

THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Trial Court Case No. 2018-CP-07-01449
Appellate Case No. 2019-000941

Floyd Hargrove.....Appellant,

v.

Anthony E. Griffis, Sr.Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

Anthony E. Griffis, Sr.
355 Park Ave SW
Aiken, SC 29081
(843) 368-5013
tonygriffis@gmail.com
Respondent

Sean Michael Bolchoz
Bolchoz Law Firm PA
PO Box 22650
Hilton Head Island, SC 29925
(843) 836-3033
sbolchoz@bolchozlaw.com

Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. Was the Motion to Dismiss converted to a Motion for Summary Judgment, so as to require further discovery?
- II. Did the trial court err in dismissing Appellant's claims, because Appellant failed to obtain the expert affidavit as required by S.C. Code Ann. §15-36-100?
- III. Did the applicable period of limitations for Appellant's claims expire and bar his claims?
- IV. Were Appellant's claims illegal and void as against public policy and bar his claims?
- V. Did Appellant have standing to bring his action?
- VI. Did the Conspiracy claim also fail by not being a separate and distinct claim, and also because no special damages were alleged?

STATEMENT OF THE CASE

Appellant's Statement of the Case (Appellant's Brief, p.2-3) is accepted except for the statement "The Court also considered the evidence attached as exhibits to the answer". (Appellant's Brief, p.3). Respondent is disputing that the Court "considered" the exhibits as evidence, or any other "evidence" except the allegations of the Complaint, which might convert the Motion to Dismiss into a Motion for Summary Judgment. There is no such "consideration" of, or reference to, such exhibit evidence contained in the Order Granting the Motion to Dismiss. However, Appellant is arguing that the Motion to Dismiss was converted to a Motion for Summary Judgment, which would require further discovery. (Appellant's Brief, p.6, 22). Therefore, this matter is contested and not appropriate for inclusion in the Statement of the Case, Rule 209(b)(1)(C), SCACR.

STANDARD OF REVIEW

A motion to dismiss for failure to state a cause of action must be based solely on the allegations in the complaint, *Gessette v. SCE&G*, 635 S.E.2d 538 (S.C. 2006). On appeal, the standard for review is whether the Complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief, *Brazell v. Windsor*, 682 S.E.2d 824, 384 S.C. 512 (S.C. 2009). The only relevant "facts" in this appeal are to be found in the dismissed Complaint. Complaint, R. P. ____ - ____.

ARGUMENT

I. The Court considered only the unambiguous “facts” alleged in the Complaint, and the Motion to Dismiss was not converted to a Motion for Summary Judgment.

In the preamble to his Argument, Appellant’s Brief p.6, R _____, Appellant makes two additional arguments: (1) that the Court did not view his Complaint averments in the light most favorable to him, and (2) that the Motion to Dismiss was converted to a Motion for Summary Judgment because the Judge had received the Answer and Exhibits to the Answer which Appellant argues were “considered” in the Order to Dismiss (thereby converting the Motion to one for Summary Judgment entitling Appellant to discovery).

First, Appellant has not even mentioned in his Brief, much less disputed, the damning admissions in his Complaint, which were cited, “considered” and relied upon by the Court in its Order to Dismiss, Order R. _____. The undisputed facts “considered” in the Order are unambiguous and leave no room for interpretation (nor do they require a viewing “in the light most favorable” to Appellant, as he asserts). It is undisputed that (1) the Appellant did not attach an expert affidavit to his Complaint, as required by S.C. Code Ann. §15-36-100; (2) the Appellant knew that both closing attorneys failed to respond to the 15-day demand letter (for payment of the commission) sent on October 29, 2009 – thereby starting the clock for the statute of limitations, Complaint ¶¶20-24, R. ____; (3) the Appellant knew that it was illegal to pay the commission directly to him, Complaint ¶¶16, R. _____. Further, any such direct payment would breach the contract with the Seller regarding the commission. Complaint ¶9, R. _____ (and arguably open the Seller to a breach of contract claim from the Broker should the commission be paid directly to the salesman).

Appellant misquotes Rule 12(c) SCRCP which states when “matters are *presented to and not excluded by the Court*, the motion shall be treated as one for summary judgment...” (emphasis added to show Appellant’s misinterpretation of the rule). Here, the Court excluded everything but the allegations in the Complaint; nothing in the Order to Dismiss, Order, R _____, goes outside of the four-corners of the Complaint.

Further, S.C. Code Ann. §15-36-100(F) requires that “the defendant raise the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading”. In order to comply with the statutory requirements, Respondent had to “present” his Answer to the Court when the Motion to Dismiss was filed. Using Appellant’s argument, the mere presenting of the Answer and Exhibits automatically converts the Motion to Dismiss to a Motion for Summary Judgment. This is not a correct interpretation of the statute and Rule 12(b)(6) SCRCP. Further, the Answer (first sentence, Answer p.1, R. _____, clearly states “*Subject to my Motion to Dismiss filed herewith*, I, Anthony E. Griffis, Sr., as Defendant, answer the Complaint...”

II. The trial court did not err in dismissing Appellant’s claims for failing to obtain the expert affidavit as required by S.C. Code Ann. §15-36-100.

South Carolina Code Ann. §15-36-100 mandates the filing of an affidavit of an expert witness contemporaneous with the filing of the complaint, if the complaint is alleging negligence against a licensed professional as listed in the statute. S.C. Code Ann. §15-36-100(G)(2) includes ‘attorneys at law’ in the professions covered by the contemporaneous filing requirement. The statute does not require a direct

“attorney-client” relationship—only that an attorney is accused of malpractice, whether it is by a client or someone claiming a “third party” beneficiary status.

In his Brief, Appellant concedes that an affidavit would be required for claims of professional negligence. “The sole issue addressed in this portion of the brief is whether the claims brought by a third party realtor seeking funds derivative to a listing agreement were claims of “professional negligence” when the alleged tortfeasor is an attorney. If so, then an affidavit would be required.” Appellant’s Brief, p.9, n.1, R. _____. Appellant further argues that the affidavit statute should not apply to a claim involving breach of fiduciary duty brought by a third party for an act or omission arising outside of an attorney-client relationship between the plaintiff and the defendant. Appellant’s Brief, p.10, R. _____.

Appellant is accusing Respondent of breaching a fiduciary duty to him. Complaint ¶74-83, R. _____. However, he admits that this “duty” arose out of the attorney-client relationship between Respondent and the Seller. Complaint ¶75, R. _____. Appellant further admits in his Brief: “While the professional relationship between Appellant and the seller was an important factor as to any joint liability, *the fiduciary duty arose out of the agency arrangement between Appellant’s brokerage and the seller.*” Appellant’s Brief, p.10-11, R. _____,¹ Thus, the Appellant is arguing that his broker was in an agency relationship with the seller, which somehow arose from the listing agreement, and that this imposes a fiduciary duty on the Seller’s attorney to Appellant as a third-party beneficiary to such agency arrangement. Assuming this scenario is true, then under agency law the broker

¹ While such an “agency” arrangement seems farfetched and lacks legal and factual support, Respondent assumes its legitimacy merely for purposes of argument.

would be the principal, and the seller an agent of the broker - and the logical result after the seller hires the attorney (Respondent herein) as his agent and closing attorney, the Respondent then becomes the agent of the broker! This would, under agency law, create an “attorney-client” relationship between the Respondent and the broker—which is the only way that such a fiduciary duty claimed by Appellant could be created (as a third-party beneficiary to this convoluted agency theory). Regardless, under the agency theory advanced by Appellant, the result is that any breach of fiduciary duty would have to arise under an attorney-client relationship (with the duty ultimately owed to the broker as the principal in the agency arrangement).

The Complaint does not allege that Respondent acted in any capacity other than as an attorney representing the Seller in the closing. Complaint ¶¶74-83, R. _____. The Order to Dismiss, Order, p.2, R. _____, correctly concluded that the affidavit was required because all claims against Respondent arose out of his legal representation of the Seller in the closing (and in no other capacity other than as an attorney).

As used in §15-36-100, “professional negligence” is a breach of a duty owed to the Plaintiff which proximately causes damage to the Plaintiff. Because of the nature of the attorney-client relationship, this duty is usually a “fiduciary duty.” In *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166 (2012), the Supreme Court held that *all* claims arising out of the “attorney-client” relationship should be merged with the malpractice claim (which would be subject to S.C. Code Ann. §15-36-100), even if pled as “breach of fiduciary duty” against the attorney. This issue was further clarified in 2013 in the case of

H&H Johnston v. Old Republic National Title Co, and Henry Bufkin, 405 S.C. 469, 748 S.E.2d 72 (S.C. App. 2013), wherein the Plaintiff alleged that the Defendant real estate closing attorney (Bufkin) breached his duties as a title insurance agent by failing to explain to Plaintiff what exceptions were in the title insurance policy. Bufkin filed a motion to dismiss based on §15-36-100(B); the Plaintiff argued that §15-36-100 did not apply because Plaintiff was suing Bufkin as a title agent, not as an attorney. However, the circuit court held that “insofar as the complaint attempts to assert any claim against Bufkin in his capacity as an attorney, the same is dismissed for failure to state a claim pursuant to section 15-36-100”. The Court of Appeals affirmed, finding that Bufkin was acting as an attorney at the closing, and that §15-36-100 applied.

Here, Appellant/Plaintiff was required to file an expert affidavit contemporaneously with the Complaint, because all claims against Respondent arose *solely* out of his legal representation of the Seller in the closing (and in no other capacity other than as an attorney).

The affidavit statute, S.C. Code Ann. §15-36-100(B), does not require privity, only that a professional listed in §15-36-100(G) is sued for negligence. If privity was a statutory requirement, then the purpose of the statute (to minimize frivolous lawsuits) would be frustrated. Among the listed professions are architects, land surveyors, professional engineers, etc. Certainly the purpose of the affidavit statute would be frustrated if injured parties not in privity (for example, a defective building design by an architect resulting in a third party claim) did not have to comply with the affidavit rule.

The authority Appellant cites in his Brief does not support his position that, as he asserts, South Carolina “imposes a privity requirement as a condition to maintaining a ‘legal malpractice’ claim in South Carolina.” Appellant’s Brief, p .7, R. _____. *See generally Fabian v. Lindsay*, 410 S.C. 475, 765 S.E2d 132 (2014) (cited by Appellant in his brief at pp.6-7.) Appellant’s argument appears to be that, because of this alleged privity requirement, his claim as a third-party beneficiary, not in direct privity with Respondent, is somehow exempt from the affidavit requirement, in that it could not be deemed a “legal malpractice claim.” However, this is not consistent with his agency theory (wherein the breached duty to him arose from the agency arrangement between the broker, seller and Respondent, and, under agency law, the Respondent would be the agent of the broker, thereby establishing an attorney-client relationship), nor §15-36-100 (which does not require privity, only a negligence or malpractice action by a client or third party).

Moreover, the *Fabian* case does not support Appellant’s position. Appellant’s Brief p.7, R. _____. *Fabian* recognizes a cause of action by a third-party beneficiary of a will or estate planning document against a lawyer whose drafting error defeats the client’s intent. *Fabian*, at 492. Throughout the *Fabian* decision, the Court (and the dissenting opinion) referred to an action by a third-party beneficiary as a “legal malpractice” action, which would certainly be subject to the expert affidavit statute (regardless of lack of privity).

Before *Fabian*, our Court recognized absolute immunity for attorneys (acting on behalf of a client) against third-parties not asserting an attorney-client relationship—focusing instead on the attorney’s undivided loyalty to a client (and not the

third-party). *See generally Rydde v. Morris*, 675 S.E.2d 431, 381 S.C. 643 (2009). In *L & H Airco v. Rapistan Corp*, 446 N.W.2d 372 (Minn. 1989), (cited by Appellant for his argument that an attorney may be held liable for conspiracy with his client), Appellant's Brief, p. 18, R. _____, the court there actually held that the attorney was not liable to an alleged defrauded adversary party, stating: "the adversarial party is not without a remedy. He or she can pursue a fraud action against the person actually causing the loss: the attorney's client... Personal liability against the attorney is not warranted." *L & H Airco*, at 381.

The other cases cited by Appellant also fail to offer support for his position in this regard. In *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct.App.1986), the Court of Appeals held that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." The Court in *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995) did acknowledge that *Garr* does not apply to acts taken outside the scope of professional relationship of the client; however, the Court nevertheless found that the attorney was acting at all times in his capacity as Stiles' attorney, and was therefore immune as to any activities conducted in his professional capacity, including any cited in the conspiracy claim (following *Garr*).

In the instant case, Respondent was acting at all times in his capacity as the seller's attorney and is immune from Appellant's claims, and nothing cited by Appellant imposes liability on Respondent or changes the expert affidavit requirement.

III. Appellant's claims are barred by the Statute of Limitations.

Appellant is seeking to collect a real estate commission from a closing occurring on May 7, 2009. Complaint ¶12, R ____). Respondent was not served with the Complaint (filed July 18, 2018) until October 30, 2018.

The three-year statute of limitations period applies to these causes of action. S.C. Code Ann. §§ 15-3-530(1) & (5).

The "discovery rule" of S.C. Code Ann. §15-3-535 provides that "all actions must be commenced within 3 years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action". Appellant alleges that he did not discover his claims against Respondent until receiving a letter dated July 19, 2017, from the Buyer's attorney stating that Respondent had informed the Buyer's attorney that no commission was payable at closing. Complaint ¶53, R _____. However, the Appellant knew, and certainly by the exercise of reasonable diligence, should have known, that he had a cause of action when no commission was paid at closing on May 7, 2009, and not paid after a formal 15-day demand letter for payment, dated October 29, 2009, went unanswered. Complaint ¶20-21, R _____.

Commencement of the period of limitations begins when Plaintiff "could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Dorman v. Campbell*, 331 S.C. 179, 500.

S.E.2d 786 (Ct. App. 1998). Although Plaintiff alleges he exercised “reasonable diligence,” Complaint ¶53, R ____, the *Dorman* court makes clear that:

The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed.

Dorman, at 789.

See also *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575-76, 593 S.E.2d 624, 627 (Ct. App. 2004) (stating under the discovery rule, “the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct”); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (explaining reasonable diligence means “simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist”).

The Appellant’s ‘injury’ or ‘claim’ is the non-payment of the Sales Commission by the Seller at the closing on May 7, 2009. Appellant admits that his Broker-in-Charge sent a written demand to both attorneys for the Seller and Buyer on October 29, 2009, providing 15 days to pay the Commission, and admits that this demand was not met. Complaint, ¶19-21, R ____. Appellant also admits that he knew that the demand had not been met by the 15 day deadline. Complaint ¶22-24, R ____. The latest date that Appellant

would have been put on notice that he had a claim against another party for the Commission would have been November 13, 2009, the 15-day deadline lapse of the October 29, 2009 demand letter. The three (3) year statute of limitations would have expired no later than November 13, 2012.

Further, Appellant's argument that Respondent "contrived a cover story which clouded such conduct" regarding the nonpayment of the commission is manifestly without merit. Appellant's Brief, p.13, R _____. Appellant knew there was no intention to pay the commission after lapse of the 15-day demand letter on November 13, 2009. Complaint ¶20-21, R _____. If Appellant had exercised "reasonable diligence" for payment of the alleged (\$100,000.00) commission, he should have been at the closing on May 7, 2009, with his hand out—and certainly he should have taken legal action against the Seller and/or closing attorneys before November 13, 2012.² However, the Seller's closing attorney was not sued until almost six years later (July 18, 2018), and the Seller (the only party contractually obligated to pay a commission) has never been sued at all.

IV. Appellant's claims are illegal and void as against public policy.

Any commission that was due in the underlying transaction would have to have been paid, by law, to the Broker in Charge for whom the Appellant worked, and he freely admits this in his Complaint.

By regulation and law, the Commission could not be paid directly to the Plaintiff but must instead had to be made to the Broker in Charge for the realty for whom he was

² The Appellant obviously knew the limitations period was about to expire on November 13, 2012, because he filed his action against the broker on November 12, 2012, *the day before* the expiration. Complaint ¶26, R. _____.

working.

Complaint ¶16, R ____.

Further, the contract dated August 2, 2007, pursuant to which Appellant claims a commission, provided that any commission must be paid to the Broker in Charge and not to Appellant. Complaint ¶9, R ____.

Appellant cannot maintain this action to recover any commission, when the laws, regulations and contract forbid any direct payment to him of said commission.³

It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act, and one who participates in an unlawful act cannot recover damages for the consequence of that act. 86 C.J.S. Torts § 12 (1954). This rule applies at both law and in equity, and whether the cause of action is in contract or in tort. 1A C.J.S. Actions § 29 (1985). *See also Graham v. Graham*, 276 S.C. 341, 278 S.E.2d 345 (1981); *Nelson v. Bryant*, 265 S.C. 558, 220 S.E.2d 647 (1975); *Roundtree v. Ingle*, 94 S.C. 231, 77 S.E. 931 (1913); Restatement (Second) of Torts § 774 (1977).

The illegality doctrine was recognized by the U.S. Supreme Court which held, in the case of *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), that illegality is a defense to a contract action:

³ It should be noted that *both* causes of action are barred because of the lack of expert affidavit, lapse of the statute of limitations, illegality of Appellant bringing an action for direct payment, and lack of standing. Any argument that the conspiracy claim does not violate public policy ignores (1) the admitted illegality of the claim in seeking direct payment, in contravention of the laws, regulations and contract in this matter, and (2) the fact that the "conspiracy" claim incorporates all of the preceding allegations of the Complaint (which admits the illegality of the underlying claim). Complaint ¶83, R ____.

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. *Id.* at 654, 19 S.Ct. at 845.

South Carolina courts have reached similar conclusions in refusing to aid plaintiffs who are themselves guilty of an illegal act. South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993). It is a well-settled principle of law that “a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice.” *McConnell v. Kitchens*, 20 S.C. 430, 437–38 (1884); *see also Pendarvis v. Berry*, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) (“Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.”) (*quoting Gilliland v. Phillips*, 1 S.C. 152 (1869)). As a general rule, both at law and in equity, a court will not aid either party to an illegal contract ... but leaves the parties where it finds them.” *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (S.C. 2012).

Appellant quotes the dissenting opinion in *Page v. Winter*, 240 S.C. 516, 574, 126 S.E.2d 570 (1962) to support his proposition that the “public policy in South Carolina is that the common law abhors a wrong without a remedy”. Appellant’s Brief, p.15. the *Page* case, however, is inapposite: *Page* involved only a public policy issue, the right of a

spouse to maintain an action for loss of consortium caused by an automobile accident. Contrary to Appellant's assertion, the court in *Page* actually **affirmed** on public policy grounds. More importantly, though, *Page* did not involve illegal conduct—a significant contrast to the instant case, wherein the Appellant freely admits his illegal acts (being paid his alleged commission directly).

Finally, notwithstanding Appellant's implication otherwise, legal remedies were available to the Appellant in his case, to wit: The broker could have sued the Seller and closing attorneys for the commission (which they failed to do, after the 15-day demand letter expired, for whatever reason). Complaint ¶20-21, R. _____. Appellant also had a remedy—suit against the broker—which he exercised in his action filed on November 12, 2013. Complaint ¶26, R. _____.

V. Appellant did not have standing to bring his action.

The Complaint states that any commission **MUST** be paid to the broker-in-charge (and not directly to the Plaintiff), pursuant to the South Carolina real estate laws and regulations, and the contract upon which the Appellant/Plaintiff's claims are based. Complaint ¶16, 9, R. _____. Therefore, the proper Plaintiff in any action for the commission, or any claims based upon non-payment (such as breach of fiduciary duty and conspiracy), is the broker-in-charge, **not** the Appellant/Plaintiff salesman.

Our Supreme Court, in *Bank of Am. N.A. v. Todd et.al.*, 405 S.C. 214, 746 S.E.2d 478 (S.C. 2013) held that “standing refers to a party's right to make a *legal* claim”. Standing is a fundamental requirement for instituting an action, *Bank of Am. N.A.* at 480.

The Court further held:

Rule 17(a) SCRPC requires that every action be prosecuted “in the name of the real party in interest”.... The South Carolina rule with respect to the real party in interest requirement is patterned after the comparable federal rule, which has been regarded as embodying the concept that an action shall be prosecuted “in the name of the party who, by the substantive law, has the right sought to be enforced.” **It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property.** (bold emphasis added)

4 S.C. Jur. *Action* § 23 (1991) (footnotes omitted). “The requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct.App.2000) (internal quotation marks omitted).

Therefore, although Appellant may be claiming a substantial “ownership” in the commission, the “right” sought to be enforced is owned by the broker, pursuant to the admitted laws, regulations, and contract.

VI. The Conspiracy claim also failed (1) by not being a separate and distinct claim, and also (2) by not alleging special damages.

The Appellant alleged below that the “allegations of the paragraphs above are hereby adopted and by express reference made a part of this cause of action.” Complaint, ¶83, R. __. Thus, the conspiracy claim is subject to dismissal on all the other grounds (i.e., no expert affidavit, expired statute of limitations, illegality of the claim in seeking direct payment, and no standing). However, the conspiracy claim is also defective on two additional independent grounds: (1) it was not a separate and distinct claim, and (2) no special damages were alleged. Both of these grounds must be shown for the conspiracy claim to survive dismissal.

The allegations of the Second Cause of Action, Complaint, ¶84-86 R ____, contain the exact same acts contained in the First Cause of Action, Complaint, ¶79-81, R ____, with the exception of naming the Seller as a participant in the alleged actions that resulted in the purported damages (i.e., real estate commission) to Plaintiff. *Hackworth v. Greywood at Hammet, LLC*, 385 S.C.110, 682 S.E.2d 871 (Ct. App 2009) states that, if the plaintiff simply reiterates the allegations in its other causes of action in its civil conspiracy claim, without being separate and distinct from the other claims, then the civil conspiracy claim fails. C.F. *Todd v. S.C. Farm Bureau*, 276 S.C. 284, 278 S.E.2d 607 (1985).

Hackworth further explains:

In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim. *See id.* at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy claim because "the [civil conspiracy] action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead"); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct.App.2000); *Doe v. Erskine Coll.*, No. 8:04-23001RBH, 2006 WL 1473853, at *17 (D.S.C. May 25, 2006); *James v. Pratt & Whitney*, 126 Fed.Appx. 607, 613, 2005 WL 670623 (D.S.C.2005).

Hackworth at 875.

Hackworth also holds that "if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Hackworth* at 875-876. *See also Vaught v. Waites*, 300 S.C. at 209, 387 S.E.2d at 95, which held that "because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred

under *Todd*". Appellant's attempt to allege "special damages" by simply calling the same damages alleged in the First Cause of Action "special damages", does not make said damages "special." The only damages specified in both causes of action are money damages from non-payment of the commission and loss of investment. (Comparing Complaint ¶¶70, 71, and 86 with ¶¶81-82, R. ____).

The conspiracy claim duplicates the damages of the first claim. The only other allegation of damages (which arguably could also be damages in the first claim) are the costs of pursuing another lawsuit against a "third party" (the broker). This ignores the fact that the lawsuit against the broker was the sole remedy of the Plaintiff according to the admitted SC laws, regulations and underlying contract.

CONCLUSION

For the reasons stated, this Court should affirm the Order of the circuit court dismissing the Appellant's Complaint, because (1) an expert affidavit is required by S.C. Code Ann. §15-36-100 and was not filed with the Complaint; (2) the applicable statute of limitations for the Complaint expired; (3) Appellant's claims are illegal and void as against public policy, against the admitted laws and regulations of South Carolina, and against the underlying contract; (4) Appellant lacks standing to bring this action, and (5) the "Conspiracy" claim also fails by not pleading separate and distinct independent facts in support of the alleged conspiracy, and also by not showing "special damages".

Respectfully Submitted,



Anthony E. Griffis, Sr.
355 Park Ave SW
Aiken, SC 29801
(843) 368-5013
Respondent

December 20th, 2019

Sean Michael Bolchoz
Bolchoz Law Firm PA
PO Box 22650
Hilton Head Island, SC 29925
(843) 836-3033
sbolchoz@bolchozlaw.com
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

DEC 23 2019
SC Court of Appeals

The Honorable Eugene C. Griffith, Jr.

Trial Court Case No. 2018-CP-07-01449
Appellate Case No. 2019-000941

Floyd Hargrove.....Appellant,

v.

Anthony E. Griffis, Sr.Respondent.

PROOF OF SERVICE

I certify that I have served the **RESPONDENT'S INITIAL BRIEF and DESIGNATION OF MATTER** on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on December 20th, 2019, addressed to Appellants' attorney of record, James A. Brown, Esq., PO Box 592, Beaufort, SC 29901.

December 20th, 2019



Anthony E. Griffis, Sr.
355 Park Ave SW
Aiken, SC 29801
(843) 368-5013
Respondent

Sean Michael Bolchoz, Esquire
Bolchoz Law Firm, PA
S.C. Bar No. 15860
PO Box 22650
Hilton Head Island, SC 29925-2560
(843) 836-3033
sbolchoz@bolchozlaw.com

Anthony E. Griffis
355 Park Ave SW
Aiken, South Carolina 29801
(843) 368-5013
E-mail: tonygriffis@gmail.com
December 20, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
DEC 23 2019
SC Court of Appeals

Re: Floyd Hargrove v. Anthony E. Griffis, Sr.
Appellate Case No. 2019-000941

Dear Ms. Kitchings:

Enclosed for the referenced appeal are the Respondent's Initial Brief, Designation of Matter to be Included in the Record, and Affidavit of Service.

Sincerely,



Anthony E. Griffis

cc: James Arthur Brown, Jr., Esq.
Sean Bolchoz, Esq.

CERTIFIED MAIL

Anthony E. Griffis

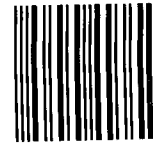
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Aiken, SC 29801



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The Honorable Jenny Abbott Kitchings
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