THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-6054
Appellate Case No. 2015-001312

Cynthia Griffis,	Plaintiff,
v.	
Cherry Hill Estates, LLC, Eugene O'Neil and Ronald Faulkner,	Defendants,
Cherry Hill Estates, LLC and Ronald Faulkner,	Third Party Plaintiffs, Petitioners,
v.	
Anthony E. Griffis,	Third Party Defendant, Respondent.

PETITIONERS REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioners

Now come the Petitioners, whom reply to Respondent's Return to their Petition, and whom further allege unto the Honorable Court as follows:

I. The "side agreements" which were not in settlement agent Qualey's file void any constructive notice to Qualey which would trigger the running of the limitations period.

The summary judgment at issue before the Court of Appeals rested on the Circuit Court's determination that the expert affidavit required to support a professional malpractice claim was not filed within three years from October 10, 2007, when settlement agent Jack Qualey executed loan guarantees as Power of Attorney for Petitioner Ronald Faulkner. The decision did not rest upon a finding of whether or not Respondent's conduct constituted negligence, but rather the trial court's implicit finding that Qualey knew or should have known that acts or omissions had occurred which could have supported a claim for professional negligence as of the closing date, and thus the trial court imputed his knowledge to Mr. Faulkner to trigger the running of the limitations period for filing an expert affidavit supporting a cause of action for professional negligence. Petitioners respectfully disagree. Preliminary, Mr. Qualey was the attorney for Cherry Hill Estates, LLC, the Purchaser, but as it relates to Mr. Faulkner, who was not the Purchaser, but whom was only a loan guarantor, there is no fact in the record below that reflects that Mr. Qualey had a separate engagement agreement with Mr. Faulkner, or that he met with Mr. Faulkner, or otherwise gave Mr. Faulkner any legal advice. Mr. Faulkner testified at deposition that he thought Mr. Griffis was his attorney. Mr. Qualey was simply an agent to execute documents authorized by a Power of Attorney that was presented to Mr. Faulkner by Mr. Qualey's paralegal.

The acts and omissions described in Mr. Pendarvis' affidavit which give rise to a claim for professional negligence could not have been known to Mr. Qualey if he had not been provided the "side agreements" or discussed with Mr. Faulkner whether or not he in fact had agreed to a personal guarantee

to the Note to Mrs. Griffis. Mr. Pendarvis' affidavit, which was also summarized in the Petition, is restated here for the Court's easy reference and not intended to burden the Court with unnecessary duplication, noted the following acts which could only have been learned by Mr. Qualey had he been provided the "side agreements" or discussed the matters with Mr. Faulkner:

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].

As noted in the Petition, 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. Additionally, Petitioners additionally assert that paragraph (3) relating to "transactions unfair to the client" are directly applicable as well. As noted in the record, the

property purchased from Mr. and Mrs. Griffis for $1,013,000 in 2007 sold for $157,250.00 in 2012, demonstrating an approximately eighty five (85%) decline in properly valuation from the terms of the transaction that Mr. Griffis structured and benefited from just five years earlier, ultimately at Mr. Faulkner's expense. Mr. Qualey could not have known the detail of how the transaction was structured or what was disclosed or not disclosed to Mr. Faulkner unless Mr. Qualey had seen those "side agreements". Mr. Qualey's knowledge concerning the accrual of a possible cause of action for negligence could not have imputed to Petitioners because Mr. Qualey had no such knowledge of the "side agreement(s)" as of the date of closing, nor did Mr. Qualey have notice that a portion of the loan proceeds from this overfunded transaction were being refunded to the Sellers. Petitioners argued and continue to argue that this aspect of the transaction, the refund of loan monies to the Sellers, without disclosure to the lender, Woodlands, is and was a transaction completed without legally required disclosure of material terms and against the public policy of South Carolina. The fact that Respondent knew that loan proceeds from the transaction were being refunded to his Seller's side, as set forth in the Agreement of October 8 that was drafted by Respondent but not disclosed by Respondent or by his client O'Neill to the settlement agent, is one of the acts that Petitioners argue is also professional negligence. In Brown v. Newell, 64 S.C. 27, 41 S.E 835 (S.C. 1902) this Court analyzed a mortgage transaction which was against public policy because it caused or encouraged one of the parties to commit tax fraud. The Court noted that its public policy analysis also required an analysis of the parties' conduct, which Petitioners assert is by its nature is a fact intensive inquiry. But the issue before the Court is not yet whether the Cherry Hill Estates transaction did in fact violate public policy, but rather whether Faulkner had notice that it did on October 10, 2007 or at some date before November 14, 2007. Petitioners submit that as it relates their public policy argument there is no possibility that Qualey

could have known that the transaction had been structured against public policy because he had no knowledge of the "side agreements" or subsequent Bill of Sale purporting to conveya one third interest in Cherry Hill Estates, LLC to Respondent.

The Respondent is an attorney, who had formed Cherry Hill Estates. LLC as its attorney [at the time]. The Respondent negotiated an one third interest in Cherry Hill Estates, LLC with his clients despite his not being required to be a guarantor on loans secured by the property he was conveying. The Respondent was the historical attorney for Mr. O'Neil and had represented Mr. Faulkner in transactions in the recent past prior to the Cherry Hill Estates, LLC transaction. As set forth in his memorandum in support of motion for summary judgment to the Circuit Court, Respondent communicated with Mr. Qualey's office the day of the anticipated closing by fax [dated October 9, 2007] to ensure that Mr. Faulkner was stated as a guarantor on the Note to Mrs. Griffis and that only Mrs. Griffis was the payee. The record below does not reflect that Respondent mentioned or transmitted to Qualey the "side agreement" executed just the day prior, which set forth the distribution of the loan funds at or after closing, and/ or the Respondent's proposed negotiated ownership in Cherry Hill Estates, LLC.

The Court of Appeals decision notes in point 2 its find that Faulkner had direct knowledge of the "side agreements" because he signed them himself. Again, Petitioners respectfully disagree. Faulkner did not realize that the Agreement of October 8, 2007 which was prepared by Respondent and which listed Faulkner as a guarantor to the Note to Mrs. Griffis, directly contravened Faulkner's understanding reached at the same in person meeting with Respondent, whom he considered his attorney at the time and whom he trusted. It is unclear from the record in the underlying action if or when Mr. Faulkner received a copy of the Agreement of October 8 or the Bill of Sale or if he received those documents at any time prior to the 2009 demand. There is no

evidence that Mr. Faulkner understood or acknowledged the October 8, 2007 agreement. He testified that learned that he was a guarantor on the second mortgage loan to Mrs. Griffis when Mrs. Griffis made her formal demand under the Note in 2009. Prior to that point no periodic payments were due under the Note. Petitioners restate Mr. Faulkner was not on the date of closing the manager of Cherry Hill Estates, LLC, Mr. Faulkner did not sit with or meet Mr. Qualey at settlement or sign the HUD 1, and other than transmitting financial information to Woodlands through Mr. O'Neill and/or the Respondent's office, he had no direct contact with Woodlands either. Mr. Faulkner was not on notice that the "side agreements" were not provided to Mr. Qualey.

As a result of loan secured by property which in 2012 was worth approximately 13% of its 2007 purchase price ($1,013,000), Bank of Ozarks obtained a $901,013.44 deficiency judgment against Faulkner. Further, Cynthia Griffis, the Respondent's ex wife, obtained a judgment against Faulkner based on his personal guarantee, the same guaranty that he testified he never agreed to. When Faulkner gave Qualey a Power of Attorney, he testified at deposition that he presumed it was only to sign a guarantee on the first mortgage loan to Woodlands, and not the second mortgage to Mrs. Griffis. Faulkner testified that the October 8 Agreement stated different terms than the terms he agreed to in Griffis office, namely the inclusion of his second guarantee.

Had Qualey been informed of the side agreements, the argument that Qualey's knowledge of the events that Faulkner alleges are malpractice would be more compelling. But Qualey was not aware of the agreements that imputed personal liability to Faulkner (contrary to Faulkners understanding) or which potentially rendered the transaction as one against public policy. Thus, Petitioner Faulkner was not aware on October 10, 2007 that events had occurred which could trigger a claim of professional negligence against Respondent.

II. Standard of Review.

This Court has broad discretion to review matters that involve public policy, or for any other special or important reason that the Court deems appropriate. Rule 242 of the Rules of Appellate Practice states:

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Thus, notwithstanding Respondent's argument in his Return that this Court is limited to review of issues that involve novel questions of law, Petitioners assert that this Court has broad power to review the legal and public policy issues raised in the Petition, including but not limited to the interplay between the discovery rule, constructive notice, and the expert affidavit requirements of section 15-36-100 (B) of the South Carolina Code, as well as the public policy considerations before the Court in this matter.

III. Relevant Procedural History

The underlying lawsuit in this matter was commenced by Respondent's ex wife Mrs. Cynthia Griffis to enforce a second mortgage Note against Petitioners. After the parties, including Respondent, engaged in limited settlement discussions and limited discovery for approximately

six months, Appellants filed their Third Party Complaint in this matter asserting the subject professional negligence claims, and other causes of action, against their former attorney, Anthony E. Griffis, on or about June 20, 2010 (R. pp. 111-117) with a Motion for Leave, and the Third Party Complaint was filed again and served on July 30, 2010 after leave was granted. While Respondent was at the time communicating pro se, another attorney contacted Petitioners counsel on Respondent's behalf to request a courtesy extension for Respondent, which was granted. The issues before the Court were first raised in Respondent's Motion to Dismiss filed on or about September 20, 2010. (R. pp. 98-99). That motion was argued on October 14, 2010 and an Order granting the Motion was entered on October 27, 2010. (R. pp. 10-11). That Order granted Appellants thirty days, or until November 14, 2010, to serve an Amended Third Party Complaint to include the supporting affidavit of an expert. *Id.* Appellants timely served their Amended Third Party Complaint with the required expert affidavit on or about November 14, 2010.

Nothwithstanding the Court of Appeals dismissal of Petitioners' equitable estoppel argument, this brief procedure history is restated to re-affirm to the Court that Petitioners, believing that they had timely filed their Third Party Complaint within any applicable limitations period, granted a courtesy extension to Respondent to file his responsive pleading, which became a Motion to Dismiss, and then Petitioners included the supporting affidavit ordered by the Circuit Court within the period expressly provided in the Court's Order flowing from the Motion to Dismiss. While the Court of Appeals dismissed Petitioners' relation back and "law of the case" arguments, Petitioners request unto this Honorable Court that it reconsider the procedural history of this matter and Petitioners' conduct in good faith after the initial lawsuit was filed, and further reliance on the Circuit Court's Order granting them thirty days to attach an affidavit as ordered by the Circuit Court, and issue a Writ of Certiorari to the Court of Appeals to permit further review of the

important matters raised herein.

IV. Conclusion.

WHEREFORE, Petitioners request that this Honorable Court grant their Petition and issue a Writ of Certiorari to permit further appellate review before this Court of the Order granting partial Summary Judgment in this case.

Respectfully Submitted,

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August 24, 2015
Hilton Head Island, SC

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Marvin H. Dukes, III, Circuit Court Judge

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PROOF OF SERVICE

I certify that I have served the Reply to Return to Petition on Anthony E. Griffis, Esquire, Respondent *pro se*, by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2015, addressed to Mr. Griffis at 355 Park Avenue SW, Aiken, SC 29801.

August 24, 2015

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