



THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr.

Appellate Case Number: 19-00941
Opinion Number: 2022-UP-207

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

PETITION FOR REHEARING

APPELLANT FLOYD HARGROVE respectfully petitions for rehearing pursuant to Rule 221(a), SCACR, on the basis that this Court overlooked and misapprehended material facts and principles of law in its unpublished per curiam opinion affirming the dismissal of his claims of breach of fiduciary duty and conspiracy on May 18, 2022. *Hargrove v Griffis*, 2022-UP-207 (SC Ct App filed May 18, 2022). Appellant is requesting that this Court rehear all issues raised on direct appeal and relied upon by the circuit court in its dismissal because this Court relied upon contract law analysis in its dispositive ruling, overlooking the facts and law cited by Appellant, and cited no law in its discussion in dicta of some of the other issues. However, at the outset, Appellant would note the two most significant issues which were misapprehended or overlooked: 1) that the statute of limitations accrual date of November, 2009 was modified by an alternate payment arrangement, see Issue I(B) below, and 2) that a watershed opinion changing

the law concerning the elements of the tort of civil conspiracy issued after the briefing of this case¹ should have been applied retroactively.

I. The Trial Court Erred in Dismissing the Claim of Breach of a Fiduciary Duty

A) An Expert Affidavit was Not Required Because the Complaint Pled a Duty Owed by Respondent to Appellant which Arose Independent of Respondent's Duty to His Client.

This Court should rehear this issue because the opinion's discussion of the fiduciary relationship omits discussion of the facts pled viewed in a light most favorable to Appellant. The opinion also omits discussion of the law concerning fiduciary duties owed to third parties. Further, the discussion omits analysis of the expert affidavit requirement as written in the applicable statute.

Appellant's complaint averred that Respondent was not his attorney. ROA, p. 54, ¶¶'s 44 & 47. Appellant pled facts establishing his equitable interest in a portion of the sales commission. ROA, pgs. 51-52, ¶¶'s 4 - 18. Appellant pled that Respondent informed closing counsel not to pay any commission. ROA, p. 54, ¶¶'s 43 - 51².

Respondent owed a duty of fair dealing to third parties with interests in the closing such

¹This opinion, *Paradis v Charleston County School District*, 861 SE2d 774 (SC 2021), was provided to this Court on July 19, 2021, pursuant to SCACR Rule 208(b)(7). This opinion was refiled by the Supreme Court on August 18, 2021.

²Respondent's alleged assertion to closing counsel that no commission was due, pled in Appellant's complaint, is directly contradicted by Respondent's Answer and attached Exhibits in which he avers that the commission would be paid in an alternate fashion. See ROA, pgs. 58 - 59, ¶ 5. Appellant asserts this contradiction, viewed in the light most favorable to his cause, suggests an attempt to extinguish Appellant's equitable interest.

that an incorrect statement interfering with these interests would be unfair.³ See *Stiles v Onorato*, 457 SE2d 601, 602 (SC 1995)(citing with approval *L & H Airco, Inc. v. Rapistan Corp.*, 446 NW2d 372 (Minn.1989) for the proposition that an attorney may be held liable for “affirmative misrepresentations”) & SCACR Rule 407, Rule 4.4, n.1 (“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but *that responsibility does not imply that a lawyer may disregard the rights of third persons.*”)(emphasis added). Appellant’s complaint pled facts under which such a duty arose. The unpublished opinion does not discuss *Stiles* or the multiple cases analyzing duties owed to a third party or applying these principles to the pleadings in the light most favorable to Appellant.

Likewise, rehearing is proper because of the statutory limitation on the need for an expert affidavit. An affidavit is required by statute when a complaint alleges “professional negligence.” SC Code Section 15-36-100(B). In contrast, an affidavit is not required when a complaint avers “negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.” SC Code Section 15-36-100(C)(2).

The opinion issued by this Court omits discussion of the statutory language but instead indicates an affidavit is required because Respondent acted within “the scope of representing his client.” While undersigned can imagine that such an interpretation is reasonable, this “scope of representation” language does not appear in the statute. Instead, the language triggering the need for an affidavit is “professional negligence.”

³ As to the proposition that the question of whether a fiduciary relationship exists is an equitable one, see *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 152 (SC Ct App 1987), overruled by *Paradis v. Charleston Cnty. Sch. Dist.*, 861 S.E.2d 774 (SC 2021).

Appellant concedes that there is case law indicating that a claim of breach of a fiduciary duty merges with a legal malpractice claim when they arise from the same duty, but this is just not the situation here because the Complaint averred that there was no attorney-client relationship between Appellant and Respondent. ROA, pgs. 51 - 57.

Thus, this Court should rehear this portion of the appeal for the reasons cited above.

B) The Statute of Limitations Had Not Expired Because the Pleadings Indicated the Payment Date had Changed from the Date of Closing until the Occurrence of Multiple Future Acts

When pronouncing the only dispositive ruling in this case, this Court's opinion indicated Appellant averred the closing occurred in May 2009 and that, following an unanswered demand (made by a third party), Appellant should have known by November, 2009 that he would not receive his equitable interest in the commission. However, this Court should rehear this portion of the case because both the Complaint and Answer with its attached exhibits indicated that an alternate payment arrangement purported to modify the date the payment was due and imposed conditions precedent to this payment. Further, the Complaint indicated that Appellant was unaware of the new conditions precedent for payment or the change in the identity of the realty to whom this commission would be paid.

Succinctly, Appellant pled that he should have been paid from proceeds disbursed to a realty at the 2009 closing⁴. However, Appellant also pled that he learned for the first time in January, 2018 that an alternate payment arrangement purportedly modified the terms of the payment. ROA, p. 55, ¶¶'s 57 - 69. Respondent's pleading also asserted an alternate payment

⁴Specifically, the payment would go to the realty for whom the Appellant was working at the time of closing. ROA, p. 52, ¶ 9.

arrangement. ROA, pgs. 58 - 59, ¶¶'s 5 - 10 & pgs. 69, 75, and 77.

On page 69 of the Record, this purported payment arrangement required the occurrence of at least two significant conditions precedent to the accrual of any time for payment: 1) the development and construction of at least 10 “residences” upon the land sold through Appellant’s real estate efforts and 2) the sale of 10 of these residences. See ROA, p. 69, ¶ 11 (“Said amount, however, to be paid in equal installments of Ten Thousand and NO/100 (\$10,000.00) Dollars each simultaneously with the Release Payments for the first ten (10) Residences.”). Despite Respondent’s pleading indicating that Appellant’s “right to a commission pursuant to the Contract dated August 2, 2007, were voided by the default of the Purchaser (BDG) under that contract,” the exhibits attached to this pleading indicated that “payment of the Brokerage fee ... described in the contract *shall continue* to be payable by Seller to Southern Lifestyle Group.”⁵ ROA, p. 60, ¶ 17 & p. 69, ¶ 11 (emphasis added to the second quote).

Thus, this Court should rehear this portion of the appeal and consider the averred modification to the payment arrangement affecting the accrual date of the cause of action for non-payment. This Court should also consider the conditions precedent imposed in the averred modification including the necessary development of the property, the construction of at least 10 residences and the sale of 10 of these homes. At worst, the Court should remand this matter on this ground to allow undersigned to plead the possible 10 dates upon which these conditions occurred. Viewed in the light most favorable to Appellant, it would appear there could be 10 different statute dates depending on the occurrence of the conditions precedent.

⁵While not explicitly referenced in the pleadings, the reference in this portion of the record to Southern Lifestyles suggests that is the realty for whom Appellant was working at the time the original contract was signed in 2007, when viewed in the light favorable to Appellant.

C/D) Public Policy Was Not Violated by Appellant's Causes of Action and Appellant had Standing to Sue

This Court should rehear the appeal to the extent it does not overrule the circuit court's order finding that public policy prevented Appellant from filing a suit for damages because the commission could not be paid directly to him. Further, this Court should rehear the portion of the appeal indicating that he did not have standing. The trial court's order of dismissal did not cite any law concerning either of these separate grounds and this Court did not address either issue as it applied to either cause of action.

Succinctly, the Complaint alleged that Appellant did not receive his equitable interest in the commission. ROA, p. 52, ¶¶s 15, 17, & 18; p. 54, ¶52. This portion was pled as seventy (70%) of the full commission. Not only is pursuit of this claim not improper on policy grounds but in fact is allowed by law including the right to redress a grievance and the right to pursue a civil claim guaranteed as a constitutional right.

Finally, Appellant had standing. One with a financial interest in a controversy ordinarily will have standing to sue. *Lee v. Chesterfield Gen. Hosp., Inc.*, 344 S.E.2d 379, 384 (SC Ct. App. 1986), overruled on other grounds by *Paradis v. Charleston Cnty. Sch. Dist.*, 861 S.E.2d 774 (SC 2021). This Court's opinion itself indicated sufficient pleading of a financial interest when it indicated Appellant should have sued a different person (the seller) under a different theory of recovery (Breach of Contract).

Thus, undersigned respectfully requests that this Court rehear these issues and reverse the ruling of the lower court on these grounds.

II. The Trial Court Erred by Dismissing the Claim of Civil Conspiracy

This Court should rehear the portion of the appeal concerning the claim of civil conspiracy and retroactively apply the watershed change in law announced by the South Carolina Supreme Court in the case captioned as *Paradis v. Charleston Cnty. Sch. Dist.*, 861 S.E.2d 774 (SC 2021). In *Paradis*, the Supreme Court overruled more than 40 years of precedent and indicated it was “returning to our long-standing precedent pre-*Todd*,” clarifying the proper elements required to be pled in a complaint asserting civil conspiracy. *Paradis*, at 780. The *Paradis* Court only precluded retroactive application of this ruling to cases which were not final and had “already been tried under the *Todd* framework.” *Paradis*, at 781.

The case at bar only proceeded to the pleading stage and, as indicated by the date of this Court’s opinion, is not yet final. Thus, this change in law is to be applied retroactively to Appellant’s cause.

A) An Expert Affidavit Was Not Required

An expert affidavit was not required as to the cause of action for civil conspiracy because this cause did not involve a claim of professional negligence. In fact, the *Paradise* Court’s discussion of civil conspiracy claims provides an elementary basis to distinguish this cause from claims of negligence because “civil conspiracy is an intentional tort.” *Paradise*, at 780, n. 9. Further, it would turn the professional relationship between the seller and Respondent on its head to find that a combination of two people seeking to prevent, delay and/or conceal payment obligations and the timing of those obligations would constitute part of the representation of the seller. Both pleadings, the Complaint and Answer with exhibits, indicate that a commission should have been paid but no pleading averred that any payment had been made.

Thus, for the simple reason that civil conspiracy is an intentional tort and not one sounding in negligence, no expert affidavit was required. This is even more so the case when all averred facts pointed to the need for payment of a commission but at the same time indicated no commission had been paid for a multitude of reasons not yet explored through either the discovery or trial process.

B) The Statute of Limitations Had Not Run

The statute of limitations had not run as to civil conspiracy because civil conspiracy is a continuing tort and each overt act extends the scope of the conspiracy. This suit was filed in July, 2018. That was less than one year from Appellant's first notification that the non-payment was occasioned by Respondent informing the closing lawyer that no commission was due. This suit was also filed within six months of Respondent informing undersigned counsel that a different payment arrangement premised on the construction and sale of 10 residences had been made.

This Court should consider the email from Respondent to undersigned refocusing the non-payment issue from the 2009 closing to the 10 lot sale arrangement as an overt act. However, if it is true that the commission was not due at the 2009 closing but, instead, after the closing of 10 different residences not yet constructed at the time of the 2009 closing, then the omission of the 10 partial payments, due upon these 10 sales, would each be an overt act.⁶

South Carolina has found that some torts should be considered continuing torts for purposes of the statute of limitations. See *Silvester v. Spring Valley Country Club*, 543 S.E.2d

⁶Of course, no claim for commission would be ripe until the residences were constructed and sold.

563, 567 (SC Ct App 2001)(Finding a claim of nuisance may be considered a continuing tort). Likewise, other states have also made such findings in both similar and dissimilar contexts. See *Eubank v. Van-Riel*, 221 N.C. App. 433, 727 S.E.2d 25 (NC 2012)(Discussing various situations in which the “continuing wrong doctrine” applies); *Mears v. Gulfstream Aerospace Corp.*, 225 Ga. App. 636, 640, 484 S.E.2d 659, 664 (GA 1997)(Discussing the continuing tort doctrine as related to a claim of intentional infliction of emotional distress); *Everhart v. Rich's, Inc.*, 229 Ga. 798, 802, 194 S.E.2d 425, 428 (GA 1972)(Discussing application of the theory of continuing tort whenever “any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time.”); and *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 787, 598 P.2d 45, 53 (CA 1979)(citing a litany of cases as support for application of the “last over act” doctrine to a claim of civil conspiracy.”).

Thus, Appellant pled overt acts which occurred within a year of the filing of this complaint which furthered the goal of depriving Appellant of his equitable interest in his portion of the commission proceeds.

C/D) Public Policy Was Not Violated by Appellant’s Causes of Action and Appellant had Standing to Sue

Appellant incorporates by reference the arguments contained in Part I, C & D of this petition addressing these same issues above.

E) Appellant Pled Special Damages

This Court should rehear this portion of the appeal to analyze the pleading of special damages. Apart from the change in law expressed in *Paradis*, Appellant pled two types of special damages: 1) the costs of pursuing a different suit against his former employer when an

alternate payment arrangement was made or discussed and 2) the loss of investment from the delay in receiving the payment as envisioned in the original contract for sale entered between the seller and buyer. ROA, p. 55, ¶¶'s 70 & 71.

These two damages were not claimed as resulting from the first cause of action. The damage claimed under that cause of action was the loss of the equitable interest in the commission. Under the “force in numbers” theory, these alleged special damages might not have resulted had there not been a combination of actors.

Nonetheless, the *Paradis* case removes this element from the pleading requirements and this ruling should be applied retroactively to Appellant’s case.

Thus, this Court should rehear and address this portion of the circuit court’s ruling.

CONCLUSION

Therefore, Appellant respectfully requests that this Court grant the petition to rehear this case, reverse the rulings of the trial court and remand this matter to the Beaufort County Court of Common Pleas. Alternatively, this Court should rehear this matter and remand this case to the trial court for retroactive application of the *Paradis* decision as to the civil conspiracy claim.

Respectfully submitted by,

/s/ James A. Brown, Jr.
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June 1, 2022
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SC Court of Appeals

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CERTIFICATE OF SERVICE

I certify that I have served copies of Appellant’s Petition for Rehearing, by electronic copies of these items, on June 1, 2022. Due to the filing procedure engendered by the Covid-19 pandemic, the Petition for Rehearing and Certificate of Service were emailed to the following attorneys at the following email addresses: Anthony E. Griffis, Sr. At tonygriffis@gmail.com, and his Attorney of record, Sean Michael Bolchoz at sbolchoz@bolchozlaw.com.

June 1, 2022

s/ James A. Brown, Jr.
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SC Court of Appeals

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

Re: Floyd Hargrove v. Anthony E. Griffis, Sr.; Appeal Court Number: 19-00941

Clerk:

Under cover of this letter please find enclosed Appellant's Petition for Rehearing and Certificate of Service for the same. Also enclosed with the mailed copy of this letter is a check in the amount of \$50.00 which represents a filing fee for this Petition. Please contact me if you have any questions.

Sincerely,

/s/Jim Brown
Jim Brown

cc via Email w/attachments **ONLY**

Anthony E. Griffis w/enclosures & certificate of service
Sean Bolchoz w/enclosures & certificate of service
Floyd Hargrove w/enclosures & certificate of service