THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-6054
Appellate Case No. 2013-001407

Cynthia Griffis,	Plaintiff,
v.	
Cherry Hill Estates, LLC, Eugene O'Neil and and Ronald Faulkner,	Defendants,
Of whom Cherry Hill Estates, LLC and Ronald Faulkner are	Appellants.
Cherry Hill Estates, LLC and Ronald Faulkner,	Third Party Plaintiffs,
v.	
Anthony E. Griffis,	Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants filed their Third Party Complaint in this matter asserting the subject professional negligence claims, and other causes of action, against their former attorney, Anthony E. Griffis, on or about June 20, 2010. The issues before the Court were first raised in Respondent's Motion to Dismiss filed on or about September 20, 2010. That motion was argued on October 14, 2010 and an Order granting the Motion was entered on October 27, 2010. That Order granted Appellants thirty days, or until November 14, 2010, to serve an Amended Third Party Complaint to include the supporting affidavit of an expert. Appellants timely served their Amended Third Party Complaint with a supporting affidavit on November 14, 2010.

Respondent filed his second Motion to Dismiss and for Summary Judgment on December 28, 2010. The Motion was argued on or about March 28, 2011 before the Honorable Marvin H. Dukes III, with a supplemental hearing by telephone on May 5, 2011. Thereafter Judge Dukes instructed Appellants' counsel herein to prepare an Order denying summary judgment on the subject negligence claim(s). Said Order was prepared and tendered to the Court, but not entered.[1]

After counsel for the Appellants became aware that the Order denying summary judgment had not been formally entered, counsel contacted the Court and a supplemental status conference was held, which resulted in Judge Dukes entering an Order denying Respondent's Motion to Dismiss and for Summary judgment on or about August 6, 2012.

On August 12, 2012 Respondent filed a Motion to Reconsider the Court's Order of August 6, 2012. The parties argued the Motion to Reconsider before Judge Dukes on October 15, 2012. On March 5, 2013 Judge Dukes entered an Order granting Respondent's Motion to Reconsider and entering summary judgment for Respondent on the negligence causes of action, based on the statute of limitations.

On March 18, 2013 Appellants filed their Motion to Reconsider the Order granting summary judgment on the negligence claim(s). The parties argued the Motion to Reconsider before Judge Dukes on April 18, 2013. On May 16, 2013 Judge Dukes entered his Order denying Appellants' Motion to Reconsider, and the within Appeal followed. Appellants seek damages in excess of One Million Dollars, the exact amount of which to be determined at

1 On or about March 21, 2011 the parties herein and Cynthia Griffis agreed to a Consent Order Bi Furcating the first party action brought by Ms. Griffis, in part to accommodate Mr. Hale's schedule due to his health . Ms. Griffis' first party case against the Appellant(s) herein was tried on May 25 and May 26, 2011 and ultimately, a

trial.

STATEMENT OF THE FACTS

In or around January, 2007, attorney Anthony E. Griffis and his estranged wife and paralegal assistant, Cynthia Griffis, began discussions with Mr. Griffis' client, Eugene O'Neil, to sell the Griffis' former marital residence and surrounding property, being twenty 27 acres in Okatie, South Carolina, to a new entity. The twenty seven (27) acre tract will be referred to hereafter as the "Cherry Hill Estates" property. The sale was structured to both generate proceeds sufficient to settle the Griffis' divorce and associated property settlement matters, and to pay off a SunTrust note and mortgage secured by the Cherry Hill Estates property, which note was in default by early 2007. (O'Neil Deposition at 35; Griffis Deposition at 22; "Confidential Memorandum from Anthony Griffis dated February 22, 2007"). Initially, the Griffises and O'Neil contemplated that Mr. Griffis and O'Neil would be partners in the purchasing entity, and a series of contracts were drafted by Mr. Griffis and presented to lender(s), none of which ultimately worked for the intended purposes.(Contract for Purchase and Sale dated March 29, 2007 and Contract for Real Estate dated May 23, 2007). In mid 2007 Mr. Griffis and/or O'Neil solicited Ronald T. Faulkner, a resident of Maryland, to involve in the proposed transaction. Faulkner was also at that time a client of Mr. Griffis, inasmuch as Griffis acted as settlement agent for several real estate transactions in which Faulkner was a principal including the purchase of Faulkner's residence on Hilton Head Island in 2007. Faulkner was also a close social friend and historical business associate

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Consent Order resulted in the entry of a judgment by settlement on January 20, 2012, the entry of judgment

of O'Neil—they were involved together in at least one other South Carolina real estate venture together known as Buckingham Development, LLC, for which Mr. Griffis served as corporate and tax counsel. Faulkner was specifically solicited by Griffis and O'Neil for his perceived financial strength—it was believed and determined a more credit worthy guarantor was required to achieve a purchase money mortgage loan in an amount sufficient to generate proceeds at closing to meet Griffis and O'Neil's intended purpose for the transaction. (O'Neil Deposition at 13). It is not clear from the facts developed thus far in the case when, exactly, Faulkner agreed to participate in the Cherry Hill Estates project, but discovery and testimony in the first party action herein and in a related third party action Bank of the Ozarks v. Cherry Hill Estates, LLC et al reflect that Faulkner's financial information was in fact provided to Woodlands bank in connection with the Cherry Hill Estates project and loan, by persons and means not completely certain.

Ultimately, a sales contract entitled Contract for Real Estate was drafted by Mr. Griffis and executed by Mr. Griffis and Mr. O'Neil on or about August 30, 2007. The contract conveyed the Cherry Hill Estates property to Cherry Hill Estates, LLC, a limited liability company formed by Mr. Griffis, for a stated purchase price of One Million and Thirteen Thousand ($1,000,013.00) Dollars. The Contract for Real Estate was presented to Woodlands Bank in connection with a request for a purchase money first mortgage in the amount of Eight Hundred Fifty Thousand ($850,000.00) Dollars. Neither the Contract for Real Estate, nor any other document subsequently presented to Woodlands Bank, suggested or stated that Mr. Griffis was intended to be a member in Cherry Hill Estates, LLC or that

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itself being delayed by Mr Hale's declining health and subsequent passing.

Mr. O'Neill or Cherry Hill Estates, LLC would receive a portion of the contemplated sales proceeds. The Contract for Real Estate, and all prior contracts, were executed by Mr. O'Neil on behalf of Cherry Hill Estates, LLC without the benefit of separate representation.

During the five weeks subsequent to the tender of the Contract for Sale, Mr. Griffis, Mr. O'Neill, Ms. Griffis and Mr. Faulkner engaged in a number of discussions and meetings in person or by phone which resulted in Mr. Griffis drafting an "Agreement Regarding Cherry Hill Estates," dated September 13, 2007 (the "September Agreement"), and a subsequent document, the "Agreement Regarding Cherry Hill Estates" dated October 8, 2007(the "October Agreement"), which was the day before the intended closing date for the Cherry Hill Estates transaction. The October Agreement added a provision whereby Mr. O'Neil and Mr. Faulkner would personally guarantee a second mortgage loan to Ms. Griffis. Mr. Faulkner and Mr. Griffis have testified that this provision reflects their intent and agreement at the time. Mr. O'Neil and Mr. Faulkner have testified that it was not their intent or agreement to personally guarantee a second mortgage to Ms. Griffis, and that their attorney added that provision without explaining it to them. The October Agreement also added the following provisions:

> "3. The additional excess closing proceeds (from buyers' loan) shall be reinvested for development purposes in Cherry Hill Estates, LLC , a SC limited liability company whose members are Ron Faulkner and Eugene O'Neil. Anthony E. Griffis shall receive a 1/3rd interest in Cherry Hill Estates, LLC, for his investment. $150,000 paid directly by Anthony E. Griffis (handwritten amendment).
> "4. $119,000 of the excess loan proceeds shall be escrowed and used for interest payments on Buyer's loan. Anthony E. Griffis shall be entitled to the tax deduction related to said business interest."

On some date prior to closing, Mr. O'Neil was referred to John P. Qualey, Esq. to be

retained as settlement agent for the contemplated transaction. The file and record in this case reflect that Mr. Faulkner did visit Mr. Qualey's office on one occasion and executed a Power of Attorney drafted by Mr. Qualey which gave Mr. Qualey authority to execute necessary documents in connection with the Cherry Hill Estates transaction. Neither Woodlands Bank's files, Mr. Qualey's files, nor any other documents or testimony generated in the first party action, this action, nor the related foreclosure action described below, reflect that the October Agreement was provided to the Woodland Bank or to Mr. Qualey. Thus, the transaction proceeded without the lender or settlement agent having knowledge that (a) Mr. Griffis, the seller, was intended to own an interest in the purchasing entity, or (b) that the purchasing entity and/or Mr. O'Neil and/or Mr. Faulkner would be receiving sales proceeds at closing, funded entirely by the purchase money mortgage loan, as the purchaser was not investing any funds at closing.

On October 10, 2007, the transaction closed with Mr. Qualey acting as the settlement agent. The property was purchased by Cherry Hill Estates, LLC for the sum of $1,000,013 and financed by a loan from Woodlands Bank in amount of $850,000 and a second mortgage note given to Cynthia Griffis in amount of $200,000. (HUD 1). The second mortgage note term expired in 2009. The transaction, as structured by Mr. Griffis, required Mr. O'Neil and Mr. Faulkner, through his Power of Attorney Mr. Qualey, to give personal guarantees for both promissory notes. Although Mr. Griffis structured the transaction to grant himself a one-third ownership interest in Cherry Hill Estates, LLC, Mr. Griffis did not personally guarantee either purchase money note. Both Mr. Faulkner and Mr. O'Neil testified at deposition that they did not understand that they were being asked to personally guarantee Ms. Griffis'

second mortgage note, but rather that they thought Ms. Griffis would be paid if and when the land was sold or developed. (Faulkner Deposition at pp 10, 23, 37-39, 40, 41, 57-59, 66, 124, 128; O'Neil Deposition at 14, 17, 46-49). Mr. Faulkner, Mr. O'Neil and Cherry Hill Estates, LLC were not represented by separate counsel during the negotiation phase of the transaction, or prior to or during the event when they executed a number of sales contracts and separate side agreements, in Mr. Griffis' office. Mr. Griffis did not issue any written instruction to either Mr. Faulkner or Mr. O'Neil that they should retain separate advice of counsel prior to entering into the Contract for Sale or the Agreement(s) Regarding Cherry Hill Estates.

On October 10, 2007, after the closing, Mr. O'Neil executed in Mr. Griffis' law office a document entitled "Bill of Sale," which was prepared by Mr. Griffis and which conveyed a one-third interest in Cherry Hill Estates, LLC to Mr. Griffis. At the same meeting, Mr. Griffis tendered a check from Mr. Griffis to "Eugene O'Neill, for Cherry Hill Estates, LLC" in the amount of Three Hundred Twenty Thousand ($ 320,000) Dollars.

In December, 2009 Cynthia Griffis filed the first-party action against Cherry Hill Estates, LLC, Ronald Faulkner and Eugene O'Neil, alleging breach of contract and seeking collection of $200,000 allegedly owed under the second mortgage promissory note, plus interest and fees. Appellants filed a Motion for Leave to Amend their Answer and to Assert Third Party Complaint against Mr. Griffis on May 25, 2010, and said Motion was granted on June 18, 2010. Cherry Hill Estates, LLC and Mr. Faulkner served the Third Party Complaint on June 22, 2010. The Third Party Complaint alleged, *inter alia*, causes of action for breach of fiduciary duty, professional negligence and indemnification against Mr. Griffis, claiming

that he failed to properly refer his clients to separate counsel prior to engaging in personal business transactions with them, and that he unfairly took advantage of his clients to his benefit and their detriment.

In or around December, 2009, the Woodlands note went into default. The successor in interest to Woodlands, Bank of the Ozarks, initiated a foreclosure action in case 2010-CP-27-0637, Bank of the Ozarks v. Cherry Hill Estates, LLC et al which resulted in the foreclosure and sale of the subject property on April 2, 2012, and ultimately in a deficiency judgment against Cherry Hill Estates, LLC, Mr. Faulkner and Mr. O'Neil in amount of Nine Hundred and One Thousand Thirteen and 44/100 ($901,013.44) Dollars. Thus the property that the Respondent sold to the Appellants for more than one million dollars ($1,013,000) in 2007 was resold for One Hundred Fifty Seven Thousand Two Hundred and Fifty ($157,250.00) Dollars in April, 2012.

ARGUMENT

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial."

Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

A. An Expert Affidavit May Not Have Been Necessary to Support the Negligence and Breach of Duty Claims asserted.

The trial court granted summary judgment based on S.C. Code of Laws, Section 15-36-100, which generally requires that claims sounding in professional negligence be supported by the contemporaneous filing of an affidavit by an expert. At the outset, Appellants note that Section 15-36-100(C)(2) eliminates the contemporaneous filing requirement where "the subject matter lies within the ambit of common knowledge and experience, such that no special learning is needed to evaluate the conduct of the defendant." The Amended Third Party Complaint herein alleged facts which violate generally understood rules requiring professionals to disclose conflicts of interest to their clients, and also alleges that Mr. Griffis advised Appellants to enter into a transaction involving a refund or "kickback" of seller proceeds to the purchaser entity without disclosure of that event to the lender or settlement agent. Appellants assert that if these refunds of sales proceeds were disclosed to the lender prior to closing or at closing, then the lender would have canceled the transaction. Mr. Griffis structured and drafted the agreement(s) that resulted in these events and had the parties execute those agreement(s) in his office, unbeknownst to the settlement agent or to the bank. Thus, the Amended Third Party Complaint alleges errors within the ambit of common knowledge and experience, such that no professional affidavit was needed to support the claims of breach of duty of care or breach of fiduciary duty. Clearly, the law does not contemplate that an expert opinion be required to support a claim against one's lawyer for structuring and participating in a transaction that would not close if it was properly

and fully disclosed to the purchase money mortgage lender, in addition to the other one sided aspects of the transaction as set forth above.

B. The Discovery Rule Extended the Applicable Limitations Period in this Case.

The trial court ultimately determined in its Order granting summary judgment that an expert affidavit was in fact required by Section 15-36-100 and that the Amended Third Party Complaint with supporting expert affidavit was time-barred by approximately thirty four days because those documents were served and filed three years and thirty four days after the closing of the subject transaction. Appellants dispute that the trial court properly applied the law regarding limitations of actions. Specifically, South Carolina follows the discovery rule, which states that the statute 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 Abba Equipment, Inc. v. Thomason, 517 S.E.2d 235, 335 S.C. 477 (S.C.App. 1999) (*citing* Mills v. Killian, 254 S.E.2d 556, 273 S.C. 66 (S.C. 1979)) our Court of Appeal held that the "discovery rule" specifically applied to causes of action under a theory of professional negligence.

i. Appellants did not discover facts underlying cause of action until January, 2010

The discovery rule triggers the statute of limitations in this case on or after January 11, 2010, when Mr. Faulkner was served with the lawsuit by Cynthia Griffis which demanded recovery on the $ 200,000 second mortgage promissory note. The Amended Third Party Complaint, accompanied by Mr. Pendarvis' affidavit, was served less than eleven months after that discovery. In actuality, Respondents learned of the lawsuit and its

underlying claims after it was filed in December, 2010, but the distinction between December 2010 and January, 2011 is not material for the discovery rule analysis herein.

Despite Respondents' testimony regarding when it/he actually learned about the guarantees on the second mortgage and note, the trial court found that the statute of limitations began to run on the date of closing, being October 10, 2007, when Eugene O'Neil executed settlement and closing documents on behalf of Cherry Hill Estates, LLC and himself, and John P. (Jack) Qualey executed loan guarantees for Mr. Faulkner through his Power of Attorney. However, the fact record developed in this case, as well as the associated first party action, reflected that as of October 2007, Mr. Faulkner did not know of the events that formed the basis for the Appellants' causes of action for professional negligence. As of the closing date, Mr. Faulkner did not know that he was being bound to guarantee a second loan to Ms. Griffis. (Faulkner Deposition at 111). Mr. Faulkner did not know that Mr. Griffis would obtain an ownership interest in Cherry Hill Estates without a corresponding requirement that he guarantee the loan(s) taken to enable the transaction. (Faulkner Deposition at 59). Finally, as of the closing date, Mr. Faulkner was unaware that structure of the transaction, which involved the refund of Seller proceeds at closing to the purchaser entities, and third parties, without disclosure to the first mortgage lender, rendered the transaction in contravention of existing lending and legal protocols. The statute of limitations for the third party negligence claims therefore could not have triggered until Mr. Faulkner and/or the entity discovered these matters, in December, 2009 or in January, 2010.

ii. Mr. Qualey had no relevant knowledge to impute on Appellants

The trial court further erred in finding that Mr. Qualey's knowledge of the closing and

the documents and obligations therein were imputed to Mr. Faulkner. Mr. Qualey's deposition testimony reflected the following:

i) that Mr. Qualey, the settlement agent for the transaction in question, is not certain he ever met with or talked to Mr. Faulkner before the closing (pp 33-34);

ii) that Mr. Qualey is not certain he spoke with Mr. Faulkner after the transaction, and if he did, does not recall the substance of the conversation; (pp 34-37)

iii) that the standard procedure for explaining the Power of Attorney would have been delegated to a paralegal named Brooke (pp 38-40);

iv) that Brooke Brown would have been the party communicating with Mr. Faulkner relating to the closing and Power of Attorney (pp 59-60); and

v) that Mr. Qualey's file did not have the Agreement Regarding Cherry Hill Estates dated October 8, 2007, and that he had not "heard" of the document prior to the deposition (pp 70-72).

The above-referenced testimony reflects that Mr. Qualey's knowledge, if any, of the events and documents at closing which give rise to the claims herein could not be imputed to Mr. Faulkner for the purpose of triggering a statute of limitations as found by the trial court. Without communication, knowledge could not be adequately conveyed, or imputed. Further, and most importantly, the Appellants contend that a central element of their claims relating to professional negligence arise from negotiations and documents of which Mr. Qualey was unaware. Thus, what Mr. Faulkner knew or understood of these negotiations and/or documents, their meaning, and legal consequence, is a fact issue that must be determined by the trial court prior to ruling on whether the statute of limitations was triggered

Mr. Griffis' contention that Mr. Faulkner (and Cherry Hill Estates, LLC) were put on constructive notice by Mr. Griffis fax transmission on October 9, 2007 to settlement agent Qualey regarding the existence of the personal guarantees on the second mortgage note, does not support summary judgment against Mr. Faulkner individually because Mr. Faulkner testified that he did not believe Mr. Qualey was his attorney, that he had not hired Mr. Qualey or had a personal communication with Mr. Qualey before closing, and that he [Mr. Faulkner] did not recall the substance of any conversation or communication with Mr. Qualey, and has not spoken to him or retained him for any purpose after the closing, and that in Mr. Faulkner's view, Mr. Qualey was simply acting as his attorney in fact to sign documents. (Faulkner Deposition, Vol. 2 at 23). Mr. Faulkner's sworn testimony in this regard creates a genuine fact issue that cannot be resolved at the summary judgment level in this jury demand case.

The alleged professional negligence and breach of duty alleged in this matter transcend the existence of the personal guarantees on the second mortgage note. Mr. Pendarvis' affidavit states Mr. Griffis breached the standard of care when he failed to inform his clients, in writing, to obtain separate counsel, and of the potential conflicts of interest, prior to entering into the separate side agreements of September 13, 2007 and October 8, 2007. These side agreements, which formed the basis of the transaction and induced Ms. Griffis and Mr. Griffis and Mr. O'Neil's to proceed, and which involved significant deviations from the transaction as it was represented to Mr. Qualey and Woodlands Bank, i.e. the refund of Sellers's proceeds to Mr. O'Neil and Cherry Hill Estates, LLC which is not depicted on the HUD 1 settlement statement, were not shown to Mr. Qualey, were not in Mr.

Qualey's file, and prior to his deposition were unknown to Mr. Qualey. (Qualey Deposition at pp 44-46,70). Thus, there is no possibility that Mr. Qualey in a capacity as agent for Mr. Faulkner could have had actual or constructive notice of the acts that are being alleged as professional negligence–those acts were concealed from him. The transaction as structured, and implemented is void against public policy because ultimately it involved a kickback of seller proceeds, financed by a bank loan, without disclosure to the lending institution, and the vesture of an ownership interest in the Purchaser, to one of the Selling parties, Mr. Griffis, without full disclosure to the lender.

Moreover, under the discovery rule, the when the date when a statute of limitations commences is in dispute, it is fact issue for the jury to determine. Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 697 S.E.2d 644 (S.C. App. 2010). Summary judgment is premature in this matter.

C. The Relation Back Doctrine Preserves the Amended Third Party Complaint and Expert Affidavit Within the Limitations Period.

South Carolina Rule of Civil Procedure Rule 15(c) codifies the common law "relation back" doctrine. The test to be used in determining whether or not an amendment should be allowed to relate back under Rule 15(c) to the date of the original pleading to avoid statute of limitations is found in the language of the Rule; specifically, whether the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading. Thomas v. Grayson, 318 S.C. 82, 456 S.E. 2d 377 (1995). Applied to the instant case, Rule 15 (c) and the relation back doctrine require that the date for tolling of the statute of limitations relate back to the filing date for the initial Third Party Complaint,

being June 22, 2010, since that Third Party Complaint put Mr. Griffis on specific notice of the breach of duty and professional negligence claims against him.

Under the relation back doctrine, the Amended Third Party Complaint with supporting expert affidavit was filed within the three year period after the earliest conceivable date for triggering the statute of limitations, being the date of closing, October 10, 2007 because the underlying Third Party Complaint was served June 20, 2010, well within the three year period using any reasonable interpretation of when the statute began to run. The filing on November 14, 2010 of the expert affidavit was responsive to an Order by the trial court granting the Appellant thirty days, or until November 14, 2010, to perfect their Complaint by obtaining such an affidavit, which they did, and that filing relates back to the date of the filing of the Third Party Complaint in June, 2010, within even the trial court's view of the statute of limitations.

There is no evidence in reported cases or legislative history suggesting that Section 15-36-100 was intended to abrogate the relation back doctrine for amended pleadings.

D. Statutory Construction and the Law of the Case Compel denial of Summary Judgment.

The plain language of Section 15-36-100 (C) grants the trial judge discretion to grant leave to amend a pleading to include the expert affidavit if "justice requires." After lengthy argument at the motion hearing on October 14, 2010, the trial court granted the Appellants leave to refile their Third Party Complaint as reflected in the October 26,2010 Order. The Appellants complied with the terms of the trial court's Order and filed their Amended Complaint, with supporting affidavit, within 30 days.

Section 15-36-100 (D) plainly states that " if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for the statute of limitations defense." In the instant case, the trial Court initially and properly exercised its discretion to extend the time for the Appellants to obtain and file a timely expert affidavit, and the Appellants complied with the Order. The trial Court's reversal of its own Order, in granting the Motion for Summary judgment, results in the trial Court both ignoring Rule 15 (c), and Section 15-36-100 (D). Equally significant, the reversal of position and grant of summary judgment by the trial court renders the trial court's Order of October 26, 2010 ineffective and violates the "law of the case" doctrine. . Where a litigant fails to appeal a ruling on a particular issue, that ruling becomes law of the case. See Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) (finding an unappealed ruling is law of the case).

Here, Respondent did not contest or appeal the grant of thirty days leave to re-file when it was ordered. Thus, under the "law of the case" doctrine, the extension of the limitations period granted by the trial Court's Order of October 27, 2010 controls the matter.

E. Equitable Tolling Precludes Application of the Limitations Period to Bar Appellants Claims for Professional Negligence

The doctrine of equitable tolling, and equity itself, compels a finding that Appellants' negligence claims are not time barred. Equitable tolling was recognized by our Supreme Court in Hooper v. Ebenezer Services and Rehabilitation Center, 386 S.C. 108, , 687 S.E.2d 29, (SC 2009). There the Court found that:

[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. *Limitations of Actions* § 115 (2005). " Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d 58, 66 (2004).

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court,* 176 Cal.App.4th 1461, 98 Cal.Rptr.3d 728 (2009). " Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period ' to ensure fundamental practicality and fairness.' " *Id.* at 736 (citation omitted).

(Hooper at 32-34). The Court in Hooper cited a number of non exclusive instances where equitable tolling had been applied to serve the interests of justice, many of which are immediately applicable in the case sub judice:

It has been observed that " [e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Ocana,* 91 P.3d at 66. However, jurisdictions have considered tolling in a variety of contexts and have developed differing parameters for its application.[6] See, e.g., Irby v. Fairbanks Gold Mining, Inc., 203 P.3d 1138, 1143 (Alaska 2009) (" Under the doctrine of equitable tolling, when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies."); Abbott v. State, 979 P.2d 994, 998 (Alaska 1999) ("Federal precedent equitably tolls the limitations period in three circumstances: (1) where the plaintiff has actively pursued his or her judicial remedies by filing a timely but defective pleading; (2) where extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim; or (3) where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim." (footnotes omitted)); Kaplan v. Morgan Stanley & Co., __ Vt. __, __, __ A.2d __, __ (2009) (2009 WL 2401952) ("Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum.") (citing Beecher v. Stratton Corp., 170 Vt. 137, 743 A.2d 1093, 1098 (1999)); cf. Machules v. Dep't of Admin., 523 So.2d

> 1132, 1134 (Fla.1988) (stating the doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits).

(Hooper at 32-34).

In the case sub judice, foremost, Appellants timely filed their Third Party Complaint, alleging professional negligence and breach of fiduciary duty under any asserted interpretation of "timely" as it relates to this matter. Appellants' pleading was deemed defective, however, because it failed to include an expert affidavit in support. They timely cured this defect within the period established by the trial court within its own order.

In addition, the underlying facts of this case compel the application of equitable tolling. Foremost, Appellant Faulkner had no reason to believe that he had personally guaranteed the loan to Ms. Griffis for the two years subsequent to the October 10, 2007 closing, as there were no payments due Ms. Griffis during that period. It was not until Ms. Griffis filed suit against the Appellants and Mr. O'Neil, in or around December, 2009, that Mr. Faulkner realized the full extent of the damages he was facing as a result of the Cherry Hill Estates transaction and the loan guaranty that his agent had executed for him. This event was nearly twenty six months after closing. Seven months later, after filing an Answer to Ms. Griffis' action and after much negotiation and discussion between Ms. Griffis, Mr. Griffis and the Appellant parties and their counsel in the normal course, the Appellants filed their Third Party Complaint against Mr. Griffis. Thereafter, Mr. Griffis, communicating through counsel who ultimately did not appear in the case, requested an extension of time to respond, which Appellants granted. (See Exhibits attached to Memorandum Asserting Additional Facts in Record in Support of Motion for Reconsideration of Order Granting Summary

Judgment).

Thus, after filing their Third Party Complaint, prior to the Motion to Dismiss, and prior to the expiration of the statute of limitations imposed by the trial court in its Order, the Appellants extended Mr. Griffis' own time to respond as a courtesy, and thus did not have the opportunity review Mr. Griffis' Motion to Dismiss until it ultimately served and filed with his first responsive pleadings on September 20, 2010. A hearing was expedited to October 14, 2010, and ultimately, the Court found that an expert affidavit was required to support the claims (but see argument in Section A, *infra* for Appellant's argument that the affidavit might not even be necessary) and ordered the Appellants to comply with the affidavit by a date which ultimately the Court determined was after the limitations period expired.

Under the facts of this case, equitable tolling is appropriate to deny summary judgment on the limitations issue because: a) no party is unduly prejudiced or harmed by the trial court's initial Order extending the limitations period; b) there are fact disputes and issues of law as to when the limitations period began to run; c) the Appellants complied with the trial court's Order extending the applicable limitations period; d) the Appellants themselves extended courtesy to the Respondent which contributed to the delay in the adjudication of the limitations issue beyond the earliest possible expiration date; and e) the subject matter herein and the magnitude of the loss sustained by the Appellants compel a trial on the merits of the causes of action.. Appellants should not be punished when they complied with the trial court's order, particularly in a case such as this, where the interests of justice require that this case be tried on the merits. It is not equitable that the Respondent be

the beneficiary of the drastic consequences of dismissal based on an alleged technical timing violation of Section 15-36-100. Unlike the parallel doctrine of equitable estoppel, equitable tolling does not require *per se* that the party invoking the doctrine be induced to delay by the party seeking to bar its claim. Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 725 S.E.2d 112, 397 S.C. 348 (S.C.App. 2012).

F . The Trial Court Erred in Granting Summary Judgment on Appellants' Claim for Breach of Fiduciary Duty.

The trial court granted summary judgment on Appellant's claim against Respondent for Breach of Fiduciary Duty because the trial court determined that any duty owed by the Respondent would arise from the professional relationship between the parties, and thus Section 15-36-100 would serve to bar the claim for breach of fiduciary duty as well.

Appellants assert that the trial court's ruling grant of summary judgment on this point was premature. Although the primary historical relationship between Respondent and Mr. Faulkner was that of attorney and client, there are factual circumstances where a fiduciary duty can exist beyond the scope of a professional-client relationship, such as where one party is in a superior position to the other and as such that position enables him to exert influence over one who reposes a special trust and confidence in him. See Burwell v. South Carolina National Bank, 288 S.C. 34, 340 S.E. 2d 786 (S.C. 1986)(decided on other grounds). Thus, where a seller of real estate has basically exclusive control of the information relating to the proposed transaction, such as appraisals, contract documents, etc., that seller owes a duty to its purchaser and third parties who act in reliance on that trust. Here, Mr. Griffis, acting as seller, had primary control over the drafting and editing of key documents governing the

transaction and also assisted with the procurement of a number of pre-closing appraisals with knowledge that the purchaser entity as buyer, and ultimately Mr. Faulkner as guarantor, would rely on those documents and their trust in Mr. Griffis in deciding to proceed with the transaction. Due to the motion practice involving the negligence claims, no discovery has proceeded in this case since May, 2011, and thus Mr. Griffis' role, if any, in the procurement of the appraisal used by Woodlands Bank in underwriting its purchase money loan has not been determined. Ultimately, the property sold for $ 157,250.00 at foreclosure sale in April 2012, a sum $901,034 less than the then existing loan balance and less than twenty percent of the anticipated appraised values in 2007 which Appellant presumes Woodlands Bank relied upon when lending $ 850,000.00 to the Appellants and Mr. O'Neil relied upon when binding Cherry Hill Estates, LLC to the loan. Until the Mr. Griffis' role in the procurement of the 2007 loan and appraisals is fully examined through discovery, summary judgment on the breach of fiduciary duty claim is premature.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, and remit this matter for further trial on the merits.

Dated: July 29, 2013

Respectfully Submitted,

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Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-6054
Appellate Case No. 2013-001407

Cynthia Griffis,	Plaintiff,
v.	
Cherry Hill Estates, LLC, Eugene O'Neil and and Ronald Faulkner,	
	Defendants,
Of whom Cherry Hill Estates, LLC and Ronald Faulkner are	Appellants.
Cherry Hill Estates, LLC and Ronald Faulkner,	Third Party Plaintiffs,
v.	
Anthony E. Griffis,	Respondent.

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant designates the following matter to be included in the Record on Appeal:

1. Order Denying Appellant's Motion for Reconsideration, entered May 16, 2013
2. Order Granting Motion for Reconsideration and Summary Judgment entered March 5, 2013
3. Order Denying Motion for Summary Judgment, entered August 3, 2012
4. Order on Motion to Dismiss, entered October 26, 2010
5. Third Party Complaint, filed July 30, 2010
6. Answer and Counterclaim Filed September 10, 2010

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7 Motion To Dismiss Filed September 10, 2010

8. Amended Third Party Complaint, filed November 15, 2010

9. Answer and Reply of Ronald Faulkner and Cherry Hill Estates to Answer and Counterclaim, filed November 15, 2010

10. Third Party Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment dated March 28, 2011 with Exhibits

11. Answer to Motion to Dismiss, dated May 20, 2011

12. Excerpts from Deposition Transcript of Anthony Griffis

13. Excerpts from Deposition Transcript of Eugene O'Neil

14. Excerpts from Deposition Transcript of John P. Qualey

15. Excerpts from Deposition Transcript of Cynthia Griffis

16. Third Party Plaintiff's Motion to Alter or Amend Judgment, filed March 18, 2013

17. Trial Brief; Addendum to Trial Brief, filed June 9, 2011

18. Memorandum Asserting Additional Facts in Record in Support of Motion for Reconsideration of Order Granting Summary Judgment, Exhibits, filed April 11, 2013

19. Defendants Memorandum in Opposition to Summary Judgment in first party action, Exhibits, filed November 1, 2010

20. Affidavit of Thomas A. Pendarvis, J.D., filed November 15, 2010

21. Affidavit of Ronald Faulkner, filed June 18, 2010

22. Contract for Real Estate (August 30, 2007)

23. Contract for Real Estate (May 23, 2007)

24. Contract for Purchase and Sale of Real Property (March 29, 2007)

25. Confidential Memorandum from Anthony Griffis dated February 22, 2007

26. Agreement Regarding Cherry Hill Estates (October 8, 2007)

27. Agreement Regarding Cherry Hill Estates (September 2007)

28. Settlement Statement HUD 1 (October 10, 2007)

29. Bill of Sale for Membership Interest Cherry Hill Estates (October 10, 2007)

30. Master's Report of Sale in Case No. 2010-CP-27-0637

July 29, 2013

Respectfully Submitted,

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Of whom Cherry Hill Estates, LLC and Ronald Faulkner are	Appellants.
Cherry Hill Estates, LLC and Ronald Faulkner,	Third Party Plaintiffs,
v.	
Anthony E. Griffis,	Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant, Designation of Matter to be Included in the Record on Appeal and Rule 209 Certification on Respondent Anthony E. Griffis, Esquire, Respondent *pro se*, by depositing a copy of it in the United States Mail, postage prepaid, on July 29, 2013, addressed to Mr. Griffis at 355 Park Avenue SW, Aiken, SC 29801

July 29, 2013

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Cherry Hill Estates, LLC and Ronald Faulkner,	Third Party Plaintiffs,
v.	
Anthony E. Griffis,	Respondent.

RULE 209(C) CERTIFICATION

I, Michael W. Mogil, do hereby certify that the Appellant's Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to the appeal.

July 29, 2013

Respectfully Submitted,

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