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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

GORDON G. COOPER, MASTER IN EQUITY FOR SPARTANBURG COUNTY

CASE NO.: 2006-CP-42-3378

James Moore, ... Respondent.

v.

Jeannette M. Benson and Thomas Lee Benson, Jr.. . . . . Appellants,

---

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in denying Appellants' motion to dismiss the complaint on the ground that Respondent filed his complaint in excess of the applicable statute of limitations?
2. Did the Trial Court err in finding Appellants converted Respondent's retirement funds totaling $29,433.46 to their own use and breached their fiduciary duty to the Respondent?
3. Did the Trial Court err in finding Respondent had actual damages?
    a. Did the Trial Court err in finding Respondent had actual damages, when he received the benefit of Appellants' payment of the property taxes and insurance for Montgomery Road for seven years?
        1. Did the Trial Court err in failing to order Respondent to reimburse Appellants the funds they expended for the payment of the property taxes and insurance for Montgomery Road for seven years?

    b. Did the Trial Court err in failing to order Respondent to disgorge the funds he received from Appellants for the purchase of the real property located on Montgomery Road in South Carolina in the amount of twenty seven thousand, three hundred and fifty dollars and forty-five cents ($27,350.45) or other amount determined by this Court?
4. Did the Trial Court err in awarding Respondent punitive damages?

STATEMENT OF THE CASE

Respondent (also referred to herein as "Mr. Moore"), James Moore, is an 88 year old man who resides on Montgomery Road in South Carolina (hereinafter referred to as "Montgomery Road"). (R. p. 47, line 25; p. 48, line 23). Mr. Moore is retired, but prior thereto was gainfully employed, asserting at trial that he has only a fifth grade education as a result of being forced into the workforce at an early age. (R. p. 49, line 9).

Mr. Moore is formerly married to his wife of 51 years, Allean Edwards Moore (hereinafter referred to as "Allean"). (R. p. 397-404; R. p. 405-413). From Mr. Moore's union with Allean, six children were born. One of those children was his daughter, Jeannette M. Benson (hereinafter referred to as "Jeannette"), one of the Appellants in this matter.

As a result of Allean's adultery during her marriage to Mr. Moore, Mr. Moore and Allean were divorced by an order of the Spartanburg County Family Court in 2000. (R. p. 397-404; R. p. 405-413). Prior to Mr. Moore's divorce from Allean, she handled all of Mr. Moore's finances during their marriage. After their divorce, however, Mr. Moore relied on his daughter, Jeannette, to assist him with his financial matters. (R. p. 50, line 23). Jeannette was considered the matriarch of the Moore family and thus the responsibility fell on her to handle her father's affairs and Jeannette was happy to assist him. (R. p. 125; R. p. 122).

As a result of Jeannette taking on the role of assisting her father with his finances, Mr. Moore executed a power of attorney naming Jeannette as his attorney in fact. Accordingly, a Durable Power of Attorney was executed on February 16, 1999 and filed

in the Record of Deeds Office on June 7, 2005 (R. p. 49, line 22; R. p. 374-380). Although Mr. Moore claimed he didn't know that he had nominated his daughter as his attorney in fact, he acknowledged at trial that he had signed the document as he recognized his own signature on the bottom of the power of attorney. (Id.).

It was undisputed that Jeannette was the individual who assisted Mr. Moore with his finances just prior to and after her parent's divorce. (R. p. 50, line 23). Jeannette began her role in assisting her father when her parent's marriage deteriorated.

The first instance Jeannette was involved in was assisting Mr. Moore with his retirement account. (R. p. 274, lines 9-10). In 1999, just prior to his divorce from Allean, Mr. Moore received a letter in the mail when he turned 80 years old advising him that he would have to move his retirement funds to another account. (R. p. 275, lines 17-25). Thus, on January 14, 1999, Jeannette assisted her father with transferring his retirement funds into another account. (R. p. 276-277). Mr. Moore's retirement funds were placed in an account in Jeannette's name. (R. p. 277, lines 19-23). Jeannette asserted at trial that her father gave her the funds as a gift because of everything she had done for him. (Id.). The total amount of the funds placed in the account in Jeannette's name was twenty-nine thousand, four hundred and thirty-three dollars ($29,433.00). (R. p. 278, lines 8-13). A penalty was assessed for moving the funds in the amount of one hundred and twenty-two dollars and fifty three cents ($122.53).

Although Jeannette asserted the funds totaling twenty-nine thousand, four hundred and thirty-three dollars ($29,433.00) were a gift to her from her father, she maintained that she utilized the funds for her father's benefit. (Id.). Specifically, Jeannette testified that she paid her father's legal fees for her parent's divorce, which

totaled fifteen thousand dollars ($15,000.00), as well as paying miscellaneous doctor bills. (R. p. 278, lines 10-13). Jeannette's claim that she paid her father's legal fees and doctor's bills for his divorce was not disputed at trial.

The next order of business Jeannette assisted her father with was complying with the terms and provisions of her parent's Decree of Divorce and Order on Defendant's Motion to Alter or Amend. Pursuant to the Decree of Divorce and its amendment, Mr. Moore was required to either sell his home on Montgomery Road or "buy out" his wife's interest. (R. p. 397-404; R. p. 405-413). Mr. Moore was required to notify his wife of his decision to do one or the other within 45 days of the Spartanburg County Family Court's Order. (Id.). Whether Mr. Moore elected to sell his residence or "buy out" Allean, Mr. Moore was required to pay unto Allean the sum of forty two thousand, six hundred and thirteen dollars ($42,613.00) within the time frame set forth in the original Decree of Divorce. (Id). However, prior to Mr. Moore being able to comply with the terms and provisions of the Decree of Divorce, Allean went back to the Spartanburg County Family Court and had the Decree of Divorce amended to entitle her to a total sum of fifty two thousand, eight hundred and fifty one dollars ($52,851.00). (R. p. 112, lines 15-18; R. p. 405-413). Mr. Moore was required to pay this sum unto Allean or sell Montgomery Road for the purpose of paying her the aforementioned funds. (R. p. 397-404; R. p. 405-413).

At trial, Mr. Moore claimed he did not know what the terms and provisions of the Decree of Divorce and its amendment were as he claimed that he could not read. (R. p. 40, line 10; R. p. 76). However, Jeanette witnessed Mr. Moore reading on several occasions and testified to the same. (R. p. 115, line 21 through R. p. 116). Regardless of

Mr. Moore's ability to read, Jeanette agreed to continue to assist her father with his financial affairs. Jeannette testified that she loved her father and would have done anything to help him. (R. p. 278, lines 19-25).

Jeannette discussed with Mr. Moore the Decree of Divorce and the amendment thereto requiring him to pay her mother fifty two thousand, eight hundred and fifty one dollars ($52,851.00) within the time frame set forth in the Divorce Decree and its amendment. (R. p. 282). Jeannette testified that she and her husband, Thomas Lee Benson, Jr., agreed they would purchase Mr. Moore's house from him for fifty six thousand, two hundred and ninety-four dollars and forty one cents ($56,294.41) the exact amount necessary to pay Allean in full, pay the outstanding mortgage in full and pay the closing costs. (R. p. 292, lines 24-25; R. p. 387-388). Although this was below the market price for Montgomery Road as determined by the Spartanburg County Family Court, Jeannette testified that she and her husband did not have the funds to purchase Montgomery Road for the value established by the Family Court. (R. p. 293, lines 3-6). Also, according to Jeannette, none of the other family members had the money to assist Mr. Moore. Thus, although Jeanette and her husband would own Montgomery Road, they agreed Mr. Moore would continue to reside at Montgomery Road. (R. p. 284 to 285). Jeannette and her husband would be responsible for the payment of the taxes and insurance thereon, and Mr. Moore would not be charged any rent or fees for continuing to reside at Montgomery Road. (Id.).

Jeannette testified that Mr. Moore wanted to sell Montgomery Road to her and no one else. (R. p. 301 to 304). This was confirmed by the real estate closing attorney as set

forth herein below. Jeannette acted in the manner which her father, Mr. Moore, desired. (Id.).

Thus, on March 19, 2001, Jeannette and Mr. Moore went to an attorney's office, that of John Henry Heckman, III, for the purpose of Mr. Moore selling Montgomery Road to Jeannette and her husband for the exact amount of funds Mr. Moore owed Allean pursuant to their Decree of Divorce and its amendment, plus the mortgage and closing costs. (R. p. 250 to 255). Mr. Moore was advised by Mr. Heckman, an attorney in good standing, of what he was doing and provided with the opportunity to ask questions. (Id.). Mr. Moore agreed to proceed with the transaction after being fully informed. (Id.). Mr. Moore paid one hundred and seventy five dollars for preparing the necessary documents for the transfer of the title, otherwise there were no costs to him. (R. p. 256, lines 20-25). The total amount paid was at the time of closing was fifty six thousand, two hundred and ninety-four dollars and forty-one cents ($56,294.41). (R. p. 387-388).

On October 13, 2006, approximately five years after Mr. Moore sold Jeanette and her husband Montgomery Road and seven years after Mr. Moore voluntarily transferred his retirement funds to Jeannette, Mr. Moore filed a Complaint against Jeannette and her husband, Thomas Lee Benson, Jr., alleging fraud, negligent representation, conversion, estoppel, civil conspiracy, breach of fiduciary duty and seeking injunctive relief. (R. p. 6 to 17). In doing so, Mr. Moore asserted that Jeannette had engaged in the aforementioned acts by taking from Mr. Moore his retirement funds totaling twenty-nine thousand, four hundred and thirty-three dollars ($29,433.00) and his property located at Montgomery Road. (Id.). Further, Mr. Moore asserted that Jeannette used his retirement funds to pay him for Montgomery Road, asserting in essence Jeannette only paid twenty-six thousand,

eight hundred and sixty one dollars and forty one cents ($26,861.41). (R. p. 6 to 17; R. p. 387-388).

In his pleadings and at trial, Mr. Moore claimed that he did not learn of the transactions until December 2005, when he grew suspicious about a truck parked on his property and a comment made by Appellant, Thomas Lee Benson, Jr. (R. p. 50 to 56). After having his grandson inquire into the matter, Mr. Moore filed the action against his daughter and her husband approximately a year and a half later.

Appellants asserted in their responsive pleadings that Respondent's Complaint should be dismissed for being filed in excess of the applicable statute of limitations. (R. p. 17 to 26). Further, Appellants filed a motion to dismiss the Complaint on the same basis, seeking a ruling from the Trial Court prior to trial. (R. p. 26). The Trial Court denied Appellants' motion finding Respondent "became aware that there may be something going on with the property" in 2005. (R. p. 4-6).

After a trial on the merits the Trial Court found Appellants converted Mr. Moore's retirement funds in the amount of twenty-nine thousand, four hundred and thirty-three dollars ($29,433.00) and breached their fiduciary duty to Mr. Moore when they purchased Montgomery Road. (Id.). The Trial Court ordered the following:

1. Within (30) days of the date of this Order, the Defendants shall re-convey the subject property to the Plaintiff by warranty deed with no encumbrances except for the current year's taxes.

2. Defendants shall pay to the Plaintiff his actual damages in the amount of $30,215.82 plus the early withdrawal penalty in the amount of $122.53 which totals $30,338.35. The Defendants will receive a credit against the awarded damages in the amount of $26,568.09 which is the amount the Defendants contributed to the total amount required to consummate the closing on March 9, 2001. This leaves a total balance due to the Plaintiff for actual damages in the amount of $3,770.26.

3. Punitive damages in the amount of $25,000.00.

4. That the Counterclaim of the Defendants is dismissed.

5. The parties shall be responsible for their respective fees and costs.

6. This Court shall retain jurisdiction to do all necessary acts incident to this Order.

(Id.).

In awarding Respondent actual damages in the amount of three thousand, seven hundred and seventy dollars and twenty-six cents ($3,770.26), the Trial Court found the following:

> On March 9, 2001, a closing was held in the office of The Heckman Law Firm located in Greenville, South Carolina. The Plaintiff executed a Title to Real Estate, Plaintiff's Exhibit 3. The Plaintiff and the Defendants executed a HUD-1 Settlement Statement, Plaintiff's Exhibit 4, which showed that from the proceeds of the transaction, Allean Moore was paid $52,851.00 and a mortgage in favor of Farmers Home in the amount of $3,024.36 was paid in full. The remaining funds were for closing costs and fees. The Plaintiff did not receive any funds from the transaction. It is clear from the examination of the HUD-1 that the purchase price to be paid for the subject real property as set out in the Purchase Contract, Plaintiff's Exhibit 2, was determined by adding the amount due to Allean Moore, the payoff of the first mortgage plus the Purchaser's attorney's fees and costs. The only amount not anticipated was the cost to be paid by the Seller in the amount of $489.50. The total purchase price to be paid by the purchaser as show on line 120 of the HUD-1 is $56,783.91.

(Id.).

Based thereon, the Trial Court awarded Respondent the sum of three thousand, seven hundred and seventy dollars and twenty-six cents ($3,770.26). (Id.). However, the Trial Court did not take into consideration the following:

1. Allean was paid fifty-two thousand, eight hundred and fifty-one dollars ($52, 851.00). (Id.).

2. Jeannette and her husband paid the taxes and insurance for Montgomery Road for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. (R. p. 284 to 286).
3. Jeannette and her husband paid the insurance for Montgomery Road for 2001, 2002, 2003, 2004, 2005, 2006 and 2007. (Id.).
4. At the time of the closing, Jeannette and her husband paid the balance of the mortgage for Montgomery Road in the amount of three thousand, twenty-four dollars and thirty-six cents ($3,024.36). (R. p. 284-287).

Accordingly, the Trial Court's findings against Appellants' resulted in Respondent receiving the real property located at Montgomery Road, the benefit of the Appellant's paying Respondent's taxes and insurance for seven years, and the Appellant's paying the balance of the debt to Allean Moore. (R. p. 4-6). Thus, the Trial Court's Order resulted in the Respondent receiving a windfall in addition to a punitive damage award. (R. p. 4-6).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANTS' MOTION TO DISMISS THE COMPLAINT ON THE GROUNDS THAT THE COMPLAINT WAS FILED IN EXCESS OF THE APPLICABLE STATUTE OF LIMITATIONS.

In Appellants' Answer they asserted an affirmative defense and filed a motion to dismiss the Complaint alleging the Complaint was filed in excess of the applicable statute of limitations set forth by South Carolina Law. (R. p. 17-26; R. p. 26). Further, Appellants renewed their motion during the trial of this matter, seeking an order granting their request for a dismissal. The Trial Court denied Appellants' motion (on all basis).

An action in tort, such as the action in the instant case, is governed by the limitations set forth in Section 15-3-530 of the South Carolina Code. This code section provides that actions for fraud, negligent misrepresentation, civil conspiracy and the like must be brought within three years of when the injury occurred. Section 15-3-530 states:

> Within three years:
>
> (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520;
> (2) an action upon a liability created by statute other than a penalty or forfeiture;
> (3) an action for trespass upon or damage to real property;
> (4) an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property;
> (5) an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15-3-545;
> (6) an action under Sections 15-51-10 to 15-51-60 for death by wrongful act, the period to begin to run upon the death of the person on account of whose death the action is brought;
> (7) any action for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery, the cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
> (8) an action on any policy of insurance, either fire or life, whereby any person or property, resident or situate in this State, may be or may have been insured, or for or on account of any loss arising under the policy, any clause, condition, or limitation contained in the policy to the contrary notwithstanding; and
> (9) an action against directors or stockholders of a monied corporation or a banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law, the cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created, unless otherwise provided in the law under which the corporation is organized.

The statutes of limitations set forth in the aforementioned code "are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public [or private] affairs." *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000).

Furthermore, "[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation." *Webb v. Greenwood County,* 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956).

"The limitations period begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. " *Turner vs. Milliman*, --- S.E.2d ----, 4, 2009 WL 56928 (Ct. App.,2009) (citing *Burgess v. Am. Cancer Soc'y, South Carolina Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989); *see also* S.C.Code Ann. § 15-3-535 (Supp.2007) ("[A]ll actions initiated under Section 15-3-530(5) 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."); *Epstein v. Brown,* 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (noting that under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct).

"The standard as to when the limitations period begins to run is objective rather than subjective." *Id. (*citing *Burgess,* 300 S.C. at 186, 386 S.E.2d at 800). "The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness." *Id.* (citing *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct.App.1998) (internal citations omitted).

"According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 364 468 S.E.2d 645 (S.C.,1996) (citing *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)). The Court has interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Id (citing Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981)). "Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial." *Id (citing Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. granted*, 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed*, 288 S.C. 468, 343 S.E.2d 613 (1986).

In Respondent's complaint filed on October 13, 2006, he alleged claims of fraud, negligent misrepresentation, conversion, civil conspiracy, breach of fiduciary duty and injunctive relief. Respondent's claims however are barred by the statute of limitations set forth in the Section 15-3-520 and his complaint should have been dismissed prior to trial or upon a directed verdict for Appellants. The Trial Court's finding to the contrary was reversible error.

Respondent asserted Appellants converted his retirement funds and had him sell the property on Montgomery Road without his knowledge or consent in 1999 and 2001. Further, Respondent claimed he did not know and could not have known that Appellants

engaged in this alleged misconduct until 2005. However, Respondent's claims are contrary to the facts in this case.

Respondent asserted that he did not understand what happened when he went to attorney John Henry Heckman, III's office on March 19, 2001, and he could not read any of the documents that he signed on that date. However, the fact the Respondent may not have comprehended the full extent of what occurred is immaterial. *See Dean vs. Ruscon, Corp.*, 321 S.C. at 364. "According to the discovery rule, the statute of limitations begins to run when the cause of action reasonably ought to have been discovered." *Id.* This is an objective standard as opposed to a subjective standard. *See Infra.* Thus, a reasonable person would have known or should have known that on March 19, 2001, when attorney John Henry Heckman, III explained that the transaction in which Mr. Moore was engaging in was sale of his real estate located on Montgomery Road to his daughter Jeannette, for the price listed on the HUD-1 Settlement Statement was in fact a transfer of his real property. Attorney Heckman's testimony is most compelling and asserts such a finding.

During Mr. Heckman's testimony he explained as follows:

Q. And what was the process you went through in closing this real estate?

A. My recollection was that it was a fairly routine transaction where Mr. Moore and Jeannette came in and we go in my conference room and not so much that I specifically remember this I do somewhat remember them being in the room but the buyer sits on the left and the seller sits on the right and this deal was a cash transaction so there would have been about six documents that we would have to sign and my general procedure is I take the documents I am going to go over what each document is. You are going to know what you are signing and if you have any questions please stop me. And in this particular transaction the seller was signing five or six and then the buyer only had to sign the settlement statement. So I would have taken the documents and gone through them with Mr. Moore. This is the seller's affidavit. This basically saying that there are no

outstanding judgments or liens or contractors owed money on the property and you know he would have signed off and I basically walk through all of the documents that way. The key document would have been the deed and on the deed I take it straight through. James Moore in consideration of Fifty Six thousand whatever dollars hereby grant, bargain, sell and release unto Jeannette Benson. I would have gone over the legal description of the property and then sign on page 3. And I would have been the witness and the notary on those documents.

(R. p. 252; lines 4-22).

Mr. Heckman when on to state:

Q. Mr. Heckman did you give Mr. Moore an opportunity during this transaction to ask any questions?

A. Yes.

Q. Did you explain to Mr. Moore what was the process that was going to take place that day in your office?

A. Yes.

Q. You asked him if he had any questions. What was his response?

A. I don't recall him having any questions.

Q. When you were discussing the matter with Mr. Moore in your office did you explain to him that he was selling his property?

A. Yes.

Q. Did he in your opinion understand what you were saying?

A. Yes.

Q. Was he communicating with you?

A. Yes.

Q. Did he appear as if he understood your questions?

A. Yes. I would not have let him-I wouldn't have allowed him to sign the deed if I was not confident that he understood what he was signing. That is part of what I feel to be my professional responsibility to my client. If I had a client in my office that I felt did not understand the transaction I

would stop the transaction and talk to them about it, you know, until I was sure they understood the transaction and probably would call the transaction off if I truly thought that one side or the other did not understand the transaction.

Q. There has been testimony in regards to some witnesses have claimed that Mr. Moore did not in fact go in your conference room with you that day but instead stayed in the hallway the entire time?

A. That is not true.

Q. What did take place?

A. They sat at my table. The buyer on one side and the seller on the other side.

Q. And you remember that?

A. Yes.

(R. p. 253-254).

Mr. Heckman's testimony was corroborated by Jeannette's testimony.

Thus, Respondent knew or should have known after meeting with an attorney who explained to him what he was executing that he was transferring title to 43 Montgomery Road to his daughter and her husband in exchange for valid consideration: the payment of the mortgage thereon and his debt to Allean. Further, Title was recorded and made a public record. (R. p. 384).

> Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); S.C.Code Ann. § 15-3-535. *See also Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed. *Id.* (emphasis supplied). Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an

> injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. *True v. Monteith,* 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997).

Epstein vs. Brown, 363 S.C. 372, 376 (2005).

A person of common knowledge or experience would have known or should have known that there were facts and circumstances that there may have been a claim against Jeannette Benson and her husband. Thus, the Trial Court erred in failing to dismiss this action.

Accordingly, Appellants seek a reversal of this case and remand to the Trial Court for a dismissal.

II. THE TRIAL COURT ERRED IN FINDING APPELLANTS CONVERTED RESPONDENT'S RETIREMENT FUNDS AND BREACHED THEIR FIDUCIARY DUTY TO RESPONDENT WHEN PURCHASING THE REAL ESTATE LOCATED ON MONTGOMERY ROAD.

The Trial Court found Appellants had converted Respondent's retirement funds in the amount of twenty nine thousand, four hundred and thirty-three dollars and forty-six cents ($29,433.46) to their own use without Respondent's knowledge or consent and breached their fiduciary duty to Respondent by purchasing Montgomery Road. For the reasons set forth herein below, the Trial Court erred in making such a finding.

The evidence at trial established that Mr. Moore gave his daughter the sum of twenty nine thousand, four hundred and thirty-three dollars and forty-six cents ($29,433.46) for taking care of him. Although the Trial Court did not find the same, there was no evidence to the contrary. Mr. Moore testified that he did not remember giving Jeannette the funds. (R. p. 53-60). However, Mr. Moore did not testify that he didn't give the funds to Jeannette as a gift, rather he stated that after seven years he wanted the back. (R. p. 60).

Further, there was no evidence to dispute that Jeannette paid Mr. Moore's legal fees for his divorce in the amount of fifteen thousand dollars from those funds or that she paid for Mr. Moore's doctor bills. (R. p. 277, lines 19-23; R. p. 278, lines 8-13). Thus, at the very least, the Trial Court should have found that Mr. Moore's legal fees were in fact paid by his daughter from Mr. Moore's retirement funds and therefore it would not have been unusual for Mr. Moore to in fact have given the money to his daughter to reimburse her for the money she had expended on his behalf.

A review of Mr. Moore's testimony reveals that at the time of trial, approximately 9 years after he had given the funds to Jeannette, Mr. Moore did not have a memory of the events that took place from 1999 to 2005. Most of the answers Mr. Moore provided on cross-examination were not answered as Mr. Moore repeatedly stated that he didn't know or counsel would have to ask someone else. (R. p. 47-96). For example, Mr. Moore was not aware that under the Spartanburg County Family Court Order he was required to pay his wife any sum of money. (R. p. 76-77). Mr. Moore could not even remember whether or not he obtained a divorce from his wife on the grounds of her adultery.

Mr. Moore's memory was also inaccurate regarding his meeting with attorney John Henry Heckman, III. Mr. Moore could not remember Mr. Heckman, yet there was testimony from Mr. Heckman regarding his meeting Mr. Moore prior to the closing on March 19, 2001, as well as testimony from another family member regarding a separate probate matter in which Mr. Moore was taken to see Mr. Heckman at his office. (R. p. 220). Mr. Moore also claimed that on the day of the closing he was not permitted to meet with Mr. Heckman, but remained in the hallway until Jeannette brought him some

documents to sign. Mr. Moore had no recollection of his meeting with Mr. Heckman. (R. p. 55). However, Mr. Heckman specifically recalled Mr. Moore being in the meeting and he explained to Mr. Moore during that meeting what he was doing. *See supra.* Nevertheless, Mr. Moore continued to assert he had no knowledge of what had occurred, but became suspicious some four years later.

The Trial Court also found Jeannette had breached her fiduciary duty to her father when she purchased Montgomery Road from him and paid her mother the money that was due and owing to her under the terms of Mr. Moore's Decree of Divorce and its amendment. However, the Trial Court ignored the uncontroverted evidence that Mr. Moore was in fact under an obligation to either sell his land or pay his ex-wife the sum of $52,851.00 within a specified time frame. (R. p. 397-404; R. p. 405 - 413). Counsel for Mr. Moore asserted there were other options Mr. Moore could have considered as opposed to selling his land to his daughter for below fair market in an effort to demonstrate Jeannette has somehow swindled her father into selling his land to him. However, Mr. Moore could not recall any of the conversations he had with his daughter regarding the sale of Montgomery Road. *See supra.* Mr. Moore could not even remember whether or not he had met with the closing attorney on a prior occasion, which he had in fact done. Moreover, despite counsel's argument, it was not unconscionable that Mr. Moore would want to "sell" his real estate to his daughter for below the market price. As Mr. Heckman, an experienced attorney in these areas testified:

> Q. Now in your experience as a real estate attorney did you have any concerns about that price of Fifty six thousand dollars for this property?
>
> A. To me it seem to be a reasonable price in fact often times as an estate planning devise you would have a child and parent come to you and say we just want to take the property out of my father and mother, parent's

name to avoid it being held up in probate for a year. So I would have not batted an eye if they said we just want you to deed the property over five dollars love and affection.

(R. p. 94, line 19-25).

The evidence simply does not support a finding that Appellants converted Mr. Moore's retirement funds and breached their fiduciary duty to Mr. Moore when they purchased Montgomery Road. Rather, what is apparent is that Mr. Moore does not recall the transaction and now after seven years has brought an action against his daughter in violation of the applicable statute of limitations.

III. THE TRIAL COURT ERRED IN FINDING RESPONDENT HAD ACTUAL DAMAGES.

The Trial Court found Respondent had actual damages and awarded Respondent actual damages in the amount of $3,770.26. The Trial Court found the following:

> On March 9, 2001, a closing was held in the office of The Heckman Law Firm located in Greenville, South Carolina. The Plaintiff executed a Title to Real Estate, Plaintiff's Exhibit 3. The Plaintiff and the Defendants executed a HUD-1 Settlement Statement, Plaintiff's Exhibit 4, which showed that from the proceeds of the transaction, Allean Moore was paid $52,851.00 and a mortgage in favor of Farmers Home in the amount of $3,024.36 was paid in full. The remaining funds were for closing costs and fees. The Plaintiff did not receive any funds from the transaction. It is clear from the examination of the HUD-1 that the purchase price to be paid for the subject real property as set out in the Purchase Contract, Plaintiff's Exhibit 2, was determined by adding the amount due to Allean Moore, the payoff of the first mortgage plus the Purchaser's attorney's fees and costs. The only amount not anticipated was the cost to be paid by the Seller in the amount of $489.50. The total purchase price to be paid by the purchaser as shown on line 120 of the HUD-1 is $56,783.91.

(R. p. 4-6).

However, the award of actual damages based on the evidence at trial was in error. The evidence at trial established the following:

Respondent owed Allean fifty-two thousand, eight hundred and fifty-one dollars ($52, 851.00. This sum was paid to Allean at the time of the March 19, 2001 closing when Mr. Moore sold Montgomery to the Plaintiffs, which is reflected on the HUD-1 Settlement statement. (R. p. 397-388). The Trial Court found the same. (R. p. 4-6) Thus, even if this Court finds that Appellants converted Mr. Moore's retirement funds in the amount of twenty nine thousand, four hundred and thirty-three dollars and forty-six cents ($29,433.46) and utilized the funds to pay the total purchase price of Montgomery Road, Appellants still paid a total of twenty seven thousand, three hundred and fifty dollars and forty-five cents ($27,350.45) of their own money at the time of closing. This figure is reached by taking the total closing costs: $56,783.91 and deducting the total amount of Mr. Moore's retirement funds of $29,433.46. Thus, Appellants paid a little more than half of Mr. Moore's debt owed to Allean. Further, the remaining mortgage on Montgomery was paid in full.

Accordingly, the Trial Court erred when it awarded Mr. Moore the property at Montgomery Road without any liens thereon and found he had actual damages in the amount of $3,770.26. The Trial Court's order in essence awarded Mr. Moore the funds Appellants paid out of their own pocket in the amount of twenty seven thousand, three hundred and fifty dollars and forty-five cents ($27,350.45). These funds were used to pay off the mortgage on the property located at 43 Montgomery, as well as to pay Mr. Moore's debt to Allean. The Trial Court's order results in an improper windfall to Mr. Moore of almost nine times what the Trial Court found as actual damages. Accordingly, The Trial Court's Order awarding actual damages to Mr. Moore should be reversed.

IV. THE TRIAL COURT ERRED IN FAILING TO ORDER RESPONDENT TO REIMBURSE APPELLANTS THE TAXES AND INSURANCE PAID FOR MONTGOMERY ROAD FOR THE PAST SEVEN YEARS.

It was undisputed at trial that Mr. Moore has not been deprived of his use and enjoyment of Montgomery Road nor has he had to pay the taxes or insurance thereon. For the past seven years, Appellants have paid the taxes and insurance for Montgomery Road for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. (R. p. 284-286). Appellants also paid the insurance for Montgomery Road for 2001, 2002, 2003, 2004, 2005, 2006 and 2007. (Id.). The Trial Court did not require Mr. Moore to contribute to these expenses, or reimburse Appellants for these expenses.

In the event this Court upholds the Trial Court's order, this matter should be reversed and remanded with an order requiring Mr. Moore to reimburse the Appellants for the taxes and insurance for 43 Montgomery Road for the 2001, 2002, 2003, 2004, 2005, 2006 and 2007 tax years, as well as for the insurance for those tax years. In the alternative, the sums paid by Appellants for the past seven years should off-set any award Mr. Moore receives, if any in this case.

V. THE TRIAL COURT ERRED IN FAILING TO ORDER RESPONDENT TO REIMBURSE APPELLANTS $27,350.45

In the event this Court upholds the Trial Court's order awarding Mr. Moore the property located at Montgomery Road, the matter should be reversed and remanded with an order from the Court requiring Mr. Moore to reimburse Appellants the sum of twenty seven thousand, three hundred and fifty dollars and forty-five cents ($27,350.45). As stated herein above, it was undisputed at trial that Mr. Moore's debt to Allean was paid in full at the time of the closing. Thus, if this Court concurs with the Trial Court's findings, Mr. Moore's retirement funds in essence went to pay a portion of the debt that was owed

to Allean. The balance of that debt and the mortgage on Montgomery Road was paid by Appellants with their own funds.

Mr. Moore received a financial gain: twenty seven thousand, three hundred and fifty dollars and forty-five cents ($27,350.45) paid to his ex-wife, payment of remaining mortgage on Montgomery Road, and the payment of seven years of taxes and insurance, while still being able to use and enjoy the property at Montgomery Road. Accordingly, in the event this Court does not find the Trial Court erred in failing to dismiss this action as set forth herein above or erred in its findings at trial, the Trial Court's award of actual damages should be reversed and this matter remanded for an order directing Mr. Moore to reimburse Appellants the sum of twenty seven thousand, three hundred and fifty dollars and forty-five cents ($27,350.45), the amount paid by Appellants for the mortgage and remaining debt to Allean, as well as reimbursement for the taxes and insurance paid for seven years.

VI. THE TRIAL COURT ERRED IN AWARDING RESPONDENT PUNITIVE DAMAGES.

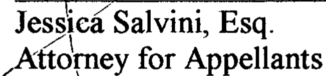
The Trial Court awarded Respondent punitive damages in the amount of twenty five thousand dollars ($25,000.00). In doing so, the Trial Court relied on *Gamble vs. Stevenson,* 305 S.C. 104, 406 S.E. 2d 350 (1991). However, it is well settled law that in South Carolina "punitive damages may be awarded only upon a finding of actual damages." *Id.* at 111. As stated *supra,* Respondent had no actual damages. Thus, the award of punitive damages was in error and this Court should reverse the Trial Court's award of the same.

//

CONCLUSION

For the reasons set forth herein above, the Appellants respectfully request this Court reverse the order of the Trial Court and remand this case for a dismissal or in the alternative reverse the award in this matter as set forth herein above.

Respectfully Submitted,



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Greenville, SC
June 22, 2009

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

GORDON G. COOPER, MASTER IN EQUITY FOR SPARTANBURG COUNTY

CASE NO.: 2006-CP-42-3378

James Moore, ... Respondent.

v.

Jeannette M. Benson and Thomas Lee Benson, Jr.. . . . . .Appellant,

---

CERTIFICATE OF MAILING

FINAL BRIEF OF APPELLANT

I served the attached the Appellants' Final Brief on the following person(s) on the date set forth below, by mailing a true copy thereof, in a sealed envelope, postage fully prepaid thereon and addressed to:

Edwin C. Haskell,III
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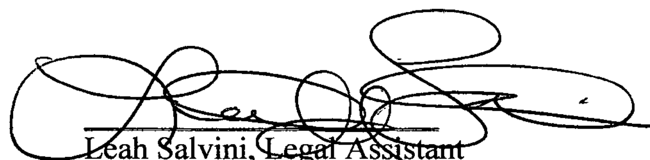
Spartanburg, SC 29306

I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on June 9, 2009, in Greenville, South Carolina.



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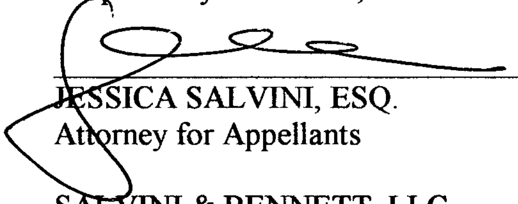
CERTIFICATE OF COUNSEL

I certify that Appellants' Final Brief complies with South Carolina Rule of Appellate Procedure, Rule 211(b).

Respectfully Submitted,



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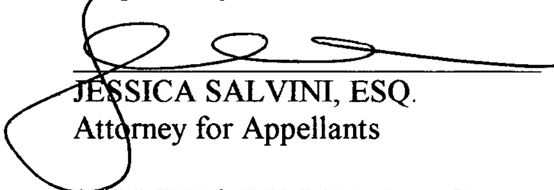
CERTIFICATE OF COUNSEL

I certify Appellants' Final Brief conforms with the Supreme Court's Order dated August 13, 2007.

Respectfully Submitted,



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CERTIFICATE OF MAILING

APPELLANT'S FINAL BRIEF

I served the attached: Appellant's Final Brief, on the following person(s) on the date set forth below, by mailing a true copy thereof, in a sealed envelope, postage fully prepaid thereon and addressed to:

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I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2009, in Greenville, South Carolina.

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