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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Appellate Case No. 2022-001026

Floyd Hargrove…….....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The only issue for review is whether the Court of Appeals erred in holding that the "statute of limitations is dispositive", citing *Futch v. McAllister Towing of Georgetown, Inc*., 335 S.C. 598, 518 S.E.2d 591 (2008), which held that an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive. There is no need for this Court to consider any of Appellant's arguments if the applicable statute of limitations bars all of his claims.[1]

ARGUMENT

The Court of Appeals correctly cited *Overcash v. S.C. Elec. & Gas Co*., 364 S.C. 569, 614 S.E.2d 619 (2005) for the proposition that a "motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based **solely** on the allegations set forth on the face of the complaint." (Emphasis supplied.) The Appellant's Complaint is included in the Record. (R. pp. 51-57)

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

The three-year statute of limitations period applies to the causes of action in Appellant's Complaint. 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

[1]The Appellant's Petition does not identify this dispositive issue as one of the "Questions Presented for Review" (p.1), though the Appellant does address this issue in his Petition at Argument I(B) (p.11).

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 to him at closing on May 7, 2009, and further, when no commission was forthcoming 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 (C t. App. 1998). Although Appellant 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 that 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 alleged 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 the respective 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 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 applicable statute of limitations would have expired no later than November 13, 2012.

Appellant knew there was no intention to pay the commission after the lapse of the 15-day demand letter on November 13, 2009. (Complaint ¶20-21, R. p. 52). If Appellant had exercised "reasonable diligence" in his effort to recover 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 before November 13, 2012.[2] However, the Seller's closing attorney (Respondent) was not sued until almost six years later, while the Seller—the only party contractually obligated to pay a commission—*has never been sued at all*. Accordingly, there is no error in the trial court's ruling, nor in the Court of Appeals' affirming the same.

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[2]The Appellant obviously knew the limitations period was about to expire on November 13, 2012, because he filed his action against his former employer, the broker-in-charge, on November 12, 2012, **the day before** the expiration. (Complaint ¶26, R. p. 53)

Petitioner's Arguments I(B) and II(B), wherein he addresses the statute of limitations issue, are based on allegations that contradict his own Complaint: Petitioner now argues, for the first time,[3] that the "alternative payment arrangement," whereby the commission would be paid upon the sale of the first 10 residences in $10,000 increments, creates 10 different statute of limitations dates depending upon the sale dates of the first 10 residences.[4] However, in his Complaint, the Petitioner states that it was agreed "At closing, Seller shall pay a commission of 2.5% of the purchase price . . ." (Complaint ¶9, R. p. 52). The Complaint goes on to assert that Petitioner "was not aware of any alternate payment arrangements" (Complaint ¶61, R. p. 55) and, furthermore, that Petitioner "did not consent to any alternate payment arrangements." (Complaint ¶62, R. p. 55) The Petitioner cannot now argue "facts" that are contrary to the allegations in his own Complaint.[5]

Further, even if the statute of limitations was not dispositive, Petitioner fails to overcome the sound legal reasoning of the Court of Appeals regarding the remaining defects in his Complaint, to wit: (1) his failure to attach an expert affidavit to the Complaint; (2) that "Griffis did not owe

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[3]While the Petitioner made a statute of limitations argument in his Motion to Alter or Amend Judgment, he asserted there that the date of an email communication sent in January of 2018 "should be considered the triggering date for the purposes of the statue of limitations" (R. p. 29); however, the Petitioner now argues—for the first time—that "there could be 10 different statute dates" for purposes of calculating the limitations period(s). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 467 (Ct. App. 2020).

[4]Petitioner cites to sections of the Record, at pages 57-69, which are not part of his Complaint, contrary to the holding in *Overcash.*

[5]It is notable that the so-called "alternate payment arrangement" Petitioner referred to as "fake and false" in his Motion to Alter or Amend Judgment (R. p. 29) and a "sham" and "cover up" in the Appellant's Final Brief is now treated in the Petition as both credible and a sufficient basis for reassessing when the limitations period commenced.

Hargrove a fiduciary duty;" and (3) that there is no legal rule "allowing Hargrove to turn a breach of contract action against the seller into a conspiracy claim against the seller's lawyer." These are independent legal reasons to dismiss the Complaint, each one alone sufficient reason for dismissal.

Finally, there exists no special or important reasons or considerations for granting certiorari under Rule 242(b), SCACR. The Court of Appeals' decision was unanimous and is not in conflict with a prior decision of this Court. Further, Petitioner's case does not involve any constitutional or federal law issues, and the Petitioner does not present any novel questions of law, relying instead on a brand-new "factual" argument regarding an alternate payment arrangement for the commission, which is contradicted by allegations in his own Complaint.

CONCLUSION

This Court should deny a Writ of Certiorari because the issues raised by Petitioner in his Petition are not supported by the allegations in his Complaint, and the Petition does not raise any novel questions of law or meet the other review considerations, as required by Rule 242, SCACR.

Respectfully submitted,

August 18, 2022

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