IN THE COURT OF APPEALS
STATE OF GEORGIA

Civil Action File No. 2018CV306061
Superior Court of Fulton County

ARNALL GOLDEN GREGORY LLP,
JOHN L. GORNALL and WILHELM ZIEGLER

Defendants/Petitioners,

v.

GREENAVATIONS POWER, LLC
and GREENAVATIONS POWER DUBLIN LLC,

Plaintiffs/Respondents.

PLAINTIFFS' RESPONSE TO DEFENDANTS' APPLICATION FOR INTERLOCUTORY APPEAL

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Plaintiffs Greenavations Power, LLC and Greenavations Power Dublin, LLC ("Greenavations") hereby respond and oppose Defendants' Application for Interlocutory Appeal ("Application"). Defendants' Application should be denied pursuant to Court of Appeals Rule 30 for the following reasons:

(1) The issue to be decided is not dispositive of the case;

(2) The trial court order will not cause substantial error at trial; and

(3) The order does not raise issues of first impression.

Defendants misstate the facts and the law applicable to this case and offer no evidence that the trial court erred in denying Defendants' Motion for Partial Summary Judgment. Moreover, the issue on appeal is not dispositive of the case. Defendants are attempting to relitigate issues decided by the Georgia Supreme Court and which are not properly on appeal. Accordingly, Defendants' Application should be denied.

I. INTRODUCTION

This action for fraud, legal malpractice and breach of fiduciary duty arises out of Defendants' concurrent representation of Plaintiffs and non-party Mage Solar Projects, Inc. ("Mage") in 2012 and 2013. Since approximately 2010, Defendants served as general outside counsel for Mage and its affiliated entities. In April 2012, Plaintiffs retained Defendants to represent them in connection with a solar project in Dublin, Georgia. Defendants intentionally and fraudulently concealed material information from Plaintiffs regarding Mage to induce Plaintiffs to purchase over $2 million worth of solar panels and solar equipment from Mage to Plaintiffs' detriment. Defendants also negligently failed to protect Plaintiffs' interests with respect to a Bond Deal in connection with the solar project.

II. STATEMENT OF PERTINENT FACTS

Plaintiff Greenavations Power, LLC ("GP") is in the business of providing consulting and design services for the development of solar energy projects and assessing the solar energy potential of commercial real estate. See Order Denying Defendants' Motion for Partial Summary Judgment, entered on March 11, 2020 ("Order"), attached to Defendants' Application for Interlocutory Appeal as Exhibit 2 (Order at 2). Plaintiff Greenavations Power Dublin, LLC ("GPD") is a special purpose entity created to facilitate the development of a solar power array at the Dublin City High School in Laurens County, Georgia (the "Project"). See Response to Motion for Partial Summary Judgment ("Response"), attached to Defendants' Application for Interlocutory Appeal as Exhibit 6 (Response at 2).

Defendant Arnall Golden Gregory, LLP ("AGG") is an Atlanta based law firm. Defendants Gornall and Ziegler are attorneys licensed to practice law in the State of Georgia who are partners at AGG (AGG, Gornall and Ziegler are referred to collectively herein as "Defendant attorneys"). (Exh. 2, Order at 2). Mage was a German manufacturer and distributor of solar energy panels and equipment. (Exh. 6, Response at 2). At all times relevant, Defendant attorneys served as outside general counsel for Mage and its affiliated German entities respecting various legal matters, including acquisition, corporate, tax, contract and employment law matters. (Exh. 6, Response at 3). Defendant Ziegler served as corporate secretary of Mage and at least eight of its affiliated German entities. *Id.*

In September 2011, the Dublin City School District (the "School District") hired Plaintiff GP to perform an analysis of the economic viability of the Project. (Exh. 2, Order at 3). In November 2011, the Laurens County Development Authority ("LCDA"), the School District and Mage decided to proceed with the Project and to finance the $4.35 million solar array with a $3.585

million taxable lease revenue bond (the "Bond Deal") and a federal grant of approximately $1.2 million. (Exh. 2, Order at 3). Plaintiffs agreed to purchase Mage's solar panels for the Project upon Mage's execution of extended warranties and a service agreement for the maintenance and support of the solar array ("Extended Warranties"). The Extended Warranties were critical to protecting Plaintiffs' interests under the Bond Deal and to limiting Plaintiffs' exposure to liability for the maintenance, repair and upkeep of the solar array. Mage's receipt of payment for the solar panels and equipment was further preconditioned upon the closing of the Bond Deal and Mage's delivery and installation of the solar panels. (Exh. 6, Response at 4). In connection therewith, Plaintiff GP executed purchase orders ("Mage invoices") for the solar panels and equipment.

Unbeknownst to Plaintiffs, Mage was on the verge of insolvency. By 2011, Mage had incurred massive financial losses and was in debt to Morris Bank in Dublin, Georgia for more than $1.3 million. (Exh. 6, Response at 3-4). Defendant attorneys knew of Mage's financial distress and outstanding bank loans at least as early as March of 2012. On or about March 19, 2012, Defendant attorneys reviewed a financial statement for Mage ("Mage Audit Report") prepared by non-party accounting firm CliftonLarsonAllen, LLP ("CLA"). (Exh. 6, Response at 3). The Mage Audit Report revealed Mage's net losses of more than $3.5 million in 2011. (Exh. 6, Response at 3-4). In an effort to obtain revenue for Mage, Defendant attorneys sought to facilitate the sale of Mage's solar panels to Plaintiffs. (Exh. 6, Response at 5).

Defendant attorneys conferred with Robert E. Green, President of Plaintiffs, regarding representing Plaintiffs with respect to the purchase orders, the Extended Warranties and the Bond Deal. Defendant attorneys sent an engagement letter to Mr. Green confirming "the nature of the legal undertaking or engagement [Plaintiffs] requested [AGG] to perform and to inform [Plaintiffs] of [AGG's] billing and payment arrangements concerning legal fees" (the "Retainer Agreement").

(Exh. 2, Order at 3). The Retainer Agreement provided the names of the attorneys who would be working with Plaintiffs; detailed the attorneys' hourly billing rates; and set forth the professional services to be rendered by AGG to Plaintiffs, to wit: assist GP and GPD "in connection with the development, installation, integration and financing of a 1.2 megawatt solar photovoltaic electricity generating system." See Plaintiffs' Sur-Reply in Opposition to Defendants' Motion for Partial Summary Judgment ("Sur-Reply"), attached to Defendants' Application for Interlocutory Appeal as Exhibit 9 (Sur-Reply at 4). The Retainer Agreement also included AGG's Standard Terms of Representation regarding fees and other important matters related to AGG's representation of Plaintiffs. (Exh. 2, Order at 3). Plaintiffs executed the Retainer Agreement on April 25, 2012. (Exh. 9, Sur-Reply at 4). Due to their concurrent (and conflicted) representation of Plaintiffs and Mage, Defendant attorneys asked Plaintiffs to execute a conflict waiver. (Exh. 2, Order at 4). On April 30, 2012, unaware of Mage's massive financial losses and outstanding bank loans, Plaintiffs executed the waiver. *Id.*

Defendant attorneys negotiated the terms and conditions of the Extended Warranties on Plaintiffs' behalf. Defendant attorneys fraudulently concealed Mage's distressed financial condition from Plaintiffs. Defendant attorneys never disclosed to Plaintiffs that Mage would be unable to fulfill its warranty obligations under the Bond Deal. (Exh. 6, Response at 5). Defendant attorneys admit that they did not advise Plaintiffs to conduct any financial due diligence on Mage. Defendants did not disclose that Mage's Extended Warranties were worthless. On January 29, 2013, in reliance upon the Extended Warranties, Plaintiff GPD entered in to the Bond Deal as the Owner, Borrower and Lessor of the solar array, which is under lease for the next 25 years to the Laurens County Public Facilities Authority ("LCPFA") and the School District. *Id.* Mage collected approximately $1.3 million from the bond proceeds. *Id.*

In June 2013, Mage's German parent company, MAGE Industrie Holding AG ("MAGE Industrie"), filed for bankruptcy. (Exh. 6, Response at 6). In July 2013, rather than repaying its debt to Morris Bank, Mage sought an additional $600,000 bank loan. To help secure the loan for Mage, Defendant Gornall advised Plaintiff GP to acknowledge the Mage invoices for the solar panels as collateral. *Id.* Defendant Gornall did not disclose MAGE Industrie's bankruptcy to Plaintiffs until after Plaintiff GP acknowledged the Mage invoices. *Id.*

In December 2013, Mage's other German parent company, MAGE Solar AG, filed for bankruptcy. *Id.* Relying on the Mage invoices as collateral, Mage's corporate officers withdrew Mage's remaining funds from its accounts with Morris Bank. *Id.* Mage defaulted on the bank loans. *Id.* Morris Bank, as assignee of Mage, filed suit against Plaintiff GP seeking repayment of approximately $900,000 in loans to Mage. *Id.* In July 2014, Defendant Ziegler assisted Morris Bank in perfecting its claim against Plaintiff GP by providing extensive documentation regarding Mage's corporate structure. *Id.* By October 2014, Mage was out of business. *Id.* In 2017, Morris Bank obtained a $1,264,500 judgment against Plaintiff GP. *Id.* In its case against Plaintiff GP, Morris Bank relied on the Mage invoices and documentation provided by Defendant Ziegler. *Id.*

Mage received $1.3 million for the solar panels in addition to almost $2 million in bank loans. Plaintiff GPD continues to incur expenses in providing maintenance and support for the solar array due to Mage's insolvency. (Exh. 6, Response at 7). Plaintiffs also have significant exposure to liability to third parties, including the School District and the LCDA, under the Bond Deal. *Id.* Had Defendant attorneys disclosed Mage's massive financial losses to Plaintiffs, Plaintiffs would have procured the solar panels and equipment from another manufacturer. *Id.* It was not until CLA produced a copy of Defendant attorneys' billing entries for Mage sometime in

mid 2019 that Plaintiffs first discovered that Defendant attorneys reviewed the Mage Audit Report in March of 2012. *Id.*

On January 20, 2017, Plaintiffs and Defendants AGG and Gornall executed a Standstill and Tolling Agreement (the "Tolling Agreement"), tolling the statute of limitation period on any of Plaintiffs' claims accruing on or after January 20, 2013. The Tolling Agreement was amended On November 17, 2017 and February 28, 2018.

To this day, Defendant attorneys falsely maintain that they had no knowledge of Mage's 2011 financial losses until March of 2014. Defendant attorneys have "doubled down" and continue to deny that they received or reviewed the Mage Audit Report or any other financial document, statement or report, whatsoever, related to Mage during the relevant time frame.

III. PROCEDURAL HISTORY

On June 5, 2018, Plaintiffs filed their Complaint for Legal Malpractice against Defendants for legal malpractice, breach of fiduciary duty, punitive damages and attorney's fees. See Complaint for Legal Malpractice ("Compl."), attached to Defendants' Application for Interlocutory Appeal as Exhibit 3. Plaintiffs alleged that Defendant attorneys knew or should have known that Mage was in financial distress as early as 2011. (Exh. 3, Compl. ¶ 39). On October 18, 2018, Plaintiffs served Defendants with their first request for production of documents requesting, among other things, copies of Defendant attorneys' billing statements to Mage and copies of financial statements and audit reports received from non-parties related to Mage. (Exh. 6, Response at 8). Defendant attorneys refused to produce their billing statements or any of the requested non-party financial documents. *Id.* Rather, Defendant attorneys falsely stated that they were "not aware of any responsive communications with . . . Clifton Larson . . . To the best of AGG's knowledge, AGG has completed its search and has produced the responsive

communications." (Exh. 6, Response at 11). Further, by letter dated June 24, 2019, defense counsel stated "AGG represents that it did not submit or receive any financial documents for any of the Mage entities, during this time period, such as any . . . audited or unaudited financial statements . . . or presentation of Mage's overall financial status that would be responsive to Plaintiffs' Request to Produce Nos. 12, 13, 14 or 16." (Exh. 6, Response at 11). In lieu of producing the requested documents, Defendant attorneys submitted false, self-serving statements, attesting under oath that they had no knowledge of Mage's 2011 financial losses until after Plaintiffs purchased the solar panels from Mage and the Bond Deal closed in 2014. (Exh. 6, Response at 10).

On January 30, 2019, Plaintiffs served a non-party request for documents to CLA. (Exh. 6, Response at 8). Defendant attorneys served CLA with a frivolous objection, claiming CLA's financial reports were subject to an "attorney-client privilege" as between Defendant attorneys and Mage. (Exh. 6, Response at 8-9). Recognizing that the attorney-client privilege does not encompass documents created or maintained by third parties, CLA produced, among other things, the Mage Audit Report, several audit response letters from Defendant attorneys to CLA dating back to March 2012 and Defendant attorneys' February and March 2012 billing records for Mage. (Exh. 6, Response at 9). Contrary to Defendants' false statements made under oath during the pendency of this litigation, the billing records revealed that Defendants requested CLA's audit file on Mage and reviewed the Mage Audit Report on or about March 19, 2012, just one month before Plaintiffs engaged Defendant attorneys and executed the conflict waiver.

On August 20, 2019, Defendants filed a Motion for Partial Summary Judgment, arguing that Plaintiffs' claims for legal malpractice are barred under a "four-year statute of limitations for legal malpractice claims" in "the absence of any allegation of fraud in the Complaint that would

meet the requirements under Georgia law to toll the statute of limitations." (Application for Interlocutory Appeal at 9). On September 24, 2019, Plaintiffs amended their complaint to include a fraud claim based upon evidence of Defendants' actual knowledge of Mage's 2011 financial losses prior to April 2012 and their intentional concealment of this information from Plaintiffs. See First Amended Complaint for Legal Malpractice ("Amend. Compl."), attached to Defendants' Application for Interlocutory Appeal as Exhibit 7. Plaintiffs allege that that Defendant attorneys fraudulently concealed Mage's financial condition from them to induce Plaintiffs to execute the conflict waiver, enter into the bond deal and to acknowledge the Mage invoices to the bank, all to Mage's benefit and Plaintiffs' detriment. (Exh. 7, Amend. Compl. ¶ 39). Plaintiffs allege that they justifiably relied upon Defendants' omissions and that Defendants owed them a fiduciary duty to disclose information that materially affected Defendants' ability to represent them in the underlying matter. (Exh. 7, Amend. Compl. ¶ 28). The same day, Plaintiffs filed their opposition brief to Defendants' Motion for Partial Summary Judgment, arguing that Defendants' fraudulent concealment of when they first learned of Mage's 2011 financial losses tolls the statute of limitation as to Plaintiffs' legal malpractice and breach of fiduciary duty claims.

On October 15, 2019, Defendant attorneys moved to dismiss Plaintiffs' fraud claim, arguing that they owed a fiduciary duty only to Mage, and not to Plaintiffs, and that they had no duty to disclose the "confidential" information contained in the Mage Audit Report prepared by third party CLA. On October 16, 2019, Plaintiffs filed their sur-reply in opposition to Defendants' Motion for Partial Summary Judgment on the basis that Plaintiffs' legal malpractice claim premised upon a written contract is governed by the six-year statute of limitation in O.C.G.A. § 9-3-24, and not a four-year statute as Defendant attorneys contend. *Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc.*, 288 Ga. 236, 239 (2010). (Exh. 9).

Plaintiffs filed their response in opposition to Defendants' Motion to Dismiss on November 18, 2019. After a hearing on November 26, 2019, the trial entered its March 11, 2020 order denying in part Defendants' Motion for Partial Summary Judgment and denying Defendants' Motion to Dismiss Plaintiffs' fraud claims in its entirety. Defendants seek review of the trial court's holding that Plaintiffs' legal malpractice and breach of fiduciary duty claims are governed by the six-year statute of limitation for written contracts.

IV. ARGUMENT AND CITATIONS OF AUTHORITY

Defendants' Application should be denied because Defendants cannot satisfy any of the requirements of Court of Appeals Rule 30. First, the issue to be decided is not dispositive of any of the claims in the case. Defendants' concealment of Mage's 2011 financial losses tolls the statute of limitation under either a four or six-year statute. Second, the Order is not erroneous because the trial court correctly applied the six-year statute of limitation to Defendants' breach of their implied promises arising from the Retainer Agreement. Third, the Order does not raise an issue of first impression because the Georgia Supreme Court has already decided this issue.

A. The Issue to be Decided on Appeal is not Dispositive of the Case

1. Defendants' Fraud Tolls the Statutes of Limitation

Appellate review of the trial court's application of the six-year statute of limitation, as opposed to a four-year statute, is not dispositive of Plaintiffs' claims because the statute of limitation as to Plaintiffs' claims for legal malpractice and breach of fiduciary duty is tolled by virtue of Defendants' fraudulent concealment of when they first discovered Mage's 2011 financial losses. Defendants ignore Plaintiffs' fraud claims and mislead this Court to believe that Plaintiffs' case is based solely on the conflict arising from Defendants' concurrent representation of Plaintiffs

and Mage.[1] While there undoubtedly was a conflict in representing both clients, Defendants' malfeasance goes far beyond undertaking to represent parties on both sides of a transaction.

Defendants' fraudulent concealment of Mage's financial condition contained in the Mage Audit Report, and of when they first reviewed the report, tolls the statute of limitation. O.C.G.A. § 23-2-53; *see also Goldston v. Bank of Am. Corp.*, 259 Ga. App. 690 (2003) ("[a] fiduciary relationship encompasses a duty to disclose so that suppression of a material fact which a party is under an obligation to communicate constitutes fraud which tolls the statute of limitation"). When actual fraud is the gravamen of the action, the statute of limitation is tolled until the fraud is discovered or by reasonable diligence should have been discovered. *Shipman v. Horizon Corp.*, 245 Ga. 808, 808-09 (1980). No other independent fraudulent act is required to toll the statute. *Id.* Silence is treated as a continuation of the original actual fraud. *Id.* Failure to exercise reasonable diligence to discover the fraud may be excused where a relationship of trust and confidence exists between the parties. *Id.* "Where the basis of an action is actual fraud, the mere silence of the party committing it is treated as a continuation of the original fraud and as constituting a fraudulent concealment, and the statute of limitation does not begin to run against such right of action until such fraud is discovered, or could have been discovered by the exercise of ordinary care and diligence." *Id.* at 809.

This Court has held that "'the fraud which will relieve the bar of the statute of limitation must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action[,]' . . . '[a] confidential relationship between the parties . . .

[1] In a misguided effort to defeat Plaintiffs' fraud claims, Defendants erroneously contend that Plaintiffs retained them to negotiate the Extended Warranties *four months* after purchasing Mage's solar panels. Defendant attorneys' contention is a blatant misrepresentation of the facts. Mage did not receive payment for the solar panels until after Defendant attorneys negotiated the terms and conditions of the Extended Warranties and the Bond Deal closed in January of 2013.

lessens, if not negates, the necessity for showing actual fraud. [Cit.]'" *Arnall, Golden & Gregory v. Health Svc. Centers*, 197 Ga. App. 791, 792-793 (1990). And, "where a person sustains towards another a relation of trust and confidence, his silence when he should speak, or his failure to disclose what he ought to disclose, is as much a fraud in law as an actual affirmative false representation." *Id.* at 793.

Defendants' actual fraud in concealing the fact that they reviewed the Mage Audit Report prior to April 2012 gives rise to a separate cause of action for fraudulent concealment independent of Plaintiffs' claims for legal malpractice. To establish fraudulent concealment under O.C.G.A. § 9-3-96 sufficient to toll a limitation period, Plaintiffs must prove that: 1) Defendants committed actual fraud involving moral turpitude; 2) the fraud concealed the cause of action from Plaintiffs; and 3) Plaintiffs exercised reasonable diligence to discover its cause of action within the applicable limitation period. *Columbia County v. Branton*, 304 Ga. App. 149, 153 (2010). Plaintiffs did not learn of Defendants' actual knowledge, as of March 2012, of Mage's 2011 financial losses until mid 2019 when they received Defendants' billing records to Mage from CLA. Defendants made every effort to conceal this information, to include filing a frivolous objection to Plaintiffs' document request to CLA, refusing to respond to Plaintiffs' discovery requests, submitting false statements under oath and filing their premature Motion for Partial Summary Judgment.

Defendants' actual fraud is the gravamen of Plaintiffs' claim for legal malpractice and breach of fiduciary duty, and as such, the statute of limitation is tolled. Plaintiffs allege that Defendants committed legal malpractice when they failed to disclose that Mage could not honor the Extended Warranty obligations. (Exh. 7, Amend. Compl. ¶ 54). Plaintiffs' claim for legal malpractice is tolled by virtue of Defendants' concealment of when they first learned of Mage's 2011 financial losses. Defendants agree that evidence of Defendants' actual fraud tolls the

applicable limitations period. *See* Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment, ("Mem. of Law"), attached to Defendants' Application for Interlocutory Appeal as Exhibit 5 (Mem. of Law at 3) ("there is no allegation – much less any evidence – of any "fraud" that would toll the statute of limitations"), ("in the absence of actual fraud required to toll the limitations period, there is no dispute that Plaintiffs' claims . . . are time barred"); (Mem. of Law at 14) ("Plaintiffs have not alleged any sort of fraud against Defendants that could possibly toll the statute of limitations"). *Id.* Accordingly, the issues to be decided on appeal are not dispositive of the case because Plaintiffs timely filed their claims under either a four year or a six-year statute of limitation.

2. Plaintiffs' Legal Malpractice Claim Arising out of Defendants' Negligent Handling of the Bond Deal in 2013 is not Time Barred Under Either Statute.

Likewise, Plaintiffs' claims for legal malpractice and breach of fiduciary duty, arising from Defendants' negligent handling of the Bond Deal after January 24, 2013, are timely filed under either a four or six-year statute pursuant to the tolling agreements. It is well settled that, when legal malpractice is alleged to arise from the negligent drafting or preparation of a contractual document, the statute begins to run from the date the contract is executed. *See Jones v. Am. Envirecycle*, 217 Ga. App. 80, 82 (1995) ("[w]e find controlling those cases concluding that the date of contract execution is the controlling date in giving rise to a cause of action for malpractice and in commencing the running of the statute of limitation").

The Bond Deal closed on January 29, 2013. Thus, Plaintiffs' claims for legal malpractice and breach of fiduciary duty arising out of Defendants' negligent handling of Bond Deal are subject to the parties' tolling agreements, which tolled the statute of limitation on any claims arising on or after January 24, 2013. Plaintiffs allege that, on January 29, 2013, Defendants were negligent in negotiating the Bond Deal on behalf of Plaintiffs by failing to include a hold harmless

or other provision in the Bond Deal shielding them from potential third-party claims. (Exh. 7, Amend. Compl. ¶ 54). Thus, under the tolling agreements, Plaintiffs had until June 10, 2018 to file their complaint with respect to those claims. Plaintiffs timely filed this action on June 5, 2018.

B. The Order will not Cause Substantial Error at Trial

The Order will not cause error at trial because the trial court correctly held that "a complete written contract for professional services exists in this case" and, therefore, the trial court properly applied a six-year statute of limitation to Plaintiffs' claim for legal malpractice. Defendants erroneously rely upon *Plumlee v. Davis*, 221 Ga. App. 848 (1996), *Frates v. Sutherland, Asbill & Brennan*, 164 Ga. App. 243 (1982) and *Jankowski v. Taylor, Bishop & Lee*, 154 Ga. App. 752 (1980) in arguing that the statute of limitation for a legal malpractice action is four years. The trial court correctly found, however, that in *Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc.*, 288 Ga. 236, 239 (2010), the Supreme Court of Georgia overruled the Court of Appeals with respect to the applicable statute of limitation in a professional malpractice case where a written contract exists between the parties. (Order, p. 9).

In *Newell*, the plaintiff, Newell Recycling of Atlanta, Inc. ("Newell"), hired the defendant, Jordan Jones and Goulding, Inc. ("JJG"), a professional engineering firm, to design an automobile shredding facility. In furtherance thereof, in 1997, JJG began work on the facility pursuant to a "Draft Scope of Work" document, a series of letters, and an agreement to prepare a concrete work platform to control drainage around the facility. *Id.* at 236. Approximately three years later the concrete platform around the facility began to fail. *Id.* In August of 2004, Newell sued JJG for breach of contract and professional malpractice. JJG moved for summary judgment, "arguing that the complaint was barred by the four-year statute of limitation applicable to actions upon any implied promise or undertaking contained in O.C.G.A. § 9-3-25." *Id.*

The trial court denied JJG's motion, concluding that the six-year statute of limitation of O.C.G.A. § 9-3-24 applicable to written contracts applied. *Id.* JJF appealed, and the Court of Appeals reversed the trial court, holding that the four-year statute of limitation in O.C.G.A. § 9-3-25 applied even to those professional malpractice claims premised on the breach of a written contract for professional services because it calls into question the conduct of the professional in their area of expertise." *Id.* at 236-37.

The Supreme Court granted certiorari to Newell to address the following issue: "whether the Court of Appeals erred in holding that a professional malpractice claim premised on a written contract is governed by the four-year statute of limitation in O.C.G.A. § 9-3-25, rather than a six-year statute of limitation in O.C.G.A. § 9-3-24." *Id.* at 237. The Supreme Court answered the question in the affirmative, reversing the Court of Appeals and holding that:

> The statute of limitations on all simple contracts in writing is six years; and this is true whether the promise sued on is expressed in the writing or implied and written into it by the law. In this regard, because an implied promise to perform professionally pursuant to a written agreement for professional services would be written into [the contract for professional services] by the law, an alleged breach of this implied obligation would necessarily be governed by the six-year statute of limitation of O.C.G.A. § 9-3-24. For this reason, the Court of Appeals was incorrect when it concluded that the four-year statute of limitation of O.C.G.A. § 9-3-25 applies even to those professional malpractice claims premised on the breach of a written contract for professional services. It is instead the six-year statute of limitation of O.C.G.A. § 9-3-24 that would apply to such a claim. By its plain terms, the four-year statute of limitation contained in O.C.G.A. § 9-3-25 does not apply where a contract is evidenced by a sufficient writing. The statute only applies where no sufficiently written contract exists and a cause of action can therefore be based solely on the breach of an express oral or implied promise. Thus, again, based on the Court of Appeals assuming arguendo that the relevant documents at issue here were sufficient to constitute an enforceable, written contract between the parties, the Court of Appeals should have concluded, as the trial court did, that the six-year statute of limitation contained in O.C.G.A. § 9-3-24 was applicable to Newell's claims as opposed to the four-year statute of

> limitations applicable to oral agreements as stated in O.C.G.A. § 9-3-25.

Id. at 237-38 (quotations omitted) (emphasis added). The Supreme Court further directed that "[i]n determining which statute of limitation applies, the threshold inquiry is to determine whether a written agreement actually exists between the parties such that any implied duties sued upon would have grown directly out of the existence of the written contract itself." *Id.* at 238. (emphasis added); *see Saiia Contruction, LLC v. Terracon Consultants, Inc.*, 310 Ga. App. 713, 716 (2011) (holding that "when a professional malpractice claim arises from a standard of care implied by law in a written contract for professional services, the statute of limitation for written contracts, O.C.G.A. § 9-3-24, applies").

In light of *Newell*, the trial court considered "whether a complete written contract for professional services" exists in this case. (Exh. 2, Order at 13). The trial court answered that question in the affirmative, holding "the record reflects and the parties do not dispute that Plaintiffs retained Defendant AGG to represent them as counsel for the Project and the Bond Deal on April 25, 2012, and the parties entered into a corresponding written Retainer Agreement for the provision of Defendants' professional services on the same date. In furtherance of the attorney-client relationship, Plaintiffs accepted the explicit terms of the Retainer Agreement, and AGG represented Plaintiffs pursuant to the Retainer Agreement." *Id.* The engagement letter prepared by Defendants and executed by Plaintiffs set forth the specific professional services to be rendered by Defendants, to wit: "assist Greenavations Power and Greenavations Dublin in connection with the development, installation, integration and financing of a 1.2 megawatt solar photovoltaic electricity generating system." (Exh. 9, Sur-Reply at 4).

Accordingly, the trial court properly held that "a complete written contract for professional services exists in this case, and the six-year statute of limitation applies." (Exh. 2, Order at 13).

The trial court further noted that "because an implied promise to perform professionally pursuant to a written agreement for professional services would be written into the contract for professional services by the law, an alleged breach of this implied obligation would [also] necessarily be governed by the six-year statute of limitation of O.C.G.A. § 9-3-24." *Id.*; *see Saiia Constuction, LLC*, 310 Ga. App. at 716. Plaintiffs need not allege a separate claim for breach of contract, as Defendants contend, where it is undisputed that a written contract for legal services exists between the parties. *Gowen Oil Co. v. Foley & Lardner, LLP*, 2013 U.S. Dist. LEXIS 31938 at *8 (S.D. Ga. 2013). Under *Newell* and its progeny, the six-year statute of limitation set forth in O.C.G.A. § 9-3-24 applies to Plaintiffs' claims of professional malpractice based upon a written contract regardless of whether the alleged breach concerns the express terms of the agreement or the "implied promise to perform professionally." *Id.*

Defendants rely upon this Court's holding in *Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc.*, 317 Ga. App. 464 (2012) ("*Newell II*") to argue that the Retainer Agreement does not constitute a complete written contract for legal services. In *Newell II*, this Court affirmed the lower court's finding that "the written documents do not contain all the essential components of a contract, and the parties' agreement therefore was not a contract in writing for statute of limitations purposes." In *Newell II,* the Court considered the four essential elements of a contract (identity of parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract and a subject matter upon which the contract can operate) and determined that the consideration component was missing because the contract at issue did not contain the defendant's hourly rates. 317 Ga. App. at 466; O.C.G.A. § 13-3-1. Therefore, because the contract was not wholly in writing, the trial court properly applied the four-year statute.

Defendants' reliance upon *Newell II* is misplaced because, unlike the Court in *Newell II*,

the trial court properly found that the Retainer Agreement satisfied each of the four essential elements of a complete written contract for professional services. (Exh. 2, Order at 13). In fact, Defendants do not dispute that the Retainer Agreement contains all four essential elements of a complete contract. Rather, Defendants argue that "no precedent holds that a 'standard law firm engagement letter' is a complete contract." They erroneously rely upon this Court's prior decisions in *Plumlee*, *Frates*, and *Jankowski*, *supra*., for the proposition that the Retainer Agreement is not a complete contract because "it does not include any terms on how AGG would undertake the duties of representation, nor does it define the tasks required to be performed by AGG, or any timeframe for performance by AGG." (Application for Interlocutory Appeal at 16). None of these cases hold that the four essential elements of a contract, above, differ respecting law firm engagement letters as opposed to any other contract for professional services.

In *Jankowski,* the written contract upon which the plaintiff relied was a letter from defendant law firm that addressed itself only as to the fees to be charged and its authority to associate local counsel. *Id.* at 754. Thus, the letter was lacking three of the essential elements of a complete contract. In *Frates*, this Court concluded that a letter which merely referenced "recent conversations regarding the employment of [defendant law firm]" was only partly in writing and partly in parol and therefore the entire contract was considered one in parol. 164 Ga. App. at 246. In *Plumlee*, this Court declined to apply the six-year statute of limitations holding:

> [t]he two-page employment contract executed by Plumlee did not constitute the entire agreement between the parties. It created the attorney-client relationship and covered certain issues such as Davis's fee, payment of expenses, and his authority. It did not specify the manner in which the attorney was to carry out his duties, when suit was to be filed, or numerous other material portions of the contract between Plumlee and Davis. Instead, as in most attorney employment contracts, those matters were subject to the duty imposed upon Davis by law and implied in his contractual relationship with Plumlee.

As discussed above, *Plumlee* was expressly overruled by *Newell* (holding the six-year statute of limitation set forth in O.C.G.A. § 9-3-24 applies to claims of professional malpractice based upon a written contract regardless of whether the alleged breach concerns the express terms of the agreement or the "implied promise to perform professionally"). Thus, the Supreme Court has expressly rejected the premise urged by Defendants, i.e., that the "Retainer Agreement is an 'incomplete contract' because it does not state how AGG will undertake the duties of representation or define the tasks required to be performed or timeframe for performance." Rather, under *Newell*, the trial court correctly held that the Retainer Agreement is a complete contract because it meets the basic elements set forth in O.C.G.A. § 13-3-1. Accordingly, under *Newell*, the six-year statute of limitation applies to Plaintiffs' claims arising from Defendants' breach of the duty to perform professionally implied in their contractual relationship with Plaintiffs.

C. The Order does Not Raise Issues of First Impression

The trial court's Order does not raise issues of first impression. As discussed above, the Georgia Supreme Court expressly overruled prior cases, such as *Plumlee, Davis* and *Jankowski*, to the extent these cases applied the four-year statute of limitation to claims of professional malpractice based upon a complete written contract. Defendants' attempt to distinguish law firm engagement agreements from contracts for other types of professional services is a red herring. Defendants cite no authority to support their contention that the four essential elements of contract construction do not apply to law firm engagement letters. Accordingly, because the trial court's Order denying Defendants' Motion for Summary Judgment is based upon well-settled law, Defendants' Application for Interlocutory Appeal should be denied.

This Court should also decline to review the issue of whether Defendants' fraud tolls the statute of limitation. As a preliminary matter, the trial court did not rule on that issue. As discussed

above, the trial court properly found that Plaintiffs timely filed their claims under the six-year statute of limitation. Accordingly, the trial court did not need to address the question of whether Defendants' fraud tolled the statute as to any of Plaintiffs' claims.

Defendants argue that "in the event the Court of Appeals reaches the questions of tolling in its review of the Order, Plaintiffs' theory of fraudulent tolling also raises an issue of first impression: whether a law firm's 'non-disclosure' of one client's confidential information to another client in a concurrent representation constitutes 'fraud'". (Application for Interlocutory Appeal at 18). This is by no means an issue of first impression. It is well-settled that lawyers owe a fiduciary duty to act in the best interests of their clients. The Court need look no further than Defendants' own Conflict Waiver, which cites Georgia's Rules of Professional Conduct ("RPC"), to realize the absurdity of their contention:

> **RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**
>
> (a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duty to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b)
>
> (b) If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client gives informed consent confirmed in writing to the representation after:
>
> (2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation…
>
> (c) Client consent is not permissible if the representation:
>
> (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.
>
> **The maximum penalty for violation of this Rule is disbarment**.

(Exh. 6, Response, "Exhibit 1").

This Court has long recognized that "[s]uppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." O.C.G.A. § 23-2-53; *Goldston v. Bank of Am. Corp.*, 259 Ga. App. 690, 696 (2003). Defendants had a fiduciary duty to disclose information materially affecting their representation of Plaintiffs and Plaintiffs' ability to give informed consent respecting the attorney-client relationship. Defendants intentionally concealed information regarding Mage's 2011 financial losses in violation of this duty. RPC 1.4 provides, in pertinent part:

> Rule 1.4 COMMUNICATION:
>
> [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . . <u>The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests</u>.
>
> [7] <u>A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person</u>.

Defendants' concealment of Mage's looming insolvency from Plaintiffs resulted in a $2.3 million cash infusion to the now defunct Mage and approximately $90,000 in legal fees to Defendants. Defendants failed to provide information to Plaintiffs consistent with their duty to act in Plaintiffs' best interests in violation of RPC 1.4[5]. Further, they withheld this information to serve their own interests or the convenience or interests of Mage in violation of RPC 1.4[7].

The Georgia Rules of Professional Conduct prohibit an attorney from withholding information regarding one client to the detriment of another because there is an equal duty to both

clients. RPC 1.7[18] sets forth a lawyer's duty of confidentiality where there is a conflict of interest in the common representation:

> Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE
>
> [18] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

Mage did not instruct Defendants to withhold the "confidential" information in the Mage Audit Report. Had Mage done so however, the Rules of Professional Conduct do not permit Defendants to withhold the information and to take actions directly adverse to Plaintiffs' interests. RPC 1.7 directs Defendants to either reveal the information to Plaintiffs consistent with their fiduciary duty or to withdraw from representing Plaintiffs. Defendants did not do either. Instead, they concealed this material information from Plaintiffs to serve their own and/or Mage's interests. Defendants' actions run afoul of the Georgia Rules of Professional conduct and constitute fraud.

CONCLUSION

WHEREFORE, Plaintiffs/Respondents respectfully request that Defendants' Application for Interlocutory Appeal be DENIED.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 3rd day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing RESPONSE TO APPLICATION FOR INTERLOCUTORY APPEAL upon counsel of record via statutory electronic service and by depositing a copy of the same in the United States mail, with adequate postage thereon, addressed as follows:

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This 3rd day of April, 2020.

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