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FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NO. 2012 CP 32 04133

Sandra Calhoon

R. Keith Dooley et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court	CLERK OF COURT LEXINGTON, SC	Attorney for : Plaintiff	Defendant
		or	
		<input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

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

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SC Court of Appeals

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2154
Judge Code

1/22/14
Date

For Clerk of Court Office Use Only

This judgment was entered on the 3rd day of Feb, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 3rd day of Feb, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Ken Wingate

Pat Frawley

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth Carnigg / mh
CLERK OF COURT

Court Reporter:

CLERK OF COURT
EDMINGTON, SC

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CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)
 SANDRA L. CALHOON, AS PR FOR)
 THE ESTATE OF JAMES K. CALHOON,)
)
 Plaintiff,)
)
 -vs-)
)
 R.KEITH DOOLEY, Individually,)
 DOOLEY & COMPANY, LLP, and)
 CHEROKEE OF LEXINGTON, LLC,)
)
 Defendants)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2012-CP-32-04133

**ORDER GRANTING PARTIAL
 SUMMARY JUDGMENT**

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HEARING DATE: October 15, 2013;
JUDGE: The Honorable Eugene C. Griffith, Jr.;
PLAINTIFF'S ATTORNEY: Kenneth B. Wingate;
DEFENDANTS' ATTORNEY: Patrick J. Frawley;
COURT REPORTER: Carol M. Thueme

This matter comes before the Court pursuant to the Notice of Motion and Motion for Summary Judgment filed by the Defendants R. Keith Dooley, individually (hereinafter referred to as "Dooley"), and Dooley & Company, LLC, formerly Dooley & Company, LLP (hereinafter referred to as "Dooley & Company").

Hearing was held October 15, 2013, at which counsel for the parties argued their respective positions, responded to questions from the Court, and submitted memoranda and affidavits supporting their positions or had the opportunity to do so. Having reviewed the pleadings in this case, the material submitted by counsel, and the applicable law cited by counsel, and having considered their arguments, I find as follows:

STATEMENT OF THE CASE

It appears that this matter was commenced with the filing and service of a Summons and Complaint on June 4, 2010, with the original Plaintiff, James Kurt Calhoon (hereinafter referred to as "Calhoon"), alleging causes of action sounding in accounting, equitable lien, breach of fiduciary duty, and negligence, with the latter two causes of action asserting that Dooley and Dooley & Company were the tax preparers for James Kurt Calhoon's personal tax returns, had a duty to file Calhoon's personal tax returns, and breached that duty by failing to file Calhoon's personal tax returns. It further appears that, although the two causes of action asserting negligence by Dooley—a licensed CPA—and Dooley & Company—an accounting firm—with regard to alleged duties in the preparation and filing of personal tax returns, no expert witness affidavit specifying at least one negligent act or omission and the factual basis for each claim was filed along with the Complaint, as required by *S.C. Code Ann.* § 15-36-100(B). It appears from the record that the Defendants Dooley and Dooley & Company filed and served separate Answers, each interposing a qualified general denial and affirmative defenses which included failure to state facts sufficient to constitute a cause of action upon which relief could be granted to the extent the Complaint purported to allege professional negligence.

It further appears that James Kurt Calhoon died in the fall of 2011, and the matter was stricken pursuant to Rule 40(j) SCRCPP by Order dated October 18, 2011, then was restored to the active roster under the current docket number by Order dated October 12, 2012, substituting the current Plaintiff as Personal Representative of the Estate of James Kurt Calhoon.

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EVIDENCE THROUGH DISCOVERY AND AFFIDAVIT

It appears that the Defendant Dooley served interrogatories on the Plaintiff by mail August 9, 2010, to which the Plaintiff responded June 29, 2012. Among the interrogatories were the following, with the Plaintiff's unverified responses immediately following:

7. Indicate for what tax years the Plaintiff maintains that this Defendant and the Defendant Dooley and Company, LLP failed to "ensure that the Plaintiff's personal state and federal tax returns were filed properly," as alleged in paragraphs 18 through 24 of the Complaint.

RESPONSE:

Plaintiff is in the process of locating information responsive to this request and reserves the right to supplement this response.

8. Identify and list by name of sender, date, and tax year, any and all notices, correspondence, penalties, or other documentation the Plaintiff has received from the United States Internal Revenue Service, the United States Treasury Department, the South Carolina Tax Commission, the South Carolina Treasury Department, or any other agency of the United States or the State of South Carolina, indicating that the Plaintiff's tax returns, whether state or federal, were not timely filed, were in any way improperly filed, or were in any way "subject to fees and penalties, as well as the denial of certain federal and state benefits," as alleged in paragraphs 18-24 of the Complaint.

RESPONSE:

Plaintiff is in the process of locating the responsive information and reserves the right to supplement this response. Further, Plaintiff will make this information available for inspection at a time mutually convenient for all counsel. Plaintiff has provided examples located at Calhoun 0002-0005.

9. Identify, by name and address, the expert witness with whom the Plaintiff has consulted and whom the Plaintiff has retained to provide the expert witness affidavit required by S.C. Code Ann. § 15-36-100 (2005 as amended) in bringing an action for damages resulting from professional negligence, and list the date of the affidavit.

RESPONSE:

Plaintiff is informed and believes that an expert witness is not needed in this case because the case "[involves] 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." See S.C. Code § 15-36-100(C)(2) (2005).

The "examples" mentioned in response to interrogatory number 8 appeared to be two

pages of a tax calculation summary from the IRS for tax year 2004 (Calhoon-0002 to -0003) and two pages of an "Assessment" from the State of South Carolina Department of Revenue for tax year 2005 (Calhoon-0004 to -0005). As of the date of the hearing on the Defendants' motion, the Plaintiff had not supplemented its Answers to Interrogatories to change or amend the above responses.

Along with their Notice of Motion and Motion for Summary Judgment, the Defendants filed and served upon Plaintiff's Counsel the August 28, 2013 affidavit of R. Keith Dooley, in which Dooley states that he is a certified public accountant licensed by the State of South Carolina, having been so licensed for 31 years, and that he has provided and continues to provide professional services through his accounting company, Dooley & Company, LLC—formerly Dooley & Company, LLP—for 30 years. *See*, Affidavit of R. Keith Dooley, ¶ 1. In his affidavit, Dooley further states that he and his company did provide tax services to James Kurt Calhoon for the years 2003 through 2006, preparing Calhoon's tax returns for those years, but that neither Dooley nor his company assumed nor undertook the duty to file Calhoon's tax returns for him. *Id.*, ¶¶ 2-4. It appears from Dooley's affidavit that Calhoon was typically late in getting his tax information to Dooley and his company for preparation of the returns, and Dooley and his company prepared requests for extensions for Calhoon in 2003, 2005, and 2006, prepared the returns for those years, and provided them to Calhoon, with Calhoon to file the returns himself, because he was filing late and because he had a significant amount of tax due that was to be paid with the filing of the returns. *Id.*, ¶¶ 3-4. Dooley further states in his affidavit that, if Calhoon's tax returns were not filed in a timely manner, it was Calhoon who failed to timely file them, not Dooley or his company. *Id.*, ¶ 4.

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The Plaintiff submitted no counter affidavit nor other evidence indicating that the standard of care for a licensed CPA or CPA firm included the *filing* of a client's tax returns, or that Dooley and/or Dooley & Company had agreed to undertake or in any way assume the duty of *filing* Calhoon's tax returns.

SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate and should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009); *Lanier Construction Company, Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009). Summary Judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Lanier*, 384 S.C. at 278, 681 S.E.2d at 911. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated thereon. Rule 56(e) SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hancock*, 381 S.C. at 329-330, 673 S.E.2d at 802.

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. However, under South

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Carolina case law, the meaning of the “scintilla of evidence rule” is *not* that, if there is *any* relevant testimony, amounting to a scintilla, it must be left to the jury to determine its force and effect; rather, “[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views.” *Crawford v. Town of Winnsboro*, 205 S.C. 72, ___, 30 S.E.2d 841, 849 (1944) (emphasis in original). *Cited with approval* in *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946). *See also, Radcliffe*, 209 S.C. at 421, 40 S.E.2d at 630 (“[if] it be conceded that there may be deduced by a process of unusual *finesse* of reasoning that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.” (emphasis in original)).

S.C. CODE ANN. § 15-36-100(B).

South Carolina law requires that in an action for damages ~~alleging~~ professional negligence against a professional licensed by or registered with the State of South Carolina and listed by statute, the Plaintiff must file as part of the Complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. *S.C. Code Ann.* § 15-36-100(B) (2005). Among the professions listed as being subject to that requirement are certified public accountants. *Id.*, § 15-36-100(G)(3). Section 15-36-100 requires a Plaintiff to craft a viable Complaint supported by the sworn testimony of a qualified expert witness, and is a required “part of the complaint” for the purpose of the circuit court’s evaluation of motions and

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the merits of the Plaintiff's case. *Cf., Ranucci v. Crain*, 397 S.C. 168, 178, 723 S.E.2d 242, 247 (Ct. App. 2012)(A medical Malpractice case in which the Court of Appeals discussed the affidavit filing requirement of § 15-36-100(B) in conjunction with the requirements of § 15-79-125 and medical malpractice cases).

DISPOSITION

Keith Dooley is a CPA licensed by the State of South Carolina, and he provided professional tax services to James Kurt Calhoon through Dooley's company, Dooley & Company. Affidavit of R. Keith Dooley, ¶¶ 1-4. Though the Plaintiff asserted the 3rd and 4th causes of action (breach of fiduciary duty and negligence) against these Defendants as a professional malpractice action, the Plaintiff asserted an exception, pursuant to S.C. Code Ann. §15-36-100(C)(2), to the expert witness affidavit requirement.

I find that the affidavit requirement was a part of the Plaintiff's pleading in asserting negligence of Dooley and his CPA firm in providing professional tax service to Calhoon, and the absence of that affidavit and its contents required by § 15-36-100(B) renders the Complaint deficient in its attempt to allege sufficient facts upon which to base its causes of action sounding in breach of fiduciary duty and negligence. Furthermore, the Plaintiff has proffered no timely evidence counter to Dooley's affidavit indicating any agreement between Calhoon and these Defendants pursuant to which these Defendants—rather than Calhoon, himself—were to assume the duty of filing Calhoon's tax returns. Dooley's affidavit expressly states that neither he nor his company assumed that duty. There is no evidence contrary to that.

I therefore find and conclude that the third and fourth causes of action of the Plaintiff's Complaint, asserting claims for breach of fiduciary duty and negligence, fail to state facts sufficient to constitute causes of action against the Defendants Keith Dooley, individually, and

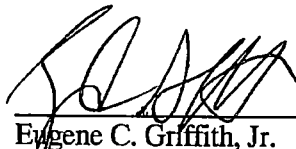
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Dooley & Company, LLC, formerly Dooley & Company, LLP. Even had I concluded otherwise on that threshold issue, I find and conclude that there is no genuine issue of material fact supporting the Plaintiff's third and fourth causes of action given the absence of any evidence or counter affidavit tendered by the Plaintiff, supporting its allegations that Dooley and/or is CPA firm either had the duty to file Calhoon's returns, or had agreed to assume that duty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendants' Motion to Dismiss and For Summary Judgment be, and it hereby is, granted, dismissing the Plaintiff's Third and Fourth Causes of Action sounding in, respectively, Breach of Fiduciary Duty and Negligence.

The Plaintiff's remaining causes of action seeking an accounting and equitable lien continue.

IT IS SO ORDERED.



Eugene C. Griffith, Jr.
Judge, Eighth Judicial Circuit

Newberry, South Carolina
January 22nd, 2014.

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