THE STATE OF SOUTH CAROLINA
*Court of Appeals*

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APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Marvin H. Dukes, III

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Trial Court Case No. 2009-CP-07-06054
Appellate Case No. 2013-001407

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Cynthia Griffis, Plaintiff,

v.

Cherry Hill Estates, LLC, Eugene O'Neil, 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.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial court err in dismissing Appellants' First, Second and Third Causes of Action, because Appellants failed to timely obtain the expert affidavit as required by S.C. Code Ann. §15-36-100(F)?

## STATEMENT OF THE CASE

On October 10, 2007, Cynthia Griffis and Respondent Anthony E. Griffis, sold approximately 27 acres of property in Jasper County, to Appellants. (HUD Settlement Statement, R. p. ___) As part of the consideration, Cynthia Griffis received a $200,000.00 Purchase Money Promissory Note due on October 10, 2009, said Note containing the personal guarantees of Eugene O'Neil and Appellant Ronald Faulkner. (Note, R. p. ___) Additionally, a separate "Guaranty" was executed by Eugene O'Neil and Appellant. (Guaranty, R. p. __) Appellant Ronald T. Faulkner appointed John P. Qualey, Esq., as his attorney-in-fact, who executed said personal guarantees on behalf of Ronald Faulkner. (Power of Attorney, R. p. __) John P. Qualey, Esq., was also the settlement agent/attorney for the Appellants in the closing.(HUD Settlement Statement, R. p. __)

Following default on the Note by Appellants, Cynthia Griffis brought action to collect said Note and to enforce the personal guarantees of Eugene O'Neil and Ronald Faulkner. As part of this litigation, on June 23, 2010, Cherry Hill Estates, LLC and Ronald Faulkner as Third Party Plaintiffs, filed a Third Party Complaint against Anthony E. Griffis (Third Party Complaint, R. p. __). The Complaint alleged a pre-existing attorney-client relationship between Anthony E. Griffis and the Third Party Plaintiffs, and that Anthony E. Griffis was negligent and breached his ethical and fiduciary duties to Third Party Plaintiffs related to the sale of the property. (Third Party Complaint, pp 4-7; R. pp.__). The Complaint alleges that Anthony E. Griffis did not advise Appellants, in writing, to obtain independent legal counsel (Complaint, p 2, #7; p. 4, # 17,18; p. 6, # 25; R. p.__). However, Appellants were represented at closing by independent counsel, John P. "Jack" Qualey, Esq., (Qualey deposition, p. 9, lines 10-13; p. 10, lines 21-22;R. pp.___).

On September 20, 2010, Anthony E. Griffis filed an Answer and Counterclaim, in response to Third Party Plaintiff's Complaint, which Answer denied the substantive allegations of negligence and breach of fiduciary duty made by Third Party Plaintiffs.(Answer, R. p. __). Contemporaneously with the filing of his Answer and

Counterclaim, Anthony E. Griffis filed a Motion to Dismiss pursuant to Rule 12(b), SCRCP, and S.C. Code Ann. §15-36-100 (Supp. 2010), for the failure of Appellants to include the required expert affidavit with the Third-Party Complaint. (Motion, R. p. ___).

On October 14, 2010, the trial court ruled that the First, Second, and Third Causes of Action of the Third-Party Complaint were dismissed without prejudice, and allowed Third-Party Plaintiff until November 14, 2010 to serve another Complaint "supported by the affidavit of an expert witness as required by S.C. Code Ann. Section 15-36-100 or to re-plead these matters so as not to require an expert affidavit". (Order dated October 26, 2010; R. p. __). On November 15, 2010, Third-Party Plaintiff/Appellants filed the "Amended Third-Party Complaint", which included a purported expert affidavit notarized on November 11, 2010 (Amended Complaint and Affidavit, R. p. ___). On December 23, 2010, Third-Party Defendant/Respondent moved for dismissal of the said causes of action based on S.C. Code Ann.§15-36-100(F) because the expert affidavit was not obtained within the statute of limitations (Motion dated December 23, 2010; R. p. ___). This motion was denied on August 3, 2012, in which the court applied "equitable tolling" to allow Appellants to file the required expert affidavit outside the applicable limitations period (Order dated August 3, 2012; R. p. ____).

On August 12, 2012 Respondent filed a Motion to Reconsider the Order dated August 3, 2012 (Motion dated August 13, 2012; R. p. ___). On March 5, 2013, the lower court entered an Order granting Respondent's Motion to Reconsider and entered summary judgment for Respondent on the First, Second and Third Causes of Action of Appellants' Complaint, based on S.C. Code Ann.§15-36-100(F). (Order dated February 20, 2013; R. p. ____).

Appellants filed a Motion to Reconsider the summary judgment Order dated February 20, 2013, on March 18, 2013. The lower court denied this motion on May 16, 2013, (R. p. ___) and this appeal followed.

## ARGUMENT

### I. The First, Second and Third Causes of Action of Appellants' Complaint are within the coverage of S.C. Code Ann.§15-36-100 (Supp. 2010).

S.C. 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.

In the instant case, all of Appellants' causes of action are alleging a breach of duty based upon an alleged attorney-client relationship (Third Party Complaint, , p. 4, #6; p. 6, #25, 28; R. p.___, and Amended Third Party Complaint, same ref, R. p. ___). Thus, Appellants were required to file an expert affidavit with the Complaint, not only to support the negligence/malpractice claim (Third Cause of Action), but also the breach of fiduciary duty claims (First and Second Causes of Action).

Appellants do not have any valid claims against Respondent, except for the allegation of a pre-existing attorney-client relationship and the breach of the duty arising from that relationship. 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. Here, as in *RFT Mgmt Co.,*

Appellants do not (in their Amended Complaint) "set forth specific facts that demonstrate their breach of fiduciary duty claim is distinguishable because it arises out of a duty *other than* one created by the attorney-client relationship or that it is based on a different set of facts", *RTF Mgt Co.*, at p. 173.

In its first Order (Order dated October 26, 2010, R. p.___) the lower court held that the "breach of fiduciary duty" claims, as pled, would require the expert affidavit; however the court gave the Appellants the option to either obtain the expert affidavit "as required by S.C. Ann. Section 15-36-100 or to re-plead these matters so as not to require an expert affidavit". Appellants did not elect to "re-plead these matters so as not to require an expert affidavit" but simply repeated the identical allegations in their amended Complaint. (compare Complaint, pp.3-5, with Amended Complaint, pp. 4-7; R. p.___ with R. p___).[1] Although Appellants are now arguing (Appellants Brief, p. 13) that an expert affidavit is not necessary where "the subject matter lies within the ambit of common knowledge and experience....", they elected not to properly plead such facts and have now waived any objections to the lower court's Order of October 26, 2010, requiring the expert affidavit. Appellants never objected at the lower court or perfected this issue for appeal.

## II. The statute of limitations for obtaining the expert affidavit expired on October 9, 2010.

The undisputed relevant facts are:

1. Ronald Faulkner signed agreements dated September 13, 2007, and October 8, 2007, containing the language "Cynthia Griffis shall receive a Promissory Note

1 Appellants never objected to the lower court's holding that the breach of fiduciary duty claims would also have to be supported by an expert affidavit as required by S.C. Code Ann.§15-36-100, and did not preserve this issue for appeal.

guaranteed by Ron Faulkner and Eugene O'Neil for $200,000.00" (Agreement dated September 13, 2007, R. p.___, and Agreement dated October 8, 2007, R. p.___)

2. John P. Qualey, Jr., Esq., represented the Appellants in the closing of the subject property as their attorney/agent:
    a. Ronald Faulkner asserted an "attorney-client privilege" in the deposition of Mr. Qualey (Qualey deposition, p.9, lines 2-9, R. p.___);
    b. Mr. Qualey was paid an attorney's fee of $500.00 by Appellants at the closing on October 10, 2007 (line 1107 of the Settlement Statement, HUD; R. p.___);
    c. Mr. Qualey testified in his deposition that he represented the Appellants in the closing on October 10, 2007 (Qualey deposition: p 9, lines 10-12; p. 10, lines 21-22; p 55-56; R. p.___)
3. John P. Qualey, Jr. was the agent/attorney-in-fact for Ronald Faulkner in the closing under the recorded Power of Attorney executed on October 10, 2007 (Power of Attorney, R. p.___):
4. John P. Qualey, Jr. prepared the Note with personal guaranties, and the Guaranty agreement (Note, R. p.___); Guaranty, R. p.___; Deposition of Qualey, p. 35, lines 20-25; p. 36, lines 1-4; p. 56, lines 20-25;R. p.___)
5. John P. Qualey, Jr., as agent and attorney-in-fact for Ronald Faulkner, executed the personal guaranties (Note and Guaranty) on October 10, 2007 (Note, R. p.___; Guaranty, R. p.___)
6. Third-Party Plaintiffs did not have the expert affidavit until at least November 11,

2010, the date of notarization of said affidavit (Expert Affidavit, R. p.___).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith where there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law". The undisputed fact in this case is that John P. Qualey was the agent for Third-Party Plaintiffs, either as their attorney and/or as the attorney-in-fact. Even if Third-Party Plaintiffs maintain that they did not "discover" the liability under the guaranty on the subject loans until being sued by Cynthia Griffis, it is undisputed that their agent, John P. Qualey, had notice of the guaranty no later than October 10, 2007 (when he prepared and signed the guaranty as attorney-in-fact), and under well settled agency law, said "notice" is imputed to Third-Party Plaintiffs for purposes of starting the period of limitations. It is also undisputed that Third-Party Plaintiffs did not have the required expert affidavit (notarized on November 11, 2010) within the applicable limitations period, which expired on October 9, 2010. When there is no conflicting evidence or only one reasonable inference can be drawn from the evidence (as in this case), the determination of when a party knew or should have known that he had a claim becomes a matter of law to be decided by the trial court. *Turner v. Milliman*, 381 S.C. 101, 671 S.E.2d 636, 641 (S.C. App. 2009), citing *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997).

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 "discovery rule" also applies, 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. *Manios v. Nelson, Mullins, Riley & Scarborough, LLP, supra.*

The essential element in all of Third-Party Plaintiffs' (Appellants') causes of action is the liability imposed by the personal guaranty on the purchase money notes - for without the personal guaranties Third-Party Plaintiffs would have no damages under any of the causes of actions.[2] Indeed, in all of the subject causes of action, Third-Party Plaintiffs allege the guaranty as an essential part of its causes of action and damages (See Third Party Complaint, p. 3, #8, 9, 11; p. 5, #20, 22, 23; p. 6, #26, 13; R. p.___). 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. In the instant case, the commencement of the period begins on the date that Appellants, or their agent, knew that a personal guaranty was required on the loans (on or before date of closing on October 10, 2007).

It is undisputed that Third-Party Plaintiff Ronald Faulkner executed two Agreements, dated September 13, 2007, and October 8, 2007, containing the following language:

"Cynthia Griffis shall receive a Promissory Note guaranteed by Ron Faulkner and Eugene O'Neil for $200,000.00 ..." (Agreements of 9/13/07 and 10/8/07, R. p.___ and R. p.___)

In spite of the plain language of the above, Ron Faulkner maintains that he did not know or understand that he would be guarantying the loan to Cynthia Griffis, and it is this

2 Except for the personal guarantees, Appellants would have been enriched by at least the $20,000+ received at closing (per HUD closing statement, line 303, R. p.___), and thereby would suffer no damages.

lack of knowledge of his personal guaranty on which he bases all of his claims and defenses. Regardless of his position, if he had exercised "reasonable diligence", he "could or should have known" about his guaranty obligation when he signed the first agreement on September 13, 2007.

However, knowledge of the "personal guaranty" issue to Third-Party Plaintiffs is more easily determined, as an indisputable fact and as a matter of law, under agency law. It is well settled that "notice to the agent is notice to the principal", *Citizen's Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709 (1925)[3]. It is undisputed that Third-Party Plaintiffs were represented by John P. Qualey, Jr., Esq., at closing, as both the Plaintiffs' closing attorney[4] and as the attorney in fact.[5] John P. Qualey, Jr. prepared the Promissory Note with personal guaranties, and a separate personal Guaranty document, which he executed for Ronald Faulkner as his attorney-in-fact on October 10, 2007 (Promissory Note, R. p.___; and Guaranty, R. p.___). According to the testimony of John P. Qualey, Jr., Esq., he had actual knowledge of the personal guaranties on October 9, 2007, and he understood the legal liability to his client, as a result of the guaranties which he prepared and executed as attorney-in-fact for Third-Party Plaintiffs[6]. As the Court in *Dorman* , *supra* at 789, in addressing the limitations period issue, stated "Nevertheless, the question of whether they actually received the letter is irrelevant, for knowledge of the information in Buist's letter

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3 Bank President was deemed the "agent" for the bank

4 Deposition of John P. Qualey, Esq., December 10, 2010, p 9, lines 10-12; p 55-56. (R. p.___)

5 Ronald T. Faulkner executed a Power of Attorney to John P. Qualey, Jr., recorded in Jasper County ROD in DB 598 at P 256, under which John P. Qualey, Jr. acted as Faulkner's agent/attorney-in-fact at the closing, and executed all closing documents including the closing statement, Promissory Notes with personal guarantees, and separate Guaranty, on October 10, 2007 (, Power of Attorney, R. p.____).

6 Qualey deposition, pages 48-49 ; R. p.____; Mr. Qualey further stated, p 58, lines 15-16; R. p.___, that there "is no question in my mind that I had that (express) authorization" to execute the guarantees to Cynthia Griffis and to Woodlands Bank on Ronald Faulkner's behalf."

was imputed to the Dormans through their agent, attorney C.J. Manos." The Court, citing *Crystal Ice Co. v. First Colonial Corp.*, 273 S.C. 306 (1979) stated "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority", and further, citing *Faulkner v. Millar*, 319 S.C. 216 (1995) reaffirmed that "notice to an attorney is notice to the client"[7]. In *Crystal Ice Co.*, the court even stated that "The relation of agency need not depend upon express appointment, and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and circumstances of the particular case ... notwithstanding a denial by the alleged principal and whether or not the parties understood it to be an agency", *Crystal Ice Co.*, 257 S.E.2d at p 497. In the instant case, there was an express appointment by Ronald Faulkner of John P. Qualey, Esq., through the recorded Power of Attorney – so the issue of "agency" in the instant case is undisputed (regardless of what Mr. Faulkner may allege). (See Power of Attorney, R. p.___)

Therefore, regardless of Third-Party Plaintiff's/Appellants' position that he did not know that he would be personally guarantying the Note, he is bound by the notice to his agent, John P. Qualey, Jr., on October 9, 2007[8], and by the execution of the personal guaranties by John P. Qualey, Jr., as attorney-in-fact, on October 10, 2007. The three year statute of limitations expired on October 9, 2010, and Third-Party Plaintiff did not obtain the expert affidavit until after November 11, 2010 (see date of expert affidavit, R. p.___). Therefore, Third-Party Plaintiff's First, Second, and Third Causes of Action must be

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7 In *Faulkner,, fn 1,* notice to the Seller's real estate agent, Dale Dawson, was also deemed to be effective notice to the Seller

8 Qualey deposition, p 58, lines 22-25; p. 59, lines 1-6; R. p.____: Q:" Is there any doubt in your mind that as of October 9, 2007, you as the attorney and later as the attorney in fact had notice that there were personal guarantees required for the $200,000 Note given to Cynthia Griffis? Qualey's answer: "You put me on notice of that requirement." Q: "On October 9, 2007?"; A: "Correct"

dismissed pursuant to S.C. Code Ann. §15-36-100(F)[9].

## III. There are no exceptions for Appellants to file an expert affidavit obtained after expiration of the statute of limitations.

A. No Statutory Exceptions:

S. C. Ann. § 15-36-100(F) provides, in pertinent part:

> [I]f a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, ***the complaint is not subject to renewal after the expiration of the applicable period of limitation*** unless a court determines that the plaintiff ***had*** the requisite affidavit within the time pursuant to this section..." **(emphasis added)**

There are no exceptions under S.C. Code Ann. §15-36-100 available to Appellants for the late filing of the expert affidavit outside the limitations period:

(a) §15-36-100(C) does not apply because the Plaintiff did not allege in his original Complaint (filed June 23, 2010), (Complaint, R. p.____), that the required affidavit could not be acquired before expiration of the period of limitations.

(b) §15-36-100(D) does not apply because it refers to the late filing exception contained in §15-36-100(C) and does not over-ride the mandatory filing requirement of §15-36-100(B) and the mandatory requirements of §15-36-100(F).

Statutory interpretation is a question of law. *City of Newberry v. Newberry Elec. Co-op, Inc.*, 387 S.C. 254, 256, 692 S.E.2d 510, 512 (2010). The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Ranucci v. Crain*, 723 S.E.2d 242, 244 (S.C. App. 2012); *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the

9 Even the hearing on October 14, 2010, and the resulting Order dated October 26, 2010 (R.p.___) are outside the period of limitations which expired on or before October 10, 2010. The Court cannot extend an expired period of limitations.

statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

In *Ranucci*, this Court held that the expert affidavit filed pursuant to section 15-36-100 is "part of the complaint" and is a pleading for the purpose of the circuit court's evaluation of motions and the merits of the plaintiff's case for granting summary judgment under Rule 56(c), SCRCP. *Rannuci, supra,* at p. 247. The *Rannuci* concurring opinion states "To the majority's analysis, I would add that section 15-36-100 does not ever toll the statute of limitations", citing section 15-36-100(D) which specifically provides "[t]his section does not extend an applicable period of limitations." *Ranucci, supra,* at p. 248.

Therefore, the "relation back" doctrine of Rule 15(c), SCRCP, does not apply to S.C. Code §15-36-100(F) - which clearly states that, if a complaint is filed without the required affidavit, it "is not subject to renewal after the expiration of the applicable statute of limitations..."

B. No Equitable Exceptions:

1. As acknowledged in the Order dated August 3, 2012, "there was certainly no deception or allegations of deception by the Defendant". (Order dated August 3, 2012, R. p.__)

2. The sole basis for the lower court in invoking equitable tolling, in its Order of August 3, 2012 (R. p.___) is that the Order itself "misleads the Plaintiff on the issue of deadlines". This is error because:

(a) Appellants' attorney, Michael Mogil, actually prepared the proposed Order

which was adopted by the Court on October 27, 2010, (Email from Michael Mogil to Marvin Dukes dated October 26, 2010; R. p.___) without change. It is hard to conclude that the Order itself "misleads the Plaintiff" when it was prepared by the Plaintiff/Appellant, with no objections from Defendant or changes by the Court.

(b) The Order of October 27, 2010, did not expressly grant Appellants an extension to obtain the required expert affidavit by November 14, 2010 – but rather an extension to file an Amended Complaint supported by the expert affidavit "as *required* by S.C. Code Section 15-36-100". The *requirement* of the statute is that the expert affidavit must be *obtained* within the period of limitations. Arguably, the requirement of the statute would have been met if the amended Complaint was filed (after the period of limitations) with an expert affidavit obtained/dated before October 10, 2010 – but the expert affidavit was not timely obtained and Appellants' claims must be dismissed.

(c) There can be no "detrimental reliance", by the Plaintiff/Appellants on the Order or any arguments that the Order misleads Plaintiff on the issue of deadlines (which is an issue of law from which (i.e. the ignorance thereof) there should not be an excuse, because the "deadline" had already lapsed on the date of the hearing (October 14, 2010) and the resulting Order dated October 26, 2010. Further, at the hearing on October 14, 2010, Respondent had no knowledge whether Appellants actually had obtained the expert affidavit prior to October 9, 2010, and was under no obligation to inquire of such matter at that time. However, if Appellants had admitted that the expert affidavit had not been obtained at that hearing, the Court should have dismissed the Appellants' claims at that time pursuant to S.C. Code Ann. Section 15-30-100(F).

(d) "Ignorance of the law" is no excuse for Appellants to be allowed an

extension to obtain the expert affidavit outside the expiration of the period of limitations, contrary to the requirements of S.C. Code Section 15-36-100(F). The "issue of deadlines" is expressly set out in the statute and there is no one to blame except Appellants for failure to read and understand the statute. Appellants filed the original Complaint in June, 2010, and had from then until October 9, 2010, to comply with the statute by obtaining an expert affidavit. It is rarely that a mistake in point of law can afford ground for relief, *Colburn v. Holland*, 35 S.C. Eq. 176 (S.C. App. Eq. 1868). A court of equity will not, in the absence of fraud or undue influence, grant relief from the consequence of a mistake of law. "Relief will not be granted where the complaining party took measure to secure knowledge as to the state of the law and, being misinformed, placed himself in the prejudicial situation of which he later complains. Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests." 27A Am.Jur.2d *Equity* § 7 (1996); *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 470 S.E.2d 858 (Ct.App.1996) *Id.*, 322 S.C. at 210-211, 470 S.E.2d at 860. *Estate of Holden*, 539 S.E.2d 703, 343 S.C. 267 (S.C. 2000).

(e) The Court should not, *of its own motion*, invoke equitable tolling. In *Hooper v. Ebenezer Senior Services and Rehabilitation Services*, 368 S.C.108 (SC 2009) the Court stated that "the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use". The Court further stated that the "party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief". In this case, Appellants never filed any Motion or otherwise argued in any way for the application of equitable tolling. Further, there are no "compelling" grounds for equitable tolling, such as deceptive acts of

Defendant. As stated in *Hooper,* "equitable tolling applies where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering facts essential to the filing of a timely lawsuit". In this case, there are no compelling reasons to apply equitable tolling, and Appellants never made any request or Motion for such equitable tolling relief, much less established any compelling reason for such relief.

(f) As stated in *Hooper,* equitable tolling is a doctrine that should be used sparingly and only when there are compelling equitable considerations. In the instant case, there are no "compelling equitable considerations", other than the Appellants' ignorance of the statutory requirement that the expert affidavit be obtained within the period of limitations. Our court has refused to apply equitable tolling based upon *Hooper*, even upon Motion of the Plaintiff and with arguably some equitable grounds (which are totally absent here). In *Kimmer v. Wright*, 719 S.E.2d 265 (S.C. App. 2011), the Court stated "we are mindful the supreme court cautioned the doctrine of equitable tolling was to be used sparingly. We find application of the doctrine is not justified under the circumstances of this case". In *Kimmer,* there was a tolling agreement between the parties, to allow a workman's compensation claim to be pursued – but the court rejected this as a ground to apply equitable tolling. In *Holmes v. Marion School District*, 093011 SCDC (US District Court, Florence Division, September 30, 2011) the court stated that "*Hooper* is inapposite to the facts here because *Hooper* involved the question of whether equitable tolling should be applied in limited circumstances such as when a defendant fails to properly list its registered agent for service with the South Carolina Secretary of State, as required by state law. *Hooper*, 687 S.E.2d at 32-34. The South Carolina Supreme Court noted equitable tolling 'should be used sparingly'. *Id* at 33."

## IV. Rebuttal to Appellants' Arguments:

A. An Expert Affidavit was necessary to support the Negligence and Breach of Duty Claims. (See Appellants' Brief, p. 13).

As noted in the appealed Order (Order dated February 20, 2013; R. p.___), all of these claims arise out of a duty created by the attorney-client relationship, and as such required a supporting expert affidavit pursuant to S.C. Code §15-36-100. See generally *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166 (S.C. 2012).

Appellants had the opportunity, pursuant to the lower court's Order dated October 26, 2010, which findings are not the subject of this appeal (Order dated October 26, 2010, R. p.____), to "re-plead these matters so as not to require an expert affidavit", but elected not to "re-plead these matters" in their amended Third Party Complaint, and have thereby waived any such right and/or arguments regarding this issue now. Appellants cannot "appeal" an issue never raised or objected to at the lower court.

B. Regarding the "discovery rule", Appellants are bound by their agent's actual notice on October 10, 2007, and the statute of limitations expired on October 9, 2010. (See Appellants' Brief, pp 14-18)

Regardless of Third-Party Plaintiff's/Appellants' position that he did not know that he would be personally guarantying the Note, he is bound by the notice to his agent, John P. Qualey, Jr., on October 9, 2007, and by the execution of the personal guaranties by John P. Qualey, Jr., as attorney-in-fact, on October 10, 2007. *Crystal Ice Co. v. First Colonial Corp.* 272 S.C. 306 (1979).

C. The "relation-back" doctrine does not apply to S.C. Code §15-36-100. (See Appellants' Brief, pp. 18-19).

The plain language of section 15-36-100(F) states that, if the required expert affidavit is not filed with the complaint, "the complaint is not subject to renewal after the expiration of the applicable period of limitation"... See generally *Ranucci v. Crain*, 723 S.E.2d 242, 244 (S.C. App. 2012).

D. Appellants' "law of the case" argument is without merit. (See Appellants' Brief, pp. 19-20)

"The law of the case" argument of Appellants is without merit in that, contrary to Appellants' argument that the Order expressly allowed the Third Party Plaintiffs until November 14, 2010, to file an Amended Complaint with the necessary affidavit, the Order states that the amended complaint must be supported by the affidavit of an expert witness "*as required* by S.C. Code Section 15-36-100". [10] This statutory "requirement" is that the Plaintiffs must *have* the requisite affidavit prior to expiration of the period of limitations – which they did not. Further, regardless of Appellants' interpretation of the "law of the case", a court does not have the power to change the plain meaning of a statute unless there are equitable exceptions. *Sloan v. Hardee*, 371 S.C. 495, 498 (2007). Certainly, a court should not, of its own motion, extend an expired period of limitations (thereby overriding the statute).

E. Equitable Tolling does not apply. (Appellants' Brief, pp 20-24)

Appellants never argued in any way for the application of the "equitable tolling" doctrine, and never filed any Motion or memorandum containing such an argument. This is a condition precedent to the application of the doctrine, *Hooper v. Ebenezer Senior Services and Rehabilitation Services*, 368 S.C. 108 (SC 2009). Further, because Appellants

[10] Section 15-36-100(D) refers only to the exception contained in 15-36-100(C) and not to the instant facts.

never raised this issue at the lower court, it should not be a valid preserved exception on appeal. There are certainly no equitable grounds, as stated in this Court's Order dated August 3, 2012 (R. p.___): "there was certainly no deception or allegations of deception by the Defendant".

Even if you assume, for the sake of argument, that Appellants are entitled to toll the period of limitations for any extension granted to Respondent to file the Answer, Appellants still would not have obtained the required expert affidavit within such extended/tolled period of limitations. Although the Complaint, dated June 18, 2010, was filed in June, 2010, it was not served until July 27, 2010 (Affidavit of Service, Complaint; R. p.__) Respondent/defendant would have through August 27, 2010, to file an Answer. The Answer was served on September 17, 2010, which was only a three (3) week extension.(Answer, R. p. __) If you add (toll) the period of limitations for three weeks (from October 9, 2010, the original limitations deadline) the "tolled" period of limitations would expire on November 1, 2010. Plaintiffs/Appellants did not "have" the required expert affidavit until November 11, 2010, and still would not meet the requirement of SC Code 15-36-100(F).

Appellants' argument ignores the requirement of S.C. Code 15-36-100 that the original Complaint filed in June, 2010, was required to have the expert affidavit attached as an integral part of the pleadings. This legal requirement is not something that Respondent should put Appellants on notice of, or educate Appellants as to the law – ignorance of the law is no excuse.

F. An expert affidavit was required to support Appellants claims for Breach of Fiduciary Duty, because the duty arose from the "attorney-client relationship". (See Appellants' Brief pp. 24-25)

Our court in *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166, 173 (S.C. 2012) held that all claims arising out of the "attorney-client" relationship should be "merged" into the malpractice claim and thereby are subject to S.C. Code §15-36-100 even if pled as "breach of fiduciary duty" against the attorney. Further, Appellants waived their right to amend their pleadings "so as not to require an expert affidavit" as provided in the lower court's Order dated October 26, 2010 (R. p.___) - by electing not to re-plead said complaint to allege facts supporting a duty other than one arising from an attorney-client relationship. Further, the Appellants never objected to the lower court's holding that the "breach of fiduciary duty" claims required an expert affidavit, and thereby did not preserve this as an issue on appeal.

## V. Additional Sustaining Grounds.

Our courts have ruled that our Rules of Professional Conduct do not, in themselves, create a cause of action or establish evidence of negligence per se. The rules are intended for guidance and disciplinary purposes, not to form a basis for civil litigation. *Spence v. Wingate*, 716 SE2d 920 (SC 2011), citing *Smith v. Haynsworth et al,* 472 S.E.2d (1996). A legal malpractice action consists of four elements: (1) attorney-client relationship, (2) breach of duty by the attorney, (3) damage to the client, and (4) proximate cause of the client's damage by the breach. *Kimmer v. Wright*, 719 S.E.2d 265 (S.C. App 2011). In the instant case, (1) appellants were represented by attorney Jack Qualey, not respondent, and there was no "attorney-client relationship" between appellants and respondent related to

the transaction giving rise to damages to appellants; (2) there was no "duty" between respondent and appellants related to the closing of the transaction, and certainly appellants had no "right to rely" on respondent when appellants had their own independent counsel in the closing of the transaction; (3) all of Appellants' damages arise solely from the personal guarantees, which were prepared and executed (as attorney in fact) by attorney Jack Qualey. Respondent did not "proximately cause" any damage to Appellants -- "but for" the personal guaranties which were prepared by Jack Qualey as Appellants' attorney, and executed by Jack Qualey as attorney-in-fact, there would have been no damages to Appellants.

## CONCLUSION

For the reasons stated, this Court should affirm the Order of the circuit court dismissing the Appellants' First, Second, and Third Causes of Action, because Appellants failed to timely obtain the expert affidavit required by S.C. Code Ann. §15-36-100(F).

Respectfully Submitted,

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