

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.

REPLY BRIEF OF APPELLANTS

RECEIVED

SEP 06 2013

SC Court of Appeals

Michael W. Mogil
Mogil Law Firm
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
(843)785-8110

Attorney for Appellants

ORIGINAL

TABLE OF CONTENTS

Table of Authorities..... 3

Argument..... 4

Conclusion..... 15

TABLE OF AUTHORITIES

<u>Brown v. Pearson</u> , 483 S.E.2d 477, 326 S.C. 409 (S.C.App. 1997) ...	9
<u>Hickman v. Sexton Dental Clinic, P.A.</u> , 367 S.E.2d 453, 295 S.C. 164 (S.C.App. 1988) ...	7
<u>Hotz v. Minyard</u> , 403 S.E.2d 634, 304 S.C. 225 (S.C. 1991) ...	9
<u>Grier v. AMISUB of South Carolina, Inc.</u> , 725 S.E.2d 693, 397 S.C. 532 (S.C. 2012) ...	6
<u>Mali v. Odom</u> , 367 S.E.2d 166, 295 S.C. 78 (S.C.App. 1988) ...	11
<u>Pederson v. Gould</u> , 341 S.E.2d 633, 288 S.C. 141 (S.C. 1986) ...	7
<u>Ranucci v. Crain</u> , 7234 S.E.2d 242, 247 (S.C. App. 2012) ...	13
<u>RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.</u> , 732 S.E.2d 166, 399 S.C. 322 (S.C. 2012) ...	9
<u>Sims v. Hall</u> , 592 S.E.2d 315, 357 S.C. 288 (S.C.App. 2003) ...	11
<u>Sharpe v. South Carolina Dept. of Mental Health</u> , 354 S.E.2d 778, 292 S.C. 11 (S.C.App. 1987) ...	6
<u>Southeastern Housing Foundation v. Smith</u> , 670 S.E.2d 680, 380 S.C. 621 (S.C.App. 2008) ...	6
<u>Stallings v. Ratliff</u> , 356 S.E.2d 414, 292 S.C. 349 (S.C.App. 1987) ...	6
<u>Welch v. Whitaker</u> , 282 S.C. 251, 317 S.E.2d 758 (Ct.App.1984) ...	6
S.C. Code of Laws, Section 15-36-100 ...	5

STATEMENT OF ISSUES ON APPEAL
AS ASSERTED IN APPELLANTS' INITIAL BRIEF

1. DID THE TRIAL COURT ERR IN FINDING THAT AN EXPERT AFFIDAVIT WAS NECESSARY TO SUPPORT APPELLANT'S CLAIMS FOR NEGLIGENCE AND BREACH OF FIDUCIARY DUTY?
2. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS WAS TRIGGERED ON THE CLOSING DATE, AS OPPOSED TO A LATER DISCOVERY DATE?
3. DID THE TRIAL COURT ERR IN FAILING TO APPLY THE RELATION-BACK DOCTRINE, AND IN DETERMINING THAT THE APPELLANTS' AMENDED COMPLAINT AND EXPERT AFFIDAVIT WERE TIME-BARRED BY THE STATUTE OF LIMITATIONS?
4. DID THE TRIAL COURT ERR IN FAILING TO FOLLOW THE "LAW OF THE CASE"?
5. DID THE TRIAL COURT ERR IN DISALLOWING THE APPLICATION OF EQUITABLE TOLLING?
6. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF FIDUCIARY DUTY?

ADDITIONAL ISSUE RAISED BY RESPONDENT

"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)?"

ARGUMENT

A. NO EXPERT AFFIDAVIT WAS NEEDED TO ALLOW THE JURY TO EVALUATE APPELLANTS' CLAIMS.

Respondent's primary argument, set forth in his Reply Brief and in written and oral argument before the court below, is that Appellants' first, second and third causes of action amounted to a single allegation of attorney malpractice and were therefore improperly pled without an expert affidavit. However, Appellants alleged that Respondent engaged in fraudulent activity and induced the Appellants to participate in a sham transaction that enriched the Respondent and his former wife, required the concealment of material information from a certain lending institution, and resulted in a voidable, and likely illegal set of notes and guarantees. These allegations required no supporting expert affidavit, both because the subject matter falls within the ambit of common knowledge and experience, and because the fiduciary relationship alleged between the parties transcended the attorney-client relationship.

i. No expert affidavit where subject matter lies within the ambit of common knowledge and experience

In their Memorandum in Opposition to Motion for Summary Judgment, Appellants argued that the subject matter at issue in this case lies within the "ambit of common knowledge and experience," such that no special learning is needed to evaluate the Respondent's conduct, and no expert affidavit is required under Section 15-36-100(c)(2). (Third Party Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, Dated March 28, 2011, p. 6; R. p. __). Section 15-36-100 was added to the South Carolina Frivolous Civil Proceedings Sanctions Act in 2005. It generally requires the

contemporaneous filing of an expert witness affidavit in an action alleging professional negligence.¹ Section 15-36-100(C)(2) waives the contemporaneous filing requirement where “a pleaded specification of negligence involve(s) 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.” Id. This exception codifies a standard applied to professional malpractice cases in South Carolina prior to the adoption of Section 15-36-100.

Prior to Section 15-36-100(c)(2), it was well settled that, where the evidence permits the jury to recognize or infer a breach of duty without the aid of expert testimony, such testimony is not required in order for the case to go to the jury. Stallings v. Ratliff, 356 S.E.2d 414, 292 S.C. 349 (S.C.App. 1987). The Stallings Court found: “[t]he issue of breach of duty does not turn on a ritual incantation of certain magic words by an expert witness. Breach of duty is a fact question to be decided by the jury on the evidence presented in each case.” Id.

The application of the common knowledge depends on the particular facts of a case. Sharpe v. South Carolina Dept. of Mental Health, 354 S.E.2d 778, 292 S.C. 11 (S.C.App. 1987) When expert testimony is not required, the plaintiff must offer evidence that rises above “mere speculation or conjecture.” Welch v. Whitaker, 282 S.C. 251, 317 S.E.2d 758 (Ct.App.1984). The majority of South Carolina reported decisions involving the application of the common knowledge exception arose from cases involving allegations of medical malpractice.² Although the subject matter at issue in these cases was medical treatment, the

¹ The expert affidavit is only required to address the breach element of a common law negligence claim, and not causation. Grier v. AMISUB of South Carolina, Inc., 725 S.E.2d 693,697, 397 S.C. 532 (S.C. 2012)

² In Southeastern Housing Foundation v. Smith, 670 S.E.2d 680, 380 S.C. 621 (S.C.App. 2008) , this Court

cases are nonetheless instructive as to how the common knowledge exception may be applied here.

In Sharpe, this Court declined to apply the exception where the Appellant had argued at trial that expert scientific knowledge was required to show negligence. Sharpe, supra, 292 S.C. 11, 14. Finding both that the Appellant's argument in appeal was inconsistent with his argument at trial, and that the proper treatment of a mental patient and the standard of care required in deciding to discharge him under a plan of outpatient care is not a matter of common knowledge to the average layman, the Court held that the common knowledge exception did not apply. The Welch court declined to apply the exception where the issue was whether the "grinding" of an eye to remove rust particles could increase the damage to a cornea. Welch, supra, 317 S.E.2d 758, 762. In Pederson v. Gould, 341 S.E.2d 633, 288 S.C. 141 (S.C. 1986), the South Carolina Supreme Court considered whether damage to the uterus which occurred during a hysterectomy fell under the common knowledge exception. Determining that the activity in question was a complicated surgical procedure, the Court found that the subject matter was not within the ambit of common knowledge and experience. Id.

On the other hand, this Court has found that the common knowledge exception is

wrote that "the standard of care for legal malpractice is outside the ambit of the common knowledge of laypersons." However, the Court did not proffer an explanation as to that reasoning, and Counsel is aware of no other reported concurring precedent. Certainly, the very existence of the common knowledge exception in the statute, as well as the extensive references to the exception in matters involving professional malpractice throughout our jurisprudence, indicate that there are instances where the standard of care for professional malpractice involves subject matter that may fall within the ambit of common knowledge and experience. Appellants aver that this is also true with legal malpractice; that is, if the standard of care for any professional malpractice case may fall within the ambit of common knowledge, then there are instances where the standard of care for legal malpractice falls within the ambit of common knowledge. The present case is one of those instances.

properly applied where the particular facts of a case merit. For instance, in Hickman v. Sexton Dental Clinic, P.A., 367 S.E.2d 453, 295 S.C. 164 (S.C.App. 1988), this Court found: “Hickman's testimony that an unsupervised dental assistant rammed a sharp object into her mouth is evidence rising above mere speculation or conjecture that the clinic failed to exercise due care in rendering professional services.”

Here, the particular facts of this case support the application of the common knowledge exception. The Appellants offered evidence that Respondent used his historic knowledge of Appellants and their financial condition to devise a plan whereby Respondent's divorce settlement would be fully funded through a sale of property at an inflated price, and through which Respondent would benefit both from the sale of the property and by being absolved of any residual liability on the note or guarantee. This evidence rises above speculation and conjecture and would permit the jury to recognize a breach of duty without the aid of expert testimony. The facts as alleged do not engender a nuanced debate as to the legal standard of duty owed from an attorney to his client; the activity alleged so clearly violated that duty that no expert testimony should be required in order for this case to go to the jury.

ii. Allegations for breach of fiduciary duty owed to Ronald Faulkner and breach of fiduciary duty owed to Cherry Hill Estates, LLC involved activity that expanded beyond attorney malpractice and therefore required no affidavit.

Only one of Appellants' six causes of action is limited in scope to a malpractice claim: the Third Cause of Action (professional negligence claimed by Ronald Faulkner and Cherry Hill Estates, LLC). The other causes of action- breach of fiduciary duty owed to

Ronald Faulkner, breach of fiduciary duty owed to Cherry Hill Estates, LLC, unjust enrichment, indemnification, and fraud in the inducement³- all involved allegations that would support claims of attorney malpractice, but which also arose independently from the attorney-client relationship, and therefore needed no expert affidavit in order to be properly pled.

“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 Management Co., L.L.C. v. Tinsley & Adams L.L.P., 732 S.E.2d 166, 399 S.C. 322 (S.C. 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 interest of the one imposing the confidence.” Brown v. Pearson, 483 S.E.2d 477, 326 S.C. 409 (S.C.App. 1997). Where there is an ongoing attorney/client relationship, the attorney has a fiduciary duty to deal with the client in good faith; whether the attorney has breached that fiduciary duty is a factual issue for the jury. Hotz v. Minyard, 403 S.E.2d 634, 304 S.C. 225 (S.C. 1991).

Appellants allege that, while Respondent had historically served as an attorney to Eugene O’Neil and Ronald Faulkner for certain transactions, he approached Mr. O’Neil to involve in the subject transaction not just as an attorney, but also as a proposed business partner. Later, Respondent and Mr. O’Neil solicited Mr. Faulkner to participate in the transaction. (Amended Complaint p. 2, Record p. __). Based upon a prior course of dealing with Respondent, Appellants agreed to involve in a proposed business transaction. Appellant

³ Appellants’ claim for fraudulent inducement has been dismissed without prejudice.

Cherry Hill Estates, LLC, which was managed by Mr. O'Neil, was at some point verbally directed to use Jack Qualey as a settlement agent. There is no record that Mr. Faulkner was directed to use a separate attorney for the transaction, or that he engaged Mr. Qualey other than to execute documents by Power of Attorney. While Respondent, at that point, continued to owe the Appellants legal and ethical duties as an attorney, he simultaneously owed Appellants fiduciary duties as a business associate. He also owed them a duty not to breach a standard of care as regards to those business dealings.

Respondent owed Appellants duty not to engage in self dealing, and a duty to not involve Appellants in a loan transaction which required nondisclosure of material facts, i.e. the refund of sellers' proceeds at closing, to ensure lender participation. Further, he owed them a duty to ensure that the terms of the transaction were materially fair, that the purchase price negotiated and paid was fair, and that his partners' risk was commensurate with their potential gain or return. In fact, the transaction as structured resulted in a closing where in addition to the funds generated to pay Respondent, his wife, and Cherry Hill Estates, LLC, Respondent received a one-third interest in the contemplated Cherry Hill Estates project without any personal liability on the more than one million dollars in indebtedness incurred to finance the project. Historically, the subject real property sold at foreclosure for less than two hundred thousand dollars, a more than eighty percent decrease in value in five years, and the entire deficiency has been borne by Appellants and Mr. O'Neil. Appellants respectfully submit that even were Respondent not their prior attorney, and simply a business partner who structured from and benefited from a deal, they would be asserting a claim for breach of fiduciary duty to recover their losses sustained from this transaction.

iii. No Expert needed where defendant admits the standard of care.

This Court has held that expert testimony is not required in a legal malpractice case where the defendant admits the standard of care that was owed to the plaintiff. Sims v. Hall, 592 S.E.2d 315, 357 S.C. 288 (S.C.App. 2003) (Citing Mali v. Odom, 367 S.E.2d 166, 295 S.C. 78 (S.C.App. 1988)). In the Third Party Answer of Anthony E. Griffis and Counterclaim v. Third Party Plaintiffs (“Third Party Answer and Counterclaim”), Respondent alleged: “Ronald Faulkner and his business partner Eugene O’Neil owed Anthony E. Griffis a fiduciary duty to act in good faith, to be loyal, and to exercise due care regarding the business of Cherry Hill Estates, LLC [...]” (Third Party Answer and Counterclaim p. 7, R. p. __). This alleged fiduciary duty owed by Mr. Faulkner and Mr. O’Neil to Mr. Griffis requires that there was a fiduciary relationship among said parties. Therefore, in alleging that he was owed a fiduciary duty, Respondent implicitly admits that there was a fiduciary relationship, with attendant duties to act in good faith, to be loyal, and to exercise due care. By this admission, Respondent, a practicing lawyer, established the applicable standard of care, and no additional expert testimony is required. Mali v. Odom, 367 S.E.2d 166, 169, 295 S.C. 78, 81 (S.C.App. 1988).

B. SECTION 15-36-100 GRANTS THE TRIAL COURT DISCRETION TO EXTEND THE DEADLINE FOR FILING OF EXPERT AFFIDAVITS

As set forth in Section A above, Appellants plead facts which fall within the ambit of common knowledge and thus restate their belief that an expert affidavit was not required to support the gravamen of their Complaint. Nonetheless, an affidavit outlining specific breaches of Respondent’s duty of due care was readily obtained and attached to the Amended

Complaint served November, 14, 2010.

Addressing Respondent's arguments in Section III of his initial brief, Appellants note that Section 15-36-100 by its terms confers the trial court with the ability to exercise discretion in these matters in two places. That section provides:

The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court 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. The filing of a motion to dismiss pursuant to this Section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

Thus, the statute grants the trial court clear discretion to extend the time within which the affidavit must be filed if justice requires. In the instant case, Appellants moved at the hearing on October 14, 2010, for leave to amend their Complaint and file an affidavit. The trial court exercised its discretion, and after hearing on the matter, the court did extend the time to serve an affidavit until November 14, 2010, per its Order of October 27, 2010. Appellants complied with this time deadline, and this Order and extension of time became the law of the case.

Further, the Statute by its terms notes that upon the filing of a motion to dismiss by the defendant against whom the affidavit should have been filed, the complaint is *subject to* dismissal for failure to state a claim. The Statute does not state that the complaint *shall be*

dismissed. Rather, it states that the complaint is “subject to” dismissal. By its terms, the “subject to” language requires the trial court to make a decision based on the interest of justice, and in this case, the trial court did so, and granted Appellants a short period of time to obtain their expert affidavit, which they did.

Respondent further argues that the “relation back” doctrine does not toll or extend the limitations period to procure an affidavit required by Section 15-36-100. However, Respondent cites no law or precedent within our jurisprudence to suggest that Section 15-36-100 rescinds the relation back doctrine or overrules South Carolina Rules of Civil Procedure Rule 15(c). Indeed, as Respondent points out, the Ranucci court held that the expert affidavit filed pursuant to Section 15-36-100 is “part of the complaint.” (Resp. Br. p. 15 (citing Ranucci v. Crain, 723 S.E.2d 242, 247 (S.C. App. 2012)). As the affidavit is part of the complaint, it follows logically that the trial court’s Order allowing Appellants until November 14, 2011 to file an amended complaint would also authorize Appellants to file the expert affidavit with the amended complaint, which Appellants did do.

Re-stated, even if this Court were to reject Appellants’ argument that the discovery rule is directly applicable to the Section 15-36-100 affidavit timeline disputed herein and were to apply a strict event based statute of limitations triggered by the execution of a loan guaranty by an agent power of attorney, who admits he has had no direct communication with his principal regarding the matter, the fact remains that Respondent was served with a detailed complaint in June, 2010 outlining a number of causes of action well within the limitations period for those causes of action, by any construction of that term. It is simply inequitable to bar the claims sounding in professional negligence because the supporting

affidavit was not procured until a date which is arguably one month after the expiration of the limitations period viewed under the most restrictive interpretation of that term.

C. APPELLANTS' REQUEST FOR EQUITABLE RELIEF WAS PROPERLY PRESERVED

Respondent further argues that the doctrine of equitable tolling does not apply because the Court should not, of its own motion, invoke equitable tolling. However, this argument belies the procedural history of this case. In actuality, Appellants raised equitable issues at every motion hearing in this case, commencing in October 2010 and proceeding through the hearings in 2011 which resulted in denial of summary judgment. Appellants raised equitable theories such as the law of the case, relation back, and interest of justice in their memorandum in opposition to summary judgment filed March 28, 2011. (Memorandum Third Party Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment dated March 28, 2011 with Exhibits; R. p. ____). Finally, in their Motion to Reconsider, and at the hearing therein argued on or about April 11, 2013, Appellants argued and introduced evidence, in the form of email correspondence between the undersigned and prospective counsel for Respondent, that Appellants in fact granted Respondent an extension of time to respond to their Third Party Complaint (Memorandum; R. p. ____), and this generosity resulted in Respondent's Motion to Dismiss, which first raised the Section 15-36-100 affidavit requirement, being filed three weeks before Respondent's claimed limitations deadline. Thus, by the time the matter was argued one month later, at which point the Court ruled that it believed an affidavit was in fact required, the time for filing the affidavit, as argued by Respondent, had theoretically expired. Had Appellants denied Respondent's

request for extended time, the Section 15-36-100 matters would have been raised a month earlier, and the pleading corrected within Respondent's construction of the limitations period. Appellants properly argued this matter at the Court below. Equitable tolling was not invoked by the Court on its own motion—it was raised by Appellants.

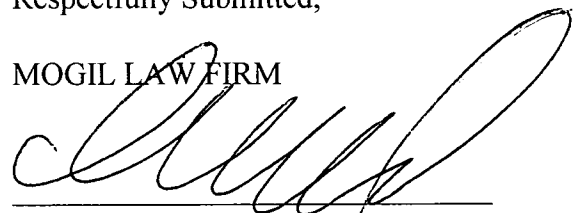
CONCLUSION

Appellants do not dispute that Respondent is entitled to assert the technical defenses he is asserting. In the final analysis, however, Respondent's argument is merely attempt to avoid defending a per se negligence case on its merits by invoking a technical argument that the claims asserted required an accompanying "expert" affidavit, and that the affidavit was submitted past the earliest deadline under a restrictive interpretation. As argued at the trial court below, the interests of justice compel that summary judgment be denied at this juncture and that all causes of action be tried on their merits.

Dated: September 3, 2013

Respectfully Submitted,

MOGIL LAW FIRM



Michael W. Mogil, SC Bar #11933
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
Tel. 843-785-8110
Attorney for Appellants