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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Master in Equity and Circuit Court Judge

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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 Petitioners.

Cherry Hill Estates, LLC and Ronald Faulkner, Third Party Plaintiffs,

v.

Anthony E. Griffis, Respondent.

PETITION FOR WRIT OF CERTIORARI

Michael W. Mogil (SC Bar #11933)
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Attorney for Petitioners

Cherry Hill Estates, LLC and Ronald T. Faulkner (the "Petitioners") submit this Petition for Writ of Certiorari to this Honorable Court pursuant to South Carolina Rules of Appellate Procedure Rule 242 on the grounds that there are novel issues of law raised in their appeal which have not been addressed within the opinions of the Court of Appeals or Circuit Court herein, or under South Carolina law.

The undersigned counsel for Petitioner hereby certifies that a Petition for Rehearing was timely made before the Court of Appeals, and that the Rehearing was denied by Order entered May 22, 2015.

Recognizing that Rule 242 provides limited grounds under which the Appellant may seek review by writ of certiorari, this Petition focuses primarily on the novel question of law presented by the Court of Appeals decision—its finding in paragraph 2 of its Order that affirmed that trial court' determination that the statute of limitations began to run on the date of the closing of the underlying purchase transaction on October 10, 2007. For the reasons summarized herein, the Appellant respectfully disagrees.

The trial court granted summary judgment based upon its finding that the expert affidavit of Thomas Pendarvis was not filed within the limitations period of three years as established by section 15-36-100 (B) of the South Carolina Code. Appellants restate that the expert affidavit was served with an Amended Third Party Complaint on November 14, 2010, approximately three years and five weeks after the subject real estate transaction. An earlier Third Party Complaint was served June 30,

2010 with a Motion for Leave, and filed July 30, 2010, without the expert affidavit, but within the three year period after the transaction. The Order granting Summary Judgment issued by the Honorable Marvin H. Dukes III, Master in Equity and Special Circuit Court Judge for Beaufort County, rests on his determination that when Petitioner Ronald T. Faulkner gave Power of Attorney to settlement agent John P. Qualey to execute closing documents, including promissory notes and loan guarantees, it followed that Mr. Qualey's constructive knowledge of Mr. Faulkner's obligations created by those documents triggered the commencement of the running of the limitations period on that transaction closing date. The Court of Appeals affirmed the trial court's finding on this issue, citing Martin v. Companion Healthcare Corp., 357 S.C. 570, 593 S.E. 2d 624 (Ct. App.2004), Epstein v. Brown, 363 S.C. 372, 610 S.E. 2d 816 (2005) and Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 276 S.C. 306, 257 S.E. 2d 296 (1979).

The Appellants respectfully disagree. Although it is the general rule that knowledge of the agent is imputed to its principal for the purpose of calculating when a statute of limitations commences, in this particular case certain acts that are alleged to be negligence by the Appellants, as set forth in the affidavit of Thomas Pendarvis, were not known by Mr. Qualey and could not reasonably have been known by him. To wit, the expert affidavit of Mr. Pendarvis opines that the following acts constitute negligence by the Respondent:

1) In failing to represent the Clients with undivided loyalty, to preserve the Client's confidences, and to disclose to the Clients any material matters infringing

upon those obligations;

2) In entering into a business transaction with the Clients;

3) In entering into a business transaction with the Clients on terms that were not fair and reasonable to the Clients;

4) In entering into a business transaction with the Clients without advising the Clients in writing of the desirability of seeking and being given a reasonable opportunity to seek the advice of independent counsel concerning "side contracts" dated September 13, 2007 and October 8, 2007;

5) In failing to obtain from Clients informed consent for a waiver of the conflicts of interest inherent in the "side contracts" dated September 13, 2007 and October 8, 2007; and

6) In failing to advise Clients that the disbursements and side agreements must be disclosed to the settlement agent and lender prior to the subject closing, and seeing to it that such disclosures were accomplished.

[Affidavit of Pendarvis, ROA, p190].

For the purpose of the summary judgment motion that was before the Circuit Court, these were the alleged actions or events which gave rise to Appellants cause of action for professional negligence.

By their terms, at least three of the acts or omissions stated by Mr. Pendarvis, being paragraphs four (4), five (5) and six (6) above, relate directly to the "side agreements" which Mr. Qualey testified he had not seen at or prior to closing, nor were those agreements in his file. From the Appellants' perspective, it is not possible

that Mr. Qualey knew, or should have reasonably known, about the existence of those contract agreements and thus Mr. Qualey's knowledge concerning the accrual of a possible cause of action for negligence could not have inputted to Appellants because Mr. Qualey had no such knowledge of the "side agreement(s)" as of the date of closing, being October 10, 2007.

The Court of Appeals decision also states that "Even if the closing attorney did not have knowledge of the Agreement Regarding Cherry Hill Estates, LLC (Agreement), imputed notice is not necessary as Faulkner had direct knowledge of the Agreement as he signed it himself. Again, Appellants respectfully disagree. In this instance, Faulkner signed the Agreement while in contemporaneous consultation with the Respondent, whom Mr. Faulkner thought was his attorney at the time. Respondent prepared the Agreement. Mr. Faulkner later testified that the Agreement did not reflect the terms of what he was advised the transaction between the parties would entail. Moreover, there is no evidence in the record that Mr. Faulkner knew or should have known what the South Carolina Rules of Conduct entail or require when he signed the Agreement(s). If in fact the Court's ruling is that Mr. Faulkner's signature on the Agreement(s) inputed knowledge to Mr. Faulkner that professional malpractice had occurred, then the Court is essentially dictating that knowledge ofthe events classified by Mr. Pendarvis as professional negligence as listed above are actually common knowledge. Code Section 15-36-100(C)(2) eliminates the contemporaneous filing of an expert affidavit requirement where "the subject matter lies within the ambit of common knowledge and experience, such that no special

learning is needed to evaluate the conduct of the defendant." If Mr. Faulkner's signature imputes knowledge, then the common knowledge doctrine is applicable.

On appeal, Appellants argued the common knowledge doctrine as an alternative theory under which summary judgment should have been denied. The Court of Appeals ruled that the issue was not properly preserved. Appellants respectfully submit that the common knowledge issue was raised, not only at three motion hearings, at least two of which were not transcribed by a court reporter, but also in Appellants' Memorandum in Opposition to Summary Judgment filed March 26, 2011 [ROA at p41, 47].

Finally, and significantly from a public policy perspective, Appellants argue that the entire transaction described in this case was structured as a transaction against public policy because it involved an undisclosed "side agreement" relating to the distribution of loan proceeds. This is alleged in Plaintiff's Amended Third Party Complaint [ROA at pp 84-92] and Appellants also argued on appeal that the nature of the subject transaction also rendered it within the common knowledge exception to the expert affidavit requirement. Even if this issue was not properly preserved, which Appellants dispute as noted above, this Honorable Court could in its discretion review the issue as it impacts on public policy of South Carolina. Thus, Appellants argue that summary judgment based on the trial court's finding that the statute of limitations barred Appellants' claim for professional negligence as set forth in the Amended Third Party Complaint and expert affidavit was premature.

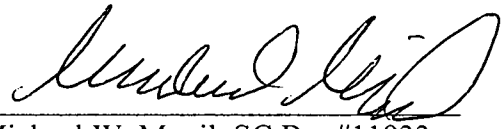
CONCLUSION

For the reasons argued herein, Petitioners Cherry Hill Estates, LLC and Ronald T. Faulkner respectfully request that the Honorable Court grant their Petition for Writ of Certiorari.

Dated: June 19, 2015

Respectfully Submitted,

MOGIL LAW FIRM



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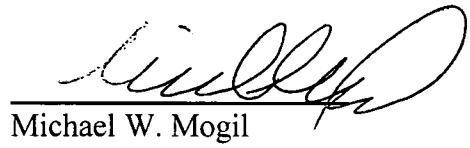
Anthony E. Griffis,	Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Anthony E. Griffis, Esquire, Respondent *pro se*, by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2015, addressed to Mr. Griffis at 355 Park Avenue SW, Aiken, SC 29801.

June 22, 2015



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