

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-1739

David M. Graham, Jr.,

Appellant,

v.

Welch, Roberts and Amburn,
LLP and Russell Patrick Welch,

Respondents.

FINAL BRIEF OF APPELLANT

October 25, 2012
Columbia, South Carolina

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QUESTION PRESENTED

1. When conflicting evidence is presented on the issue of the statute of limitations, did the trial court err when it entered summary judgment for the Respondent, rather than allowing a jury to determine that issue of fact?

STATEMENT OF THE CASE

The central facts giving rise to the Complaint involve the alleged misapplication of funds sent from David M. Graham (hereinafter "Graham") to his accountant and tax adviser, Welch Roberts and Amburn, LLP and Russell Patrick Welch, individually, (hereinafter collectively referred to as "Welch"), to pay certain taxes owed by Graham to the New York Tax Commission.

On October 13, 2005, Graham issued a check made payable to Welch in the amount of \$4,296.49, the exact amount owed to the New York Tax Commission at the time, (R. p. 68) with the specific belief that the funds would be used by Welch to satisfy Graham's tax liability to New York. (R. p. 65, lines 13-15).

On November 28, 2005, Welch invoiced Graham in the total amount of \$6,656.00, but displayed a credit to Graham of \$4,296.49, thus leaving a balance owed from Graham to Welch of \$2,359.51, which Graham promptly paid on December 30, 2005. (R. pp. 1-2). Following this payment, Graham assumed that all tax liabilities had been resolved and that Welch had been paid in full, so no further payments occurred. (R. pp. 65-67).

However, on April 29, 2008, Graham received a notice from his bank that the State of New York had placed a levy against his account due to the failure to satisfy his tax liability. (R. p. 72). After receiving this notice, Graham had his new accountant, Michael Goldson, contact Welch to verify that payment had been made to the New York Tax Commission. (R. p. 66, lines 14-22). However, Welch refused to provide any information regarding the payment received, and did not provide any information. (R. p. 66, lines 19-22). Thereafter, on April 20, 2010 with considerable effort, Graham

finally confirmed with certainty that the payment was deposited into Welch's account and that the tax liability had gone unpaid. (R. pp. 66-67).

On March 9, 2011, commenced an action against Welch alleging professional negligence, breach of fiduciary duty, fraud, negligent misrepresentation, conversion, and unjust enrichment. (R. pp. 3-19). Attached to the Plaintiff's Complaint was the affidavit of Michael Goldson, which addressed the issue of Welch's alleged professional negligence. (R. pp. 20-22). In his affidavit, Goldson stated that Welch had violated the professional standard of care by (1) "failing to pay taxes on behalf of David Graham in a timely manner after collecting such funds for this purpose" (R. p. 21, lines 19-20); (2) "failing to disclose to David Graham that they failed to make the payment" (R. p. 21, line 21); (3) "failing to refund the money David Graham provided Defendants to pay his tax payment" (R. p. 21, lines 22-23); and (4) "failing to provide an accounting to the client of the client's funds" (R. p. 21, line 24).

On May 24, 2011, Welch filed and served his Answer, denying the allegations and counterclaimed, alleging a frivolous proceeding. (R. pp. 36-43). Graham filed and served his Reply on June 23, 2012. (R. pp. 49-50).

On June 14, 2011, Welch moved for summary judgment on the grounds that the statute of limitations time-barred Graham from the receipt of any relief against Welch. (R. pp. 52-64).

On October 28, 2011, The Honorable R. Markely Dennis, Jr. sat in a non-jury term and heard Welch's motion for summary judgment. Welch presented an affidavit in support of summary judgment detailing his position as to when Graham should have been aware of the non-payment of the tax liability (R. pp. 56-57) which conflicted with Graham's affidavit, stating that he was not aware the taxes had not been paid until he received the notice of levy on April 29, 2008. (R. pp. 65-67). Additionally, the affidavit of Michael Goldson, which was attached to the Complaint was part of the record considered. (R. pp. 20-22).

After reviewing the pleadings, the affidavits submitted by the parties, the court then heard

argument of counsel. (R. pp. 75-86). At the conclusion of the hearing, the Court issued an order granting Welch's motion for summary judgment, finding Graham's position to be unpersuasive, and that Graham either knew or should have known that he had a cause of action on or around November 28, 2005, and thus the entirety of Graham's claims were held to be barred by the statute of limitations. (R. pp.1-2)

On February 1, 2011, Graham received notice of written entry of the Order Granting Summary Judgment to Welch, and served his Notice of Appeal on March 1, 2012.

ARGUMENT

I. With conflicting evidence presented, the trial court erred in deciding when the statute of limitations began to run, as this is an issue of fact for the jury to decide.

A trial court may properly grant a motion for summary judgment when "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." Rule 56(c), SCRPC. Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). Moreover, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.*

In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC. *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998).

The statute of limitations for a tort action is three years. S.C. Code Ann. § 15-3-530(5) (Supp.2011) (stating the statute of limitations for "an action for assault, battery, or any injury to the

person or rights of another, not arising on contract and not enumerated by law” is three years).

The limiting period begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. This rule is most commonly known as the “discovery rule”. *Burgess v. Am. Cancer Soc’y, South Carolina Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see also S.C. Code Ann. § 15-3-535 (Supp. 2011) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (noting that under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct).

The burden of proof in establishing the bar of the statute of limitations rests upon the party attempting to interpose it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (where testimony is conflicting upon the issue of the statute of limitations it is for the jury to decide). *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338-39, 534 S.E.2d 672, 681-82 (2000) (when testimony conflicts, the date on which discovery should have been made becomes an issue for the jury to decide).

In the instant case, viewing the testimony, as presented in the affidavits, in the light most favorable to Graham, it is clear that the testimony, at the very least, conflicts as to when Graham knew or should have known that his payment was not applied to his tax liability by Welch. Graham’s affidavit is clear that he gave Welch specific funds to pay his tax liability. (R. p. 65, lines 15-18). It is reasonable for a jury to find that Graham reasonably believed the invoice he received with the credit applied to it reflected and included the tax liability.

Although the dates and amounts of the payments and invoices are undisputed, the evidence, in

the form of affidavits, presented to the trial court demonstrates that a genuine issue of material fact exists as to when the Graham first learned that the tax payment had not been made to the New York Tax Commission. In fact, it is reasonable to believe that a jury could find that Graham did not reasonably know he had a cause of action against Welch until April 20, 2010, when he finally confirmed that the tax liability had not been paid.

In Graham's affidavit, he states "it was not uncommon for Mr. Welch to pay expenses on my behalf with funds I provided him" (R. p. 65, lines 17-18). Additionally, Graham states:

"On or about April 20, 2010, after considerable effort, I was able to get Wachovia Bank to verify that Mr. Welch did in fact receive and deposit the funds to pay the Tax Penalty into his firm's account. This was the first time I knew that a cause of action related to the failure to pay the Tax Penalty might exist against Mr. Welch.

(R. p. 66, line 23 – p. 67, line 3).

Accordingly, Graham can show that there had been a regular course of dealing whereby Welch would pay tax liabilities for Graham in this exact same pattern, and Graham believed that the tax liability had been satisfied until he received the notice of April 29, 2008. (R. p. 65, lines 15-18).

Additionally, in oral argument, Graham's counsel specifically raised this point to the court in saying: "Mr. Welch was his CPA, that he had a course of dealing with Mr. Welch with Mr. Graham, where he would on a frequent basis, pay taxes on Mr. Graham's behalf and then request funds from Mr. Graham." (R. p.79, line 25 – p. 80, line 4).

Consequently, this course of dealing led Graham to reasonably believe that this tax liability payment was going to be handled in the same manner. However, it was not until April 29, 2008, when Graham received a notice that a levy had been placed against his account due to the failure to satisfy his tax liability, that Graham first realized that the tax liability had gone unpaid. (R. pp. 72-74). Believing that an error on the part of the New York Tax Commission had occurred, Graham had his new accountant review the records and contact Welch to confirm the payment had indeed been made. (R. p.

66, line 14 – p. 67, line 3). Moreover, Welch's stonewalling of Graham's new accountant's request for information delayed Graham's knowledge of what happened with the funds sent to Welch and Graham's knowledge of whether or not a cause of action existed. If a jury finds that Graham should not have reasonably known about this misapplication of funds until one of these later dates, the Respondent's statute of limitations defense is not applicable.

Admittedly, the affidavit of Welch takes a conflicting position in regards to when Graham should have known that his payment was not applied to the New York Tax Commission. In his conflicting affidavit, Welch specifically states: "It is impossible that the Plaintiff could have operated under the belief that this check in the amount of \$4296.49 had been used for the payment of a tax he owed to the State of New York" (R. p. 57, lines 1-3).

However, the mere fact that the testimony conflicted as to what Graham reasonably believed presents enough of a dispute to survive a motion for summary judgment. Accordingly, the trial court erred when it chose between the two conflicting affidavits and essentially made a credibility determination that resulted in a finding of fact that Graham's affidavit was "unpersuasive" (R. p. 2, line 9). Quite simply, it was not the place of the trial court to decide which party's testimony was more persuasive or credible. *Hiers by Hiers v. Mullens*, 310 S.C. 63, 425 S.E.2d 57 (Ct. App. 1992) (matters of credibility should not be determined at the summary judgment stage).

The determination of when Graham knew or should have known of any potential claims was consequently a jury issue. See, *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 274, 384 S.E.2d 693, 696 (1989); *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. Of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) (finding that when all of the evidence goes to the reasonableness of a party's actions, the statute of limitations issue becomes one for the jury to decide). As such, the trial court in this matter committed an error of law when it granted Welch's motion for summary judgment based on the expiration of the statute of limitations. *Maher v. Tietex Corp.*, 331 S.C.

371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (in determining whether statute of limitations begins to run under discovery rule, the jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action).

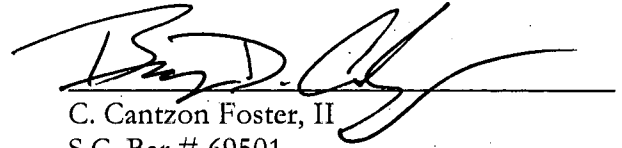
Additionally, the conversion cause of action was not the only cause of action in Graham's Complaint. The cause of action as to professional negligence may go to Welch's attempted cover-up and refusal to cooperate with Graham's new accountant in ascertaining the truth of what happened to the funds. Accordingly, several different statutes of limitations may exist in this action associated with different causes of action. In any event, all of these questions regarding the statute of limitations are for a jury to decide – not a judge.

Ultimately, the question of which affidavit was more persuasive was not a question for the trial court at the summary judgment stage. When presented with conflicting testimony regarding the statute of limitations, the trial court, believing the affidavit of Welch over Graham, committed the error of overstepping its bounds onto an issue of fact that should have been decided by a jury. As a result, the trial court's decision to grant summary judgment to Welch should be reversed.

CONCLUSION

Based upon the foregoing, the post-trial order entered on January 20, 2012, by the Honorable R. Markley Dennis, Jr., should be reversed and this matter should be restored to the active jury-trial docket.

Respectfully Submitted,



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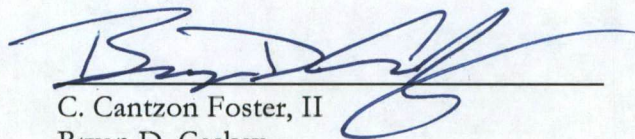
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CERTIFICATE OF COMPLIANCE

The undersigned certified that the Final Brief and the Final Reply Brief complies with Rule 211(b), SCACR.



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