sure.

19 MR. BROWN: --- I hand it up. And for what it's worth  
20 on page 8 of the copy on the right hand column under the  
21 Headnote 5 and 6 Court's of equity have carefully refrained  
22 from defining particular instances of a fiduciary  
23 relationship.

24 Now short version, the seller had an obligation to pay  
25 the commission at least to the closing attorney or to see

1 that it was paid. But the duty at least extends to some  
2 fair dealing to the people who are being paid by the  
3 seller, the debt that were owned out by the seller, and so  
4 whether it's Mr. Griffis' aided and abetted Mr. Simmons who  
5 is dead, the seller or not, its still the same cause of  
6 action, breach of fiduciary duty or aiding and abetting a  
7 breach of fiduciary duty by telling the closing lawyer,  
8 affirmatively telling him, that it is not a duty.

9 And so that act is something, he had a fiduciary duty  
10 to at least be honest with the closing attorney about the  
11 debts of the seller that were due. That's how closings  
12 happen. Everybody tells them what they owe and he puts it  
13 in a little sheet. I used to run a Xerox machine for a  
14 Spartanburg lawyer when I was in college, all those sheets,  
15 triple copies, whatever it is, and all the parties talk  
16 about what comes over it. The bank sends their little  
17 sheet, work sheet, over, et cetera. And so an affirmative  
18 statement that is not due is a breach of a fiduciary duty  
19 at least on honesty to the closing lawyer on that.

20 It may turn out that the closing lawyer was wrong when  
21 he says Mr. Griffis told him that. It may be the closing  
22 lawyer is lying to me now and Mr. Griffis didn't tell him  
23 not to pay it. I don't know because we do have discovery  
24 request out. They have not been answered. They're not  
25 really behind. We were talking about he did answer an

1 request to admit. He has not answered the other ones. We  
2 haven't done anything else, this is a new case.

3 And so, your Honor, we believe -- all right, first,  
4 there's two different causes of action. They don't over  
5 lap directly. Thirdly or second, we don't believe that  
6 this claim for breach of a fiduciary duty is identical to  
7 the claim against Citadel Realty for the non-payment of the  
8 commission. And for what it's worth they didn't owe the  
9 commission. We're not suing Citadel for not paying the  
10 commission. The commission was owed by the seller to the  
11 broker in charge of the realty for whom Floyd Hargrove was  
12 working at the time of closing which was Citadel Realty.

13 That's who was owed the commission. Citadel Realty  
14 was owed the commission. We were just owed our cut from  
15 Citadel. And so we're not seeking the commission for Mr.  
16 Griffis. We're seeking damages for that false statement.  
17 We didn't learn about that until 2017. It's not because we  
18 hadn't tried.

19 And we just ask that maybe summary judgment, this  
20 thing works out something else, maybe under comparative  
21 negligence that Citadel was more at fault. They had a  
22 lawyer who wrote a letter says we're suing you, that seems  
23 to be it. They didn't do anything else. Maybe its  
24 because they were only owed \$30,000 and it wasn't worth  
25 Citadel pursuing \$30,000 especially when they didn't even to

1 the initial contract. They didn't even list the property.  
2 I mean that was easy money and they wrote a letter and it  
3 didn't scare anyone they quit. And it may be that these  
4 cases should end up being joined.

5 THE COURT: Okay. That seems kind of obvious to me.

6 MR. BROWN: We're not necessarily opposed to it but we  
7 didn't want to slow one down with the other one because the  
8 other one's just been glacial. Citadel Realty is -

9 THE COURT: Maybe this will speed that one up.

10 MR. BROWN: Maybe it would. Citadel is defunct for  
11 what its worth. We're suing the actual individual who owed  
12 it as well and the --

13 MR. GRIFFIS: I would certainly object to that grounds  
14 of statute of limitations also because under Rule --  
15 whatever it is -- 5 or 15 C or whatever that rule is.  
16 There's certainly cases, I know of one case in particular  
17 that says that -- let me see if I can find it -- it says  
18 that you can't join -- and of course that's not before the  
19 court -- but if you make an error in judgment -- and that  
20 case was an automobile wreck case and they sued the owner  
21 of the car, the father, and let the statute of limitations  
22 expire and they tried to bring the son in under that rule  
23 and the court held that -- stop, you know, you're out. You  
24 can't do that if the statute of limitations -- if your  
25 Honor will wait just a second I'll find that case.

1        *Dulles versus Simmons* 681, S.E. 2d 607 2009 case under  
2 Rule 15 © there is no relation back to an original  
3 complaint dated that an additional defendant added after  
4 the statute of limitations has expired. In that case they  
5 had sued the owner of the vehicle after the statute of  
6 limitations expired. They attempted to bring in the driver  
7 of the vehicle who was the son. He like me brought an  
8 affirmative defense of the statute of limitations and the  
9 court held that you can't do that under Rule 15 © and they  
10 dismissed the case as against the son.

11        In rebuttal, I mean it's very simple. I was doing  
12 everything in this closing as the seller attorney. He's  
13 alleging that there's some separate fiduciary duty that  
14 arises out of some conduct other than my capacity as an  
15 attorney. I don't understand how it can be. I mean all  
16 sales contracts have seller expenses; pay a survey, pay  
17 somebody to cut the grass; paint the house. I mean all of  
18 these third-party beneficiaries who are not in privity of  
19 contract with my client or with me anyway to perform a  
20 selling functions as a seller attorney under his theory any  
21 of these third parties could come in to sue me for breach  
22 of fiduciary duty if they didn't get paid at closing.

23        That's totally ridiculous. I have a primary duty --  
24 the only duty I have is to my client the seller. And if my  
25 client tells me don't make that payment, don't make the

1 sales commission or for whatever reason the sales --  
2 there's a modification of the terms and it's not to be paid  
3 at closing -- it's delayed or whatever -- that's not my  
4 problem so far as a fiduciary duty to someone to ensure  
5 that they get paid, whatever. I mean it's a simple breach  
6 of contract action here which is for a contract under the  
7 terms of a sells agreement or a listing agreement.

8 They had notice that early on in 2009 and a demand  
9 letter it was a fifteen day period to pay the commission.  
10 His client knew at that point in time that the sales  
11 commission -- the fifteen day period had lapsed and the  
12 sales commission did not -- was not paid. Under our cases  
13 describing what is meant by exercising reasonable diligence  
14 it says basically that that's what starts the period - the  
15 clock ticking on the statute of limitations.

16 You don't wait until you get a full blown -- actually  
17 that's the language -- a full blown theory of recovery.  
18 That doesn't make any difference. For the purposes of  
19 running it's the date of the injury that starts. He knew  
20 at that point in time that there was no sales commission  
21 paid at that time.

22 Now he makes some sort of comment about some third  
23 party attorney -- I don't know what he's talking about --  
24 said that they would get paid on this commission and don't  
25 worry you're gonna get paid. I don't know who made that

1 representation but for an equitable tolling of the statute  
2 of limitations to apply, he has to show that I made that  
3 representation and that he had a right to rely on that  
4 representation. And I can tell you right now I don't  
5 remember making any kind of representation to what he's  
6 trying to rely on to toll -- to make an equitable tolling  
7 of the statute of limitations.

8 He's very ambiguous in the pleadings. To establish  
9 that he would have to in his pleadings and in the complaint  
10 set forth the grounds for an equitable tolling which he  
11 hasn't done. And that, you know, he hasn't said anything  
12 about who made the representations or his right to rely on  
13 that representation. He had no right to rely on anything  
14 except the fact that we didn't meet the fifteen day demand  
15 for paying the commission in 2009. And, you know, eight or  
16 nine years later he brings an action against me, and it's  
17 very clear that that's way beyond the three year statute of  
18 limitations.

19 So far as the 15-33-100 expert affidavit argument, the  
20 cases are clear that if I'm acting solely in my capacity as  
21 an attorney, which I was, I don't know what other capacity  
22 I could have been acting. I was not a part in the deal. I  
23 was not anybody. I was only acting solely as the attorney  
24 for the seller in this transaction. And everything -- he's  
25 even alleging in his complaint paragraph 75 but -- cause of

1 action. 75 says the plaintiff proposed a special  
2 confidence in the defendant's Griffis because he was the  
3 seller's attorney. It doesn't say because I was his  
4 business partner or because I was some other relationship  
5 that would give rise to an independent fiduciary duty  
6 that's not subject to the expert affidavit rule.

7 Everything arises out of my capacity serving as the  
8 seller attorney and so forth. So he is required or was  
9 required to file the expert affidavit witness complaint  
10 which he didn't do.

11 THE COURT: All right. I got enough to read and make  
12 a decision. I think we've heard enough on the motion to  
13 dismiss. Is there any other issue other than those five  
14 grounds for the motion to dismiss?

15 MR. GRIFFIS: No, your Honor.

16 MR. BROWN: He puts in the answer that it was mediated  
17 as to the court's satisfaction. We did plead it was  
18 mediated it was not so.

19 THE COURT: Okay.

20 MR. BROWN: I just point that out because that is one  
21 of his answers, or I'd say affirmative defenses that he  
22 puts in his answer. He does not actually raise that  
23 directly in his motion.

24 MR. GRIFFIS: That has nothing to do with this motion.

25 THE COURT: Okay.

1 MR. BROWN: I understand. I just wanted to point that  
2 out.

3 THE COURT: Okay. All right. I'll let y'all know.  
4 I'm gonna read some of these cases y'all submitted and  
5 we'll see what we can get.

6 MR. BROWN: Thank you, your Honor.

7 THE COURT: I'll let you know.

8 (COURT IN RECESS AT 11:51 A.M.)

9 (END OF TRANSCRIPT OF RECORD.)  
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CERTIFICATE OF REPORTER

State of South Carolina    )  
                                          )  
County of York                )

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Beaufort County, South Carolina, on the 8th day of January, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda S. Nelson

Wanda S. Nelson, CVR-M  
Certified Verbatim Reporter,  
Official Court Reporter,  
Notary Public, in and for  
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: August 5 / 2019

ORIGINAL

THE STATE OF SOUTH CAROLINA  
Court of Appeals

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APPEAL FROM BEAUFORT COUNTY,  
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

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Common Pleas Number(s): 2018-CP-07-01449  
Appeal Court Number: 19-00941  
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Floyd Hargrove .....Appellant.

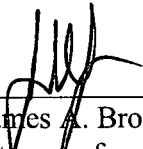
v.

Anthony E. Griffis, Sr., .....Respondent.

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CERTIFICATE OF COUNSEL  
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I certify that this Record on Appeal contains all material proposed to be included by  
any of the parties and not any other material.

Respectfully submitted by;

  
\_\_\_\_\_  
James A. Brown, Jr.  
Attorney for Appellant

January 17, 2020  
Beaufort, SC

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