

THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Common Pleas Number(s): 2018-CP-07-01449
Appeal Court Number: 19-00941

Floyd Hargrove Appellant
v.
Anthony E. Griffis, Sr., Respondent

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Trial Court err in dismissing Appellant's Cause for Breach of a Fiduciary Duty?
 - A. Was an expert affidavit required in a claim against an attorney who was not in privity of contract with the Appellant making the claim?
 - B. Was Appellant's claim timely made when filed within one year of the closing attorney notifying Appellant that Respondent was the cause of the non-payment of a realtor commission owed to Appellant?
 - C. Was Appellant barred by public policy from recovering his portion of the realtor fees because he was not a broker in charge, but instead only the realtor who made the sale?
 - D. Did Appellant have standing to pursue his claim of breach of a fiduciary duty?

- II. Did the Trial Court err in dismissing Appellant's Cause for Conspiracy?
 - A. Was an expert affidavit required in a conspiracy claim alleging an attorney conspired with others, including non-lawyers, to conceal tortuous conduct through an unauthorized alternative payment arrangement of a real estate commission?
 - B. Was Appellant's conspiracy claim timely made when filed within 6 months of Appellant's discovery of an unauthorized modification of the terms of the real estate commission payment?
 - C. Was Appellant barred by public policy from recovering damages caused by a conspiracy to cover up tortuous conduct?
 - D. Did Appellant have standing to pursue his claim of conspiracy?
 - E. Did Appellant sufficiently plead special damages?

STATEMENT OF THE CASE

Appellant filed a summons and complaint on or about July 18, 2018. (R. p. 50-57). This complaint alleged two causes of action, breach of fiduciary duty and conspiracy, over 86 paragraphs pled within seven pages. R, p. 51-57. Appellant sought a jury trial as to the issues of liability and damages. (R. p. 51).

An answer was filed on November 14, 2018. (R. p. 58). The answer contained a general denial as to both causes of action, an objection as to the existence of a fiduciary duty, and an objection to the pleading as to special damages. (R. p. 58-61). The answer also complained of the failure to provide an expert affidavit, of the running of the statute of limitations, of the public policy preventing recovery by Appellant, a lack of standing, and accord and satisfaction. (R. p. 61).

The answer included four exhibits. (R. pp. 63-79). These exhibits included documents relating to real estate negotiations. (R. pp. 63-73). These exhibits also included emails and letters discussing the payment of the real estate commission of which Appellant complains. (R. pp. 74-79).

Respondent also filed a Notice and Motion to Dismiss pursuant to SCRPC Rule 12(b)(6) and SC Code Section 15-36-100 on November 14, 2018. This motion asserted dismissal was appropriate for the same reasons asserted as defenses in the answer except for the general denial, the denial as to the existence of a fiduciary relationship and the accord and satisfaction. A hearing was held on this motion on January 8, 2019.

The Honorable Eugene C. Griffith, Jr. presided at this hearing. The Appellant was represented by undersigned counsel. Respondent represented himself.

Argument was held during which the Court referenced the pleadings in this case as well as pleadings in a related case which was referenced in the complaint. (R. p. 80-120). The Court also considered the evidence attached as exhibits to the answer. After taking the matter under advisement, the Court requested that Respondent prepare a proposed order granting the motion.

Undersigned filed objections to the proposed order. (R. pp. 14-18). Respondent filed a response to these objections. (R. pp. 19-20). The Court signed the order without modification and it was filed on March 15, 2019.

Undersigned then filed a Motion to Alter or Amend. (R. pp. 27-31). Respondent filed a response to this Motion. (R. p. 32). The Court signed a Form 4 order denying the Motion on April 25, 2019. (R. p. 24).

A Notice of Appeal was filed on May 28, 2019. This Notice was served upon Respondent on May 28, 2019. This brief follows.

STATEMENT OF FACTS

On or about July 18, 2018, Appellant filed a complaint asserting two causes of action. The first cause of action alleged a breach of fiduciary duty and the second cause of action alleged a civil conspiracy. The following facts are pled in the complaint.

Appellant worked as a real estate agent who procured the sales contract between the seller of a piece of commercial real estate and the buyer. (R. p. 51, ¶ 4-6). The sales price was averred as four million dollars (\$4,000,000.00). (R. p. 51, ¶ 7). The two point five percent (2.5%) commission equaling one hundred thousand dollars (\$100,000.00) was owed to the realty for whom the Appellant was working at the time of closing. Complaint, ¶ 9. Respondent was the attorney representing the seller who owed the commission. (R. p. 54, ¶ 44).

Appellant was working for Citadel Realty at the time of the closing. (R. p. 52, ¶ 13). Appellant was owed seventy percent (70%) of this commission. (R. p. 52, ¶ 15). Despite assurances from Citadel Realty that its legal counsel would obtain the commission, Appellant was never paid. (R. p. 52, ¶ 19-23).

Appellant then made a demand of Citadel Realty which was unmet. (R. pp. 52-53, ¶ 24-25). Appellant filed suit against Citadel Realty on November 12, 2013. (R. p. 53, ¶ 26). This suit alleged three causes of action. (R. p. 53, ¶ 27).

Appellant filed a motion for default judgment followed by Citadel's motion to dismiss which, following conversion to a summary judgment motion, was granted. (R. p. 53, ¶ 28-31). However, Appellant filed a motion to alter or amend. This motion was partially granted and a part of the case was restored to the docket. (R. p. 53, ¶ 32).

The matter was mediated on May 11, 2016. At this time, Appellant was provided a document from an attorney involved in the closing which assured counsel for Citadel Realty that the commission would be paid. (R. p. 53, ¶ 34). Appellant had not seen this document before despite discovery requests. (R. p. 53, ¶ 35).

Appellant then sought to depose the attorney for the purchaser of the property and in doing so was provided a letter from the closing attorney. (R. p. 53, ¶ 36-40). The closing attorney informed Appellant that no commission was paid because Respondent told him not to pay the commission. (R. p. 54, ¶ 43). This July 19, 2017 letter was the first time that Appellant learned that another party caused the non-payment of the commission to anyone. (R. p. 54, ¶ 43-49).

According to the letter, Respondent told the closing attorney that no real estate

commission “remained due at the time of closing.” (R. p. 54, ¶ 50). Following the receipt of this information, undersigned contacted Respondent indicating an intention to file suit over this conduct. (R. p. 54, ¶ 53-55). Respondent acknowledged in a January 23, 2018 email that no funds were allocated for the commission at all. (R. p. 54, ¶ 56).

Respondent continued by asserting that alternate payment arrangements were made by which the commission would be paid at some future time following a condition precedent involving the development of the property. (R. p. 55, ¶ 57-58). Appellant was not aware of any alternative agreement, did not agree to the same and is unsure whether the condition precedent has occurred. (R. p. 55, ¶ 59-62). Appellant does not know if such an alternative agreement was made with others and only learned of this assertion by Respondent through the January 23, 2018 email.

Appellant spent resources litigating the case against Citadel Realty. (R. p. 55, ¶ 70). Appellant lost the value of his portion of the commission. (R. p. 55, ¶ 72). Appellant lost the investment opportunity to the money if an alternative payment arrangement was made. (R. p. 55, ¶ 71).

STANDARD OF REVIEW

“A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true. ...[The court must] construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true. If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard applied by the trial court. This Court is free to decide questions of law, such as whether South Carolina recognizes a certain cause of action, with no particular deference to the trial court.” *Fabian v. Lindsay*, 765 S.E.2d 132, 136 (SC 2014).

ARGUMENT

The trial court erred in dismissing both of Appellant’s causes of action against Respondent.

Aside from the particular arguments presented below, the trial court’s ruling is erroneous because he did not view the averments in the light most favorable to Appellant. Further, the trial court considered evidence not pled in the sworn averments. (R. pp. 63-79). This converted the motion before the court to a summary judgment motion under SCRCP Rule 56, despite the statements in the Order Granting Motion to Dismiss to the contrary.

When certain outside information is considered, the review is converted to a summary judgment motion. See SCRCP Rule 12(c). When such occurs, all parties are to be given a “reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” SCRCP Rule 12(c). The court’s dismissal is then erroneous because Appellant had not been able to engage in discovery in the suit by the time the motion was heard. See R., p. 113, l. 23- p. 114, l. 2.

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S CLAIM OF BREACH OF A FIDUCIARY DUTY

A. An Expert Affidavit Was Not Required

The trial court erred by finding a claim of breach of a fiduciary duty made against an

attorney was a claim of “professional negligence” requiring an expert affidavit at the pleading stage. An expert affidavit was not required because the fiduciary duty owed Appellant did not arise out of a professional relationship between Appellant and Respondent. The trial court’s order implicitly and incorrectly equated the fiduciary duty owed to Appellant by Respondent with one owed by attorney to his client. Because the trial court extended such a requirement to a cause of action not alleging professional negligence, this Court should reverse.

A plaintiff is required to obtain an expert affidavit supporting professional liability when asserting claims against some professionals. An attorney is such a professional. SC Code Section 15-36-100. However this pleading requirement is limited to actions involving claims of “professional negligence.” SC Code Section 15-36-100(B).

South Carolina law requires an expert affidavit when a claim for professional negligence is brought against an attorney by one in privity with that attorney. See *H and H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 748 SE2d 72 (SC 2013).

South Carolina law “imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina.” *Rydde v. Morris*, 675 S.E.2d 431, 435 (2009). “A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 170 (2012). Privity, in a legal malpractice setting is “established by the existence of an attorney-client relationship.” *Fabian v. Lindsay*, 765 S.E.2d 132, 136 (2014).

In contrast, to plead a claim for breach of fiduciary duty, the plaintiff must allege: (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and

(3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012). “A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Pitts v. Jackson Nat. Life Ins. Co.*, 574 S.E.2d 502, 507 (SC Ct. App. 2002). The South Carolina courts have recognized that an attorney may be liable for breach of a fiduciary duty. See *RFT Mgmt. Co.*, 732 SE2d 166, 173 (SC 2012) (“Our courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship.”)(Internal quotation omitted).

The South Carolina Supreme Court has held that a breach of fiduciary duty claim merges with a professional negligence claim when the fiduciary duty arises “out of the duty inherent in the attorney-client relationship.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012). On the other hand, a claim for breach of fiduciary duty, as a general matter, is distinguishable from a claim for legal malpractice because it can arise in contexts other than one involving an attorney-client relationship. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012). One must plead an obligation which “arises out of a duty other than one created by the attorney-client relationship or because it is based on different material facts” to distinguish one’s breach of fiduciary duty claim from a legal malpractice claim. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (SC 2012).

Further, the South Carolina Supreme Court has expressly held that an “attorney may be held liable”... “where, in addition to representing his client, he breaches some independent duty to a third person...” *Stiles v. Onorato*, 457 SE2d 601, at 602 (SC 1995). The *Stiles* Court

reached this holding following citation with approval to various cases from other jurisdictions which “recognize[d] that an attorney may be held liable where he acts in bad faith.” *Stiles*, at 602. The *Stiles* opinion specifically mentioned that “an attorney may be held liable arising out of a conspiracy with his own client.” *Id.*

As mentioned by the *Stiles* Court, an attorney’s liability for a claim, as an exception to the general rule of immunity¹, arises when such a claim is made for “acts taken outside the scope of a professional relationship.” *Stiles*, at 602, distinguishing *Gaar v. North Myrtle Beach Realty Co., Inc.*, 339 SE2d 887 (SC Ct. App. 1986)(emphasis added).

The case of *LaBerre v Gold*, cited approvingly by the *Stiles* Court, held that an attorney may be liable when his actions in a real estate closing converted money owed to a third party to the benefit of his client. *Stiles*, at 602, citing *Laberre v Gold*, 520 So2d 1327 (Miss 1987). In *Laberre*, the sole attorney incorrectly disbursed purchase proceeds and failed to satisfy the obligations to a third party creditor. The *Laberre* Court noted that the attorney, Laberre, only represented the party who improperly converted the money. Nonetheless, the *Laberre* Court held: “[w]hile an attorney cannot be held liable to third parties for his actions made in furtherance of his role as counselor, he has a duty to refrain from committing tortuous acts against third parties.” *LaBarre v. Gold*, 520 So. 2d 1327, 1331 (Miss. 1987).

Thus, attorney liability may take the form of other torts aside from professional

¹This appeal does not involve questions of immunity or whether a fiduciary duty was owed by Respondent to Appellant as neither of these questions were raised. The sole issue addressed in this portion of the brief is whether the claims brought by a third party realtor seeking funds derived from a listing agreement were claims of “professional negligence” when the alleged tortfeasor is an attorney. If so, then an affidavit would be required. If not, then the trial court erred in granting a 12(b)(6) dismissal on this ground.

negligence. Such liability can arise out of a special duty owed to third parties. As such, this conduct is beyond the reach of the statute requiring an expert witness affidavit.

The expert affidavit requirement of SC Code § 15-36-100 has never been extended by statute or case law to apply to an action involving a claim of 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.

In the case at bar, Appellant pled that the liability arose from a duty owed by Respondent to Appellant, a third party, and was not pled as arising out of the attorney client professional relationship between Respondent and Appellant.

The action pled in the case at bar included a claim of breach of a fiduciary duty asserted by a real estate agent (Appellant) against an attorney (Respondent). As pled, Respondent represented the seller in a real estate transaction. (R. p. 54, ¶ 44). As pled, Respondent told the closing attorney that no real estate commission “remained due at the time of closing.” (R. p. 54, ¶ 50).

Specifically, the complaint did not allege privity between the Appellant and the Respondent. As such no claim of legal malpractice could have been brought by the Appellant against the Respondent. Thus, the pleading contained no professional negligence claim to merge with the breach of a fiduciary duty claim and no such professional negligence claim could have been made.

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. See *Rft Mgmt. Co, Inc.*, 173 (the duty is distinguishable if

it arose out of a duty owed other than one created by an attorney client relationship.) It may be that the seller was equally liable as to the breach of a fiduciary duty if he personally told the closing attorney to not pay the commission to the broker and no professional relationship would be involved. In this sense, Appellant did not complain of professional negligence.

Thus, the trial court erred in requiring an expert affidavit to a situation in which no professional relationship between the parties at suit existed.

B. The Statute of Limitations Had Not Run

The trial court erred in dismissing Appellant's breach of fiduciary duty claim when he found that the complaint failed to plead due diligence in the discovery of the action against Respondent. To the contrary, the pleading detailed the steps Appellant took to recover the damage he suffered when he was not paid his portion of the proceeds due from the real estate commission. When viewed in the light most favorable to Appellant, the trial court should have allowed discovery on the issue instead of accepting Respondent's version of events that he did not commit any tortuous conduct.

By statute, the statute of limitation for a cause of action for breach of fiduciary duty is three years. SC Code § 15-3-530. The law clarifies the triggering date for such a time line indicating that the action "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." SC Code § 15-3-535. The one seeking to impose the bar of the statute of limitations rests upon the one asserting it. *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 806 (D.S.C. 2011), on reconsideration in part (Jan. 11, 2012)(Internal quotations and citations omitted). If the material facts as to whether the statute of limitations is a bar are disputed, the issue is one for the jury. *Id.* When there is

conflicting evidence as to whether a claimant knew or should have known he had a cause of action, the question is one for the jury. *Id.*

To judge whether Appellant exercised due diligence, one must examine the steps taken by Respondent to breach the fiduciary duty owed Appellant and cover up this breach. As pled, Appellant was owed a portion of the proceeds from the commission of a sale of real estate. While the seller owed this money to the broker in charge of the realty company (Citadel Realty) for whom Appellant was working at the time of closing, Appellant originally took suit against this company for a claim of conversion. (R. p. 52, ¶¶ 9, 24-33).

At the mediation and despite previous discovery requests, Appellant learned for the first time that a third party attorney assured Citadel Realty that the commission would be paid. (R. p. 53, ¶¶ 33-35). Prior to the discovery of this document, Appellant believed that non-payment had been caused by the tortuous acts of Citadel in pursuing the money from the closing attorney. Appellant received this letter on May 11, 2016; 26 months before the filing of the suit against Respondent.

As pled, Appellant followed the discovery of this letter with requests to examine the closing documents to learn who did receive the commission money. (R. p. 53, ¶¶ 36-39). On July 19, 2017, Appellant learned for the first time that no commission had been paid at the closing. (R. pp. 53-54 ¶¶ 40-42). This letter also indicated that Respondent caused this non-payment through his affirmative act of misleading the closing attorney that no commission was due. (R. p. 54, ¶¶ 43-53).

Appellant had no reason to believe the commission had been withheld from everyone or that such withholding was caused by Respondent's statement. In fact, the statement of the

closing attorney implicating Respondent in a tort is not something which would be expected from any closing documents or other related items. It is just not normal to believe that an attorney would prevent payment where due because such a person is one in whom others trust to exercise fair dealings with third parties in real estate transactions. See Argument IA, above.

But more than being an abnormal action, Respondent and others contrived a cover story which clouded such conduct. As pled, Respondent and others created documents supporting an alternative payment arrangement through which the commission would be paid through the sale of home sites. This cover story was a smoke screen to conceal the truth from Appellant.

In fact, Respondent attempted to deflect liability prior to the filing of the suit by providing undersigned with the cover story in an email sent on January 23, 2018, less than six months before the filing of the instant suit. (R. pp. 54-55, ¶¶ 56-63). It would be illogical to believe that Appellant knew an action against Respondent had accrued when Respondent's assertions to undersigned suggest that the condition precedent for payment of the commission has not yet occurred. (R. p. 74, section 5 and R. p. 77, section 10). Appellant can not have both filed the suit too late and filed the suit too early.

Appellant also pled that this email was another act in the commission of the tort of breach of the fiduciary duty enlarging the time period of the commission of this tort. (R. p. 55, ¶ 69). Appellant filed this suit well within three years of the act of sending this email. At the pleading stage, that is all that is required of Appellant to surpass a challenge under SCRCP Rule 12(b)(6).

Thus, because Appellant exercised reasonable diligence and pled the same, the trial court erred in dismissing the matter on these grounds. Further, Respondent should not be able to assert

a cover story that the commission is not yet due and at the same time assert that the commission was due so long ago that the injury to Appellant through the non-payment of the commission triggered the statute of limitations years ago. Such inconsistent facts, viewed in the light most favorable to Appellant, mandate a reversal of the trial court's order in this regard.

C. Plaintiff's Efforts to Litigate a Controversy and Redress a Grievance of More than Twenty Dollars Did Not Violate Public Policy

The trial court erred when it dismissed Appellant's complaint for breach of fiduciary duty because it found that recovery of monetary damages would violate public policy². No law preventing the recovery of monetary damages by a real estate agent in a tort claim was cited in the Order. (R. pp. 5-6, section 3). Instead, the Order merely indicates that the real estate commission itself could not be paid directly to Appellant at the closing; not addressing the issue of Appellant's right to bring suit to redress the injury caused by the tortuous acts of another.

In the complaint, Appellant pled that he was damaged by the non-payment of the commission due his broker because he did not received his portion. (R. p. 52 & 56, ¶¶ 15-18, & 82). Appellant pled that, while he could not be paid the commission directly, he had an equitable interest in seventy percent (70%) of the commission. (R. p. 52, ¶ 18). The commission amount serves as a yard stick by which a jury could judge the damage caused to Appellant by Respondent's actions in breach of the fiduciary duty owed Appellant.

Contrary to the trial court's reasoning, public policy in South Carolina asserts that the common law abhors a wrong without a remedy. *Page v. Winter*, 126 S.E.2d 570, 574 (SC

²It is not clear that such a dismissal is appropriate in a motion made under SCRPC Rule 12(b)(6).

1962)(“It is the boast and a primary principle of the common law that there can be no wrong without a remedy.”) A dismissal for public policy reasons would deprive Appellant the opportunity to pursue redress from a tortfeasor who caused the injury. Denial of this opportunity would violate public policy more than the receipt of any award to Appellant.

Thus, the trial court erred in dismissing Appellant’s efforts to collect for a breach of fiduciary duty on public policy grounds.

D. Appellant had Standing to File Suit

The trial court erred by finding that Appellant did not have standing to bring the cause of action for breach of fiduciary duty against Respondent. Appellant suffered an injury which was causally related to the Respondent’s actions and it was likely that a favorable outcome in this suit would redress this injury. Nothing more is required to assert constitutional standing.

The United States Supreme Court has defined the principle of standing under the United States Constitution as “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Supreme Court utilizes a three-part test to evaluate standing: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ ” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130 (internal citations omitted). The South Carolina Supreme Court utilizes

this same test when addressing issues of standing in suits brought in its state courts. *ATC S., Inc. v. Charleston Cty.*, 669 S.E.2d 337, 339 (SC 2008).

In the complaint, Appellant indicated that he was due a portion of a sales commission but had not received these proceeds. (R. p. 52 & 54, ¶¶ 9, 15, 18, 52 & 56). This is an injury in fact. Appellant possessed a legally protected interest in these proceeds and the withholding of these due funds actually injured Appellant by causing him to not receive the money he was due. (R. p. 56, ¶ 82).

Appellant indicated in the complaint that Respondent's actions caused the funds to be withheld and not disbursed at closing. (R. p. 54, ¶¶ 43- 45, 49, 50, & 51). Specifically, Appellant pled that "this commission was not paid because the [Respondent] informed [the closing attorney] not to pay any commission." (R. p. 54, ¶ 43). According to the closing attorney Respondent "advised (closing attorney CS and his staff) that no such amount remained due at the time of closing." (R. p. 54, ¶ 50).

Finally, Appellant pled that he was entitled to an award of money to make him whole for his loss in his prayer for relief. (R. p. 56, ¶ 82). It is likely that a monetary award would recoup the money lost when the commission was not paid. This satisfied the third prong of standing.

In comparison to the detailed pleadings addressing the standing concerns, the trial court's order merely stated a one sentence conclusion. (R. p. 6, section 4). This sentence does not include any citation to any law. Instead, this sentence merely restates an assertion that Appellant could not be paid a commission directly, not whether Appellant could receive an award of money from a jury of his peers.

Thus, the trial court erred in dismissing the pleading because Appellant lacked standing to

bring a claim of breach of fiduciary duty.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM FOR CONSPIRACY.

A. An Expert Affidavit Was Not Required

The trial court erred in dismissing the claim of conspiracy averred without an expert affidavit because this cause did not assert a claim of professional negligence.

As recounted above, one pleading a cause of action alleging professional negligence must incorporate into the complaint an expert witness affidavit. SC Code § 15-36-100. However, this requirement is limited to claims of professional negligence. A claim that an attorney conspired to commit a tort against a third party does not state a claim for professional negligence when such an act is outside of the professional relationship. *Stiles*, at 602.

In the complaint, Appellant alleged that Respondent and the seller agreed to not pay the sales commission. (R. p. 56, ¶¶ 84 and 85). Appellant averred that the reference to an alternative payment arrangement by Respondent in an email is an overt act in furtherance of the conspiracy. (R. p. 55, ¶ 68). As pled, this email and the alternative payment arrangement is an attempt to conceal the breach of the fiduciary duty pled in the first cause of action.

This agreement between Respondent and the seller is outside of a professional relationship as no such relationship existed between Respondent *and Appellant*. Further, Appellant alleged, unlike the plaintiff in *Stiles*, that Respondent breached an independent duty owed to Appellant. This is the fiduciary duty alleged in the first cause of action. (R. p. 54, ¶ 48). The trial court never found that such a duty did not exist as a matter of law. All the Appellant must do is plead that such a duty existed at this stage.

Further, Appellant pled that the suggested alternative payment arrangement was an attempt to conceal Respondent's acts causing the non-payment of the commission. (R. p. 55, ¶ 70). The concealment of tortuous conduct is not within a normal professional relationship. As indicated by the South Carolina Supreme Court, "attorneys have been held liable for fraud and conversion in conjunction with their representation of clients." *Stiles v. Onorato*, at 602; also see *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn.1989) (attorney who makes affirmative misrepresentations to an adversary or conspires with his or her client may be held liable for fraud); & *LaBarre v. Gold*, 520 So.2d 1327 (Miss.1987) (attorney liable for conversion for improperly paying real estate proceeds only to his client).

Thus, the trial court incorrectly dismissed this matter by erroneously finding that the conspiracy claim was one of professional negligence.

B. The Statute of Limitations Had Not Run

The trial court erred in finding that the statute of limitations had run as to the conspiracy cause of action.

As indicated above, the statute of limitations begins to run three years from the time that a plaintiff discovers through reasonable diligence that he has a cause of action against another. SC Code § 15-3-535. The commission of an overt act such as the promotion of a cover up email is an act committed in furtherance of the conspiracy. Appellant pled that Respondent engaged in an overt act within six months of the filing of this complaint in an effort to further this conspiracy when he presented Appellant's counsel with the sham alternative payment arrangement in a January 23, 2018 email. (R. p. 55, ¶ 68).

Further, Appellant pled that he could not have learned of this alternative payment

arrangement cover up except for the email from Respondent. (R. p. 55, ¶ 63).

Even if the statute of limitations ran as to other conspiracies, the email sent to Appellant was itself proof of an agreement to conceal the breach of the fiduciary duty *in 2018*. This agreement is actionable and was pled within three years of the email. Thus, the trial court erred in dismissing the second cause of actions as outside of the statute of limitations.

C. Plaintiff's Efforts to Litigate a Controversy and Redress a Grievance of More than Twenty Dollars Does Not Violate Public Policy

The trial court erred in dismissing the second cause of action for conspiracy as a violation of public policy.

An agreement to injure a plaintiff which causes special damages is all that is required to plead a cause of conspiracy. Appellant pled that Respondent and the seller entered an agreement. (R. p. 56, ¶ 84 & 85). Appellant pled that Respondent and seller entered this agreement to injure Appellant by depriving his company from receiving the funds to pay his portion of the fee. The special damages which arose from this agreement are pled as the time and expense pursuing suit against Citadel Realty and the loss of investment of the proceeds if in fact the commission is to be paid on a contingency. (R. p. 55, ¶¶ 70 & 71).

Thus, Appellant has sufficiently pled the second cause of action and the trial court's dismissal is erroneous.

D. Appellant had Standing to File Suit

The trial court erred in dismissing the second cause of action for a lack of standing.

As pled, Appellant suffered an actual injury- the non-payment of his portion of the commission, a delay in the payment of his portion if the alternative payment arrangement is

valid, and the time and resources spent pursuing Citadel Realty for non-payment of Appellant's portion of the fee. By the very assertion of Respondent that the alternative payment arrangement caused Citadel, and derivatively Appellant, to no longer be entitled to the commission, Respondent's actions can be linked casually to Appellant's damages. A verdict recompensing Appellant for the special damages pled in paragraphs 70 and 71 of the complaint would address this injury.

Thus, the trial court erred in dismissing the second cause of action for a lack of standing.

E. Appellant Pled Special Damages Separate from the Damages in the First Cause

The trial court erred in dismissing the second cause of action for a failure to plead special damages. Contrary to the court's Order, Appellant did plead special damages in two paragraphs in the body of the complaint and in a third paragraph within the section specifically discussing the second cause of action. Appellant pled damages for the second cause which were different from those asserted in the first cause of action.

To begin, a plaintiff must assert special damages in an action for civil conspiracy.

Hackworth v. Greywood at Hammett, LLC, 682 S.E.2d 871, 875 (SC Ct. App. 2009)(internal citations omitted). While general damages are inferred by the law as the immediate, direct, and proximate result of the act complained of, special damages are not implied at law because they do not necessarily result from the wrong. *Id.* Thus, a plaintiff must specifically allege special damages to avoid surprise to the other party. *Id.*

In the case at bar, Appellant pled that the special damages for the conspiracy included those incurred "because Plaintiff pursued suit against Citadel." (R. p. 55, ¶ 70). The Complaint also indicated that the special damages included the loss of investment created by the alternative

payment arrangement which by its terms delayed any payment of the commission from which Appellant would receive his due portion. (R. p. 55, ¶ 70). These two types of special damages were again reflected in the section of the complaint averring the elements of the conspiracy cause of action. (R. p. 57, ¶ 86).

The pleading of the general damages section for the first cause of action does not include any reference to the “loss of time and resources pursuing alternate legal remedies.” (R. p. 56, ¶ 82). Further, construed in the light most favorable to Appellant, the loss of investment pled as to the alternative payment arrangement in paragraph 71 differs from the loss of investment as to the non-payment of the commission engendered by the breach of the fiduciary duty pled in paragraph 82. While the measure of these two loss of investments might be similar, the alternative payment arrangement delays payment until a condition precedent occurs- the selling of certain parcels of property, while the loss of investment as to the non-payment of the commission is limited to the time the commission was due at the closing until the award by the jury. Thus, these are not the same loss of investment time periods.

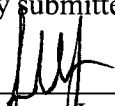
Nonetheless, the special damages suffered by pursuing a claim against Citadel Realty including the loss of time and resources is distinctly pled only as to the conspiracy cause of action and that is all that is required to pass a 12(b)(6) challenge. These damages are unique as to this tortuous conduct. Thus, the trial court erred in dismissing the conspiracy cause of action on this ground.

CONCLUSION

Therefore, this Court should reverse the trial court’s dismissal of both of Appellant’s cause of action. At a minimum, this Court should remand the matter to allow discovery so that

Appellant may oppose what developed into a summary judgment hearing. Otherwise, the Court should remand the matter until the time that any summary judgment motion would be appropriate.

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January 17, 2020
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THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM BEAUFORT COUNTY,
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Common Pleas Number(s): 2018-CP-07-01449
Appeal Court Number: 19-00941

Floyd HargroveAppellant.

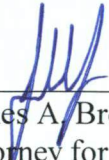
v.

Anthony E. Griffis, Sr.Respondent.

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b) as it is identical to the brief previously served except for references to the record and corrections of typographical errors and misspellings.

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