THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-32-04133

Sandra L. Calhoon, as Personal Representative
for the Estate of James K. Calhoon,.....Appellant,

v.

R. Keith Dooley, Individually, Dooley & Company, LLP
and Cherokee of Lexington, LLC,.....Respondents.

[INITIAL] BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from the Circuit Court's grant of summary judgment to R. Keith Dooley and Dooley & Company, LLP on January 22, 2014. James Kurt Calhoon (hereinafter referred to as "Calhoon") initiated this action against R. Keith Dooley, Individually, Dooley and Company, LLP, and Cherokee of Lexington, LLC.[1] Compl. at p.1; R.____. Calhoon commenced this action by filing a Complaint on June 4, 2010 alleging causes of action sounding in accounting, equitable lien, breach of fiduciary duty, and negligence. Order at 2, Jan. 22, 2014; R.____. R. Keith Dooley and Dooley & Company, LLP (hereinafter referred to collectively as "Dooley") filed 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. Order at 2; R.____.

Calhoon died in the fall of 2011, and the action was stricken pursuant to Rule 40(j), SCRCP, by Order dated October 18, 2011. Order at 2; R.____. The matter was restored to the active roster by Order dated October 12, 2012, substituting Sandra L. Calhoon, Personal Representative for the Estate of James K. Calhoon, as the Plaintiff. Order at 2; R.____. Dooley moved for summary judgment on the Plaintiff's Third and Fourth Causes of Action, contending 1) there was no evidence supporting the Plaintiff's claims as to either cause of action, 2) there is no genuine issue of material fact as to either cause of action, 3) neither cause of action states facts sufficient to constitute a cause of action against the Defendants upon which relief can be granted, and 4) the Plaintiff failed to comply with the requirements of S.C. Code Ann. § 15-36-100. Defs.' Mot. for Summ.

[1] R. Keith Dooley, Individually, as well as Dooley and Company, LLP, are the Respondents in this appeal.

J. at 1, Aug. 26, 2013; R.____. The Circuit Court granted Dooley's motion for partial summary judgment on January 22, 2014. Order at 8; R.____. Sandra Calhoon filed her notice of appeal to that decision on February 21, 2014.

STATEMENT OF FACTS

This case involves the accountability and duties between one partner, who was an accountant and bookkeeper, to the other partner, who was not an accountant or bookkeeper. On or about October of 2006, James K. Calhoon and R. Keith Dooley formed Cherokee of Lexington, LLC. Compl. ¶ 2, 4 and 5; R.____. At all times, Dooley had the duty of keeping all the records and documents for the business. Compl. ¶ 6; R.____. In addition to serving as the bookkeeper and accountant for the business, Dooley also served as Calhoon's personal accountant. Compl. ¶ 17; R.____. In Dooley's affidavit, he stated, "[i]t is true that I provided tax services to Mr. Calhoon through Dooley and Company, preparing his returns for him for the years 2003 through 2006 through my company." Dooley Aff. ¶ 2, Aug. 28, 2013; R.____. As business partner and personal accountant, Dooley represented to Calhoon that Dooley & Company had been properly filing Calhoon's personal state and federal income tax returns. Compl. ¶ 18; R.___. Calhoon learned that the company had not in fact been filing his personal returns for several years when the Internal Revenue Service subjected him to fees and penalties, and he was denied certain federal and state benefits. Compl. ¶ 19-21; R.____.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment should only 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 a judgment as a matter of law." *Schmidt v. Courtney,* 357 S.C. 310, 316, 592 S.E.2d 326, 330 (Ct. App. 2003). Summary judgment is inappropriate where further inquiry into the facts is desirable to clarify proper application of the law. *Wade v. Berkeley Cnty.,* 330 S.C. 311, 316, 498 S.E.2d 684, 687 (Ct. App. 1998). In determining whether an issue of material fact exists, the Court must construe all facts and inferences in light most favorable to non-moving party. *Wogan v. Kunze,* 379 S.C. 581, 586, 666 S.E.2d 901, 903 (2008). In a preponderance of the evidence case, the nonmoving party "is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment" *Hancock v. Mid-South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Furthermore, this appeal further seeks to correct the Circuit Court's interpretation of S.C. Code Ann. § 15-36-100. The interpretation of a statute is a question of law for the Court to decide. *Sparks v. Palmetto Hardwood, Inc.,* 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). The reviewing court may interpret the statute based on its own determination and with no particular deference to the Circuit Court's ruling. *Bell v. Progressive Direct Ins. Co.,* 757 S.E.2d 399, 404-405 (S.C. 2014).

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY PREMATURELY GRANTING R. KEITH DOOLEY AND DOOLEY & COMPANY, LLP'S MOTION FOR SUMMARY JUDGMENT BECAUSE FULL DISCOVERY, INCLUDING THE DEPOSITION OF DOOLEY, WOULD UNCOVER RELEVANT EVIDENCE REGARDING DOOLEY'S DUTIES AND FAILURE TO COMPLY WITH THOSE DUTIES.

South Carolina appellate courts have consistently held that summary judgment is a drastic remedy and "should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Helena Chem. Co. v. Allianz*

Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). *See also Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986); *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010). Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman* at 112, 410 S.E.2d at 543. The opposing party must show that further discovery will lead to additional relevant evidence and that the party is not engaged in a "fishing expedition." *Schmidt* at 322, 592 S.E.2d at 333 (citing *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Lastly, the Supreme Court of South Carolina has listed two factors for consideration in determining whether the opposing party has had a full and fair opportunity to complete discovery: (1) as previously noted, the party must show that discover will uncover additional evidence relevant to the issue and (2) the party must show that it was not dilatory in seeking discovery. *Baughman* at 112-113, 410 S.E.2d at 543-544; *see also Uzenda v. Pittman*, No. 2006-UP-313, 2006 WL 7286732 at *3 (Ct. App. 2006).

Part of the basis for the Respondent's Motion for Summary Judgment was that the Appellant failed to provide timely evidence counter to Dooley's affidavit to indicate any agreement between Calhoon and the Respondents regarding the duties of filing Calhoon's tax returns. Defs.' Mot. for Sum. J. at 7; R.____. However, during the hearing on October 15, 2013, counsel for the Appellant brought to the Circuit Court's attention the fact that the parties had not yet been deposed. Hr'g Tr. 19:23-24, Oct. 15, 2013; R.____. Furthermore, Appellant's counsel noted the importance of deposing the Respondent in

order to get to the bottom of what testimony he has regarding his duties and failings to comply with those duties. *Id.* at 20:10-15; R.____. Notwithstanding the fact that the Appellant's counsel specifically brought to the Circuit Court's attention the need for further discovery in order to uncover additional evidence relevant to the issue of the Respondent's duties, the Circuit Court found that no genuine issue of material fact existed concerning the causes of action for breach of fiduciary duty and negligence due to the absence of evidence supporting the Appellant's allegations that Dooley had a duty to file Calhoon's returns. This conclusion was reversible error.

The Circuit Court prematurely granted Respondent's Motion for Summary Judgment because the Appellant has not had a full and fair opportunity to complete discovery. Allowing additional time to complete proper discovery would not lead to a "fishing expedition" but rather would allow the Appellant an opportunity to uncover additional evidence relevant to the issue of Dooley's entire duties regarding the filing of Calhoon's tax returns. Furthermore, the Appellant is able to meet its additional burden of showing it was not dilatory in seeking discovery. As noted in the Circuit Court's order, Calhoon passed away in fall of 2011 after which the matter was stricken pursuant to Rule 40(j) SCRCP by Order dated October 18, 2011. Order at 2; R.____. After another order restored the case to the active roster, the parties entered into mediation and agreed to hold off on discovery issues. Hr'g Tr. 19:24-25; 20:1-2; R.____. Due to the fact that mediation attempts were unsuccessful and the Summary Judgment hearing was only three months later, the parties were never able to make a full discovery. *Id.* at 19:2-3; R.____.

Therefore, this Court should remand this matter to ensure that the Appellant is not deprived on a disputed factual issue. The parameters set forth in a motion for summary

judgment regarding what the Circuit Court can consider is limited. The only pleadings the Circuit Court had to consider in this case were the complaint, answer, and affidavit of Mr. Dooley, none of which mentioned a retainer agreement or the lack thereof. Allowing full and complete discovery would allow the parties to uncover basic, important evidence relevant to the issue of what exactly were the duties and responsibilities of Dooley regarding Calhoon's tax returns, a factual issue that is disputed by the parties.

III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY GRANTING R. KEITH DOOLEY AND DOOLEY & COMPANY, LLP'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE FILING OF A TAX RETURN IS A ROUTINE AND STANDARD ACCOUNTING PROCEDURE, AND THEREFORE, WITHIN THE AMBIT OF COMMON KNOWLEDGE AND EXPERIENCE.

The cardinal rule of statutory instruction is to ascertain and effectuate legislative intent. *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457, 459 (2007). When the language of a statute is clear and unambiguous on its face, the court must apply statute according to its literal meaning. *In re Estate of Hover,* 407 S.C. 194, 202, 754 S.E.2d 875, 879 (2014). In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan* at 499, 640 S.E.2d at 459. Further, "the statue must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *Centex Intern., v. S.C. Dept. of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69. Therefore, the court should read a statute as a "whole" rather than focus on isolated phrases within the statute." *Id.*

South Carolina Code Section 15-36-100(B) states:

> Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of

> South Carolina and listed in subsection (G)[2] . . ., 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) (Supp. 2013)(footnote added). The statute further provides for exceptions including Subsection (C)(2), which states:

> The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving 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.

S.C. Code Ann. § 15-36-100(C)(2) (Supp. 2013).

Section 15-36-100 became effective on July 1, 2005. As such, there is not extensive case law regarding the court's interpretation of its requirements and exceptions. *See* John Moylan, *After the Dust Clears*, 17 S.C. LAW. 37, 38 (Sept. 2005) (explaining that the legislature did allow for limited exceptions to the affidavit requirements but that South Carolina appellate courts will be called upon to define the parameters of § 15-36-100(C)(2)). Specifically, this is a matter of first impression for South Carolina courts regarding the requirement of an expert affidavit to be filed with a complaint alleging professional negligence of a certified public accountant.

As it is currently written, §15-36-100(B) requires an expert witness affidavit to accompany a complaint in an action alleging professional negligence in order to specify the negligent act. However, § 15-36-100(C)(2) provides an exception to the affidavit requirement if the alleged negligence involves subject matter within the common

[2] Subsection (G) lists among other professions . . . (3) certified public accountants. S.C. Code Ann. § 15-36-100(G) (Supp. 2013).

knowledge of a lay juror. Based on its interpretation of this statue, the Circuit Court concluded that the absence of the affidavit and its contents required by § 15-36-100(B) rendered 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. Order 7, Jan. 22, 2014; R.____. The Circuit Court's conclusion was reversible error.

The Respondents cite two South Carolina cases that interpret §15-36-100(B).[3] The first case involved a medical malpractice action brought against a physician after suffering a collapsed lung following a medical procedure. *Ranucci v. Crain*, 397 S.C. 168, 169, 723 S.E.2d 242 (2012). The second case involved real estate purchaser who brought an action against a real estate closing attorney, who also served as an agent for title insurer, for breach of contract and promissory estoppel that arose out of certain claims, which were excluded from coverage under the title insurance policy issued to the purchaser. *H & H of Johnston, LLC., v. Old Republic Nat'l Title Ins. Co.,* 748 S.E.2d 72 (2013). In both cases, this Court found that when a plaintiff asserts a professional negligence claim against a professional listed in Subsection (G), §15-36-100(B) requires an expert witness affidavit to accompany the complaint and specify the particular negligent act. *See Ranucci* at 176, 723 S.E.2d at 246; *H & H of Johnston* at 74.

Although this Court correctly stated that in those two cases §15-36-100(B) requires an expert affidavit to accompany a complaint in a professional negligence claim, the issue in this case is not the requirement of §15-36-100(B) but rather the common knowledge exception to Subsection (B) that the legislature provided in § 15-36-100(C)(2). In South Carolina, it is a well established principle that "[w]here the subject matter is beyond the common knowledge of the jury, such as in a professional liability

[3] As noted earlier, there are currently no South Carolina cases that interpret § 15-36-100(C)(2).

case, expert testimony is required." 18 S.C. JUR. *Negligence* § 15 (2014). However, the South Carolina Supreme Court recently reaffirmed that an exception exists where a situation is such that subject matter of the claim falls within a layman's common knowledge or experience. *Dawkins v. Union Hosp. Dist.,* No. 27380, 2014 WL 1386880, at *2 (S.C. 2014). In determining the application of the common knowledge exception, this Court has stated that whether an expert's testimony is required depends on the facts of each case. *Sharpe v. S.C. Dept. of Mental Health*, 292 S.C. 11, 14, 354 S.E.2d 778, 780 (Ct. App. 1987).

For example, in *Melton v. Medtronic, Inc.*, a patient and his wife brought, among other causes of action, a medical malpractice claim against a cardiologist and heart clinic for troubles that resulted after the installation of an implantable cardioverter defibrillator in the patient's heart. *Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010). This Court found that the common knowledge exception in proving negligence depends on the particular facts of each case and that it would not be "within the province of a lay jury to determine whether something so complex as an ICD was operating properly; to do so would not only require the jury to know the electrical ins and outs of the device itself, but also whether the discharges were brought on by a malfunction or an irregularity in Melton's heartbeat." *Id.* at 664, 698 S.E.2d at 898. However, this Court specifically held that "[w]hile expert testimony is generally required in medical malpractice cases, it is not required if the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants." *Id* at 663, 698 S.E.2d at 897.

The same logic applies to the case at hand. The common knowledge exception is a principle that states lay testimony concerning routine or standard procedures is admissible to establish negligence in a malpractice case. *See* BLACK'S LAW DICTIONARY (9th ed. 2009). The two cases relied on by Dooley involve issues relating to a needle biopsy of the plaintiff's breast as well as the law regarding the role of an attorney acting as an agent for a title insurer, both of which are not standard or routine procedures and require special learning in the medical and legal profession. As such, this Court correctly held that in those two cases, §15-36-100(B) required an expert witness affidavit in order to explain and evaluate the negligent act. However, the issue involved in this particular case is not an in-depth analysis of complicated Internal Revenue Service tax codes used in the preparation of a tax return. Instead, as Dooley noted in his affidavit, the disputed fact focuses on whether Dooley had a duty to file Calhoon's completed tax returns by sending them to the IRS. Although preparing tax returns involves complicated issues and tax codes, sending completed tax returns to the IRS is a routine and simple procedure that most Americans make on an annual basis. Therefore, in interpreting 15-36-100 as a whole, this Court should find that while Subsection (B) requires an expert witness affidavit to accompany a complaint alleging professional negligence, if the subject matter involves a simple or routine procedure within the common knowledge of a layman then Subsection (C) does not require the plaintiff to include such an affidavit.

Furthermore, in *Dawkins v. Union Hospital District*, the South Carolina Supreme Court discussed the distinction between cases that involve professional malpractice and require expert testimony as compared to cases that involve administrative or routine procedures and do not require expert testimony. The Court noted that "[i]n general, if the

patient receives allegedly negligent professional medical care, then expert testimony as to the standard of that type of care is necessary . . . [h]owever, if the patient instead receives 'nonmedical administrative, ministerial or routine care,' expert testimony establishing standard of care is not required, and the action sounds in ordinary negligence." *Dawkins* at *3 (internal citations omitted). Based on the Supreme Court's distinction, in this case the act of failing to send a document to the IRS is an administrative, non-accounting procedure that resonates in ordinary negligence, and therefore, does not require expert testimony to aid in the jury's determination of fault.

CONCLUSION

The Circuit Court's Order dated January 22, 2014, which granted Dooley's Motion for Summary Judgment, should be reversed. For the reasons set forth in this brief, this case should be remanded to the Circuit Court for a trial on the merits.

Respectfully submitted,

June 16, 2014

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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Eugene C. Griffith, Jr., Circuit Court Judge

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R. Keith Dooley, Individually, Dooley & Company, LLP,
and Cherokee of Lexington, LLC,.....Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, on R. Keith Dooley, Individually, Dooley & Company, LLP, and Cherokee of Lexington, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on June 16, 2014, addressed to Respondents' attorney of record, Patrick J. Frawley, Davis Frawley, LLC, Post Office Box 489, Lexington, South Carolina 29071.

June 16, 2014

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RE: Sandra L. Calhoon, as Personal Representative for the Estate of James K. Calhoon v. R. Keith Dooley, Individually, Dooley & Company, LLP, and Cherokee of Lexington, LLC
Appellate Case No. 2014-000350
Case No. 2012-CP-32-04133
Our File: 4396-8119

Dear Ms. Kitchings:

Enclosed herewith for filing are an original and one copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal. Enclosed also are an original and one copy of the Proof of Service.

Please return, by the courier who delivers the documents, one stamped copy of the Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal, and Proof of Service.

Thank you for your assistance in this matter.

Sincerely yours,

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