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,

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

Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUE ON APPEAL

Did the trial court err in granting summary judgment based upon the expiration of the statute of limitations when the Plaintiff offered no evidence whatsoever as to why or how he could not reasonably have known as early as November 28, 2005 that a tax liability to the State of New York has not been paid thereby creating the basis for a claim against his former accountant which was not commenced until March 9, 2011?

STATEMENT OF THE CASE

The central issue on appeal is the Plaintiff's failure to explain how or why he did not commence this action within three years from the date that he knew, or with the exercise of any reasonable diligence should have known, that a tax liability which he incurred with the State of New York in 2005 had not been paid.

At all times relevant to this dispute, Welch, Roberts and Amburn, LLP and Russell Patrick Welch (hereinafter collectively "Welch") served as financial and tax advisors to David M. Graham, Jr. ("Graham"). (R. p. 7, para. 8). On July 5, 2005, Graham received notice of a tax liability owed to the State of New York in the amount of $4,296.49. (R. p. 68). By October, 2005, Graham owed Welch the sum of $6,656.00 for services rendered. (R. p. 56, para. 3).

On October 13, 2005, Graham issued a check in the amount of $4,296.49 made payable to Welch with specific instructions on the face of the check that Welch "Post to Account: DM Graham." (R. p. 59). Graham claims in his affidavit that he believed the check would be used by Welch to satisfy the New York tax liability. (R. pp. 65-67). Upon receipt of the check, the amount was applied to Graham's account as per the instructions on the instrument. (R. p. 56, para. 5).

After having applied the check against the amounts owed to Welch, there remained an outstanding balance owed by Graham to Welch in the amount of $2,359.51. (R. p. 56, para. 5).

On November 28, 2005, Welch issued an invoice to Graham for services rendered in the amount of $6,656.00. The invoice reflected a credit for payment received by Graham in the amount of $4,296.49, thus leaving a balance due of $2,359.51. (R. p. 56, para. 6). On December 30, 2005, Graham issued a check in the amount of $2,359.51 made payable to Welch with the specific instructions on the face of the check that Welch "Post to Account: DM Graham." (R. pp. 63-64).

On April 29, 2008, the New York Department of Taxation and Finance issued a Tax Compliance Levy on Graham's Wachovia bank account in the amount of $5,434.88. (R. pp. 72-74). Graham contends that this was his first notice that the taxes had not been paid and that it prompted him to ask that his new accountant, Michael Goldson, to investigate. (R. p. 66). However, the Tax Compliance Levy attached to Graham's Affidavit indicates that a warrant issued against Graham as early as February 20, 2006. (R. pp. 72-74).

On March 9, 2011, Graham commenced this action, alleging a number of causes of action against Welch. On May 24, 2011, Welch answered the complaint, denying any allegations of misconduct and asserting the statute of limitations, set off and frivolous proceedings in defense.

On June 24, 2011, Welch moved for summary judgment and the grounds that Graham knew or should have known of his claims as early as November, 2005, and that his March, 2011 action was therefore time barred. On October 26, 2011, two days prior to the scheduling hearing on Welch's motion for summary judgment, Graham served his affidavit in which he attempted to create material issues of fact.

On October 28, 2011, oral arguments were held before the Honorable R. Markley Dennis, Jr. Judge Dennis granted summary judgment finding specifically that Graham

knew or should have known he had a cause of action on November 28, 2005. Judge Dennis' Order from which Graham now appeals was entered on February 1, 2011.

ARGUMENT

Statutes of limitations are not simply technicalities, but instead they embody important public policy concerns to stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs and by relieving the courts of the burden of trying stale claims when a plaintiff has slept on his rights. To entertain Graham's attempt to create a material issue of fact based upon his failure to act with reasonable diligence and/or upon an illogical assumption is to invite literally every litigant to seek to contort the statute of limitations based upon the simple contention that they assumed one thing to be true despite the fact that all objective evidence pointed to the opposite conclusion. Graham's claims are time barred.

Graham would urge this court that he did not know, and more importantly, that he could not reasonably be expected to know, that the payment he made to Welch on October 13, 2005 in the amount of $4,296.49 was not applied toward the payment of his New York taxes as he assumed it had been, and that he remained ignorant of this fact until April 29, 2008. It is not contested, however, that:

a. In October, 2005, Graham owed Welch for "Service Rendered Through October 31, 2005" the sum of $6,656.00 (R. p. 59);

b. On October 13, 2005, Graham wrote a check to Welch in the amount of $4,296.49 with the express instruction that it be posted to his account (R. p. 59);

c. On November 28, 2005, Welch provided Graham with a detailed invoice for services rendered during October, 2005, which invoice makes reference to researching the New York tax issue, but no reference whatsoever to payment of the taxes (R. p. 61);

d. The November 28, 2005 invoice from Welch to Graham shows that Welch was owed $6,656.00 for the itemized services that had been rendered and that credit for Graham's payment in the amount of $4,296.49 had been posted to the account per Graham's express instruction, thus leaving a balance due of $2,359.51(R. p. 61);

e. On December 30, 2005, Graham paid the November 28, 2005 invoice by remitting a check in the precise amount of $2,359.51, again with the instruction that it be posted to his account (R. pp. 63-64).

f. Finally, in his Affidavit offered in opposition to summary judgment, Graham never says that he did not receive the November 28, 2005 invoice; he never contends that he did not read the November 28, 2005 invoice; he never contends that he did not understand the November 28, 2005 invoice.

Graham's sole argument that the trial court erred is his contention that by having asserted in his affidavit that he assumed that the taxes had been paid in October, 2005, he has created a material issue of fact which would preclude granting summary judgment. Respectfully, the Respondent believes that the Appellant misperceives the law in this setting and rejects the idea that he can handcuff both the Respondent and this Court into the continuation of a frivolous action in which, even if he were to prevail and prove that Welch should have applied the check for $4,296.49 toward the payment of taxes, he would at the same time prove that Welch was therefore not paid for services rendered in the exact same amount. The statute of limitations is designed precisely to discourage these types of fruitless legal endeavors on behalf of parties who have slept on their rights.

The applicable statute of limitations for the Appellants claims is three years. South Carolina Code Ann., Section 15-3-530, 1976, as amended. 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. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). Graham contends that he did not know the taxes were not paid in the year 2005. For purposes of this appeal, the

Respondent must begrudgingly accept that fact to be true. Graham further contends that he could not have known the taxes were not paid and that he acted with reasonable diligence. It is to this contention that the Respondent takes strong exception.

Not only did Graham know that the October 13, 2005 payment in the amount of $4,296.49 was not applied toward the payment of taxes, through receipt of a detailed invoice and payment of the balance due, Graham accepted this result and ratified it. The Respondent does not ask much of Graham in this setting. All that is expected is that Graham actually read and understood the invoice that he ultimately paid. If he did not understand it or took exception to its propriety, the law afforded him three full years to bring his claim. He waited nearly six. In other words, and consistent with well-settled South Carolina law, Graham was possessed of facts which were sufficient to put a reasonable person on notice of the existence of a cause of action as early as November 28, 2005, but did nothing until nearly six years later. See Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816, (2005), citing True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997): "Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another."

The Appellant asserts that it was improvident for the trial court to grant summary judgment because his Affidavit claiming ignorance was sufficient to create an issue of fact for the jury. In making his argument, however, the Appellant ignores that the issue of fact must by a genuine and material issue of fact and further ignores the important policy considerations underpinning the statute of limitations as was discussed in Kelly v. Logan, Jolley and Smith, LLC, 383, S.C. 626, 682 S.E.2d 1 (Ct. App. 2009):

> Statutes of limitations are not simply technicalities. Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Hooper v. Ebenezer Senior Serv. & Rehab., Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct.App.2008). Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Moates, 322 S.C. at 172, 470 S.E.2d at 404. One purpose of a statute of limitations is "to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights." McKinney v. CSX Transp., Inc., 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct.App.1989) (internal quotations and citations omitted). Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct.App.2008) (internal citation omitted). "Statutes of limitations are, indeed, fundamental to our judicial system."

Appellant is precisely the sleepy litigant to whom these policy statements refer. To grant the Appellant the relief that he seeks is quite literally to invite every other litigant who has slept on their rights to seek to oppose the imposition of the statute of limitations based upon a simple declaration that "I did not know," when all objective evidence says that they should have. Respondent urges the court not to issue such an invitation and to uphold the trial court.

CONCLUSION

Graham offers no evidence to support the contention that he could not reasonably have been expected to discover that his 2005 tax liability had not been paid. His claim nearly six (6) years later that he assumed the Respondent had paid the taxes is time barred.

Based upon the foregoing, the post-trial order entered on January 20, 2012, by the Honorable Markley Dennis, Jr., should not be reversed and this matter should not be restored to the active jury-trial docket.

{Signature Page to Follow}

Respectfully Submitted,

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RESPONDENTS RULE 211 CERTIFICATION

The undersigned hereby certifies that the Final Brief has been compiled in accordance with the provisions of Rule 211 (b)

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