

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

App. Case No. 2013-000020
Case No. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C.. Appellants,

vs.

Randall J. Drew Respondent.

RECORD ON APPEAL - VOL 3 of 3; Pages 677 - 997

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Court Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 1st day of May, 2012, in the City of Charleston, County of Charleston, State of South Carolina.

EVE WILBANKS,
Registered Professional Court
Reporter and Notary Public

My commission expires:
December 16, 2014

Shahid, Mary

1
2 STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON) CASE NO. 2011-CP-10-3241
4 KEITH ROBERTS AND LOT)
5 12 YELLOW HOUSE, LLC)
6 Plaintiffs,)
7 vs.)
8 RANDALL J. DREW,)
9 Defendant.)

* * * * *

10 DEPOSITION OF: THOMAS STONE
11
12 DATE TAKEN: Wednesday, April 25, 2012
13
14 TIME: 1:00 p.m.
15
16 PLACE: Carlock Copeland & Stair
17 40 Calhoun Street
18 Charleston, South Carolina
19
20 REPORTED BY: EVE WILBANKS
21 Registered Professional
22 Reporter, Certified LiveNote
23 Reporter and Notary Public
24
25

* * * * *

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S T I P U L A T I O N S

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the reading and signing of the transcript is reserved by the Deponent.

THOMAS STONE, SWORN.

D I R E C T E X A M I N A T I O N

BY MR. COUNTRYMAN:

Q. Mr. Stone, my name is Andy Countryman, and I represent Randy Drew in this legal malpractice action that's pending in Charleston County. I really appreciate your time today. I'll try to get you in and out as quickly as possible.

I know you've had your deposition taken before, but just some basic ground rules: The most important thing is that the court reporter is taking down what we say, so we need to make sure not to talk over each other.

A. Okay.

Q. And if you don't understand a question, let me know and I'll be happy to rephrase it. If Mr. Pendarvis objects to the form of a question, you can still answer it. If -- make sure you answer audibly, yes's and no's, things like that,

Stone, Thomas

1 no nods of the head or "uh-huh's" or "huh-uh's."

2 A. Yes, sir.

3 Q. If you want to take a break at any time,
4 let me know. We have water or soft drinks,
5 whatever you might need. And that's about it. So
6 we'll get started.

7 (Defendant's Exhibit No. 1 was marked
8 for identification.)

9 Q. I've marked Exhibit No. 1; and we'll be
10 looking at a variety of documents today, but this
11 is the Notice of your deposition and Subpoena that
12 I served regarding your deposition. Is this the
13 Subpoena and Notice that you're appearing under
14 today?

15 A. Yes, sir.

16 Q. And I'm going to mark as a second
17 exhibit, a copy of the transcript of your
18 deposition in the federal case. That's
19 09-cv-428-CWH. Let the court reporter mark that.

20 (Defendant's Exhibit No. 2 was marked
21 for identification.)

22 Q. Do you recall having your deposition
23 taken in that case on September 16, 2009?

24 A. I do.

25 Q. And you were honest and truthful in that

1 deposition, correct?

2 A. Yes, sir.

3 Q. We can avoid going over some of the
4 background information, if I can rely on this. Is
5 that fair?

6 A. Yes, sir.

7 Q. Have you read this transcript?

8 A. I have not. I did not get a copy of
9 this.

10 Q. But you remember the deposition?

11 A. Yes.

12 Q. State your full name and address for the
13 record, please.

14 A. Thomas Harris Stone,
15 , Isle of Palms.

16 Q. And I saw in this transcript that you're
17 basically from Charleston and you went to
18 Porter-Gaud and have remained in Charleston since?

19 A. Yes, sir.

20 Q. What is your employment?

21 A. I own The Trailer Shop in Mt. Pleasant.

22 Q. How long have you done that?

23 A. Twenty-three years.

24 Q. And I assume you know why you're here
25 today, to answer some questions about the closing

Stone, Thomas

1 that took place in 2005, when you sold this Lot 12
2 piece of property to Keith Roberts.

3 A. Yes, sir.

4 Q. And by way of some background, I
5 represent Randy Drew, who was the lawyer who
6 oversaw the closing where you sold it to Mr.
7 Roberts.

8 A. Yes, sir.

9 Q. Mr. Roberts is alleging in this lawsuit
10 that Mr. Drew was negligent in overseeing that
11 closing.

12 A. Yes, sir.

13 Q. Tell me how you came to buy that piece
14 of property.

15 A. In 2001, I was launching on Clouter
16 Creek, and the owner of the landing -- the owner
17 of the landing had a friend, next-door neighbor,
18 that just actually came over and started talking
19 about waterfront property. I, in turn, got
20 interested in it. He said, If you meet me the
21 next day, I will show you the property.

22 I looked at it, I liked it, we came up
23 with a price, and about, I guess, one year after
24 that I was able to close on it.

25 Q. And did you all close on it for 135?

1 A. We did.

2 Q. What did you do during that year? What
3 issues arose that made it take a year to get the
4 closing through?

5 A. Dock contingency. I said I would not
6 buy the property without a dock permit before the
7 closing. Looked into septic tanks; it was heirs'
8 property but not complex. I was only dealing with
9 three heirs on the property. So that was the
10 three main things.

11 Q. And you hired Rob Donaldson to help you
12 out with those issues?

13 A. I did.

14 Q. What did he do for you?

15 A. Title research in detail to make sure
16 there weren't more people than we thought.

17 Q. So he was able to establish title,
18 essentially?

19 A. Yes.

20 Q. Did he help with you the dock permitting
21 issues?

22 A. No.

23 Q. Describe that process for me, of
24 obtaining the dock permit.

25 A. No one helped me with the dock permit.

1 I had never done a dock permit before. My wife
2 and I did the dock permit.

3 Q. How did you figure out how to do it?

4 A. It wasn't easy. I got a terrible
5 headache. It was tough. But we did it, applied
6 for it, the permit was granted. When I get the
7 papers back, if you want dates, I will gladly say,
8 but that's a long time ago. I will have to have
9 those papers back that you copied. I'm going to
10 say I got the dock permit in 2002.

11 Q. Let me help you out with that.

12 (Defendant's Exhibit No. 3 was marked
13 for identification.)

14 Q. This will be No. 3. I think this is a
15 copy of the dock permit that you were issued.

16 A. Okay. So this says 2001 is when it was
17 issued.

18 Q. And that was before you closed on the
19 property?

20 A. Yes.

21 Q. Do you remember when you submitted your
22 application?

23 A. If I get my papers back -- I need the
24 papers you're copying, and I've got like ten dates
25 on there and I can tell you exactly.

1 Q. Okay. They should be coming up shortly.

2 Do you want me to get those now?

3 A. I would like that. I would feel more
4 comfortable.

5 (The deposition went off the record.)

6 (Defendant's Exhibit No. 4 was marked
7 for identification.)

8 BY MR. COUNTRYMAN:

9 Q. Mr. Stone, I've given you what has been
10 marked as Exhibit No. 4. These are copies of
11 notes that you brought in to today's deposition
12 that you said would be helpful in answering my
13 questions today.

14 A. Okay.

15 Q. What are these notes?

16 A. Just dates from the time I initially
17 purchased the property, when the dock permit was
18 given to me, the time it was revoked, the added
19 time after the permit was revoked. I went to
20 court; it was reinstated. That time gap was added
21 onto the permit application, which was 172 days.

22 Q. Should we just run through all of these
23 dates? Would that be the easiest thing, you
24 think?

25 A. Yeah..

1 Q. Let me ask you, when did you prepare
2 these notes?

3 A. Sunday.

4 Q. Is that page 1?

5 A. Yeah.

6 Q. What about the second page, which I
7 think is a cover of an envelope?

8 A. That was the first time that we talked,
9 which was October the 20th, 2011. You -- we
10 talked on the phone for ten minutes. You briefed
11 me as to what was happening with the case, and
12 that I was probably going to have to give a
13 deposition. And we also talked briefly about the
14 agreement at the closing concerning we were going
15 to remove the dock contingency from the contract.
16 And, in turn, at closing, I took \$50,000 off the
17 closing price. That's what we discussed on that
18 day.

19 Q. What is the last page of notes?

20 A. It's just briefly highlighting in years
21 what the first page said.

22 MR. COUNTRYMAN: I'm going to mark
23 another exhibit.

24 (Defendant's Exhibit No. 5 was marked
25 for identification.)

1 BY MR. COUNTRYMAN:

2 Q. When did you prepare that third page of
3 notes?

4 A. All on Sunday.

5 Q. This is Defendant's Exhibit 5. Is that
6 a copy of the contract between you and Mr.
7 Roberts, where he agreed to purchase the property?

8 A. It is.

9 Q. It looks to be an accurate executed
10 copy?

11 A. Yes, sir.

12 Q. Do you -- I saw where you testified that
13 you did not meet Mr. Roberts prior to the closing;
14 is that correct?

15 A. I did not.

16 Q. All of those dealings were between the
17 real estate agents?

18 A. Correct.

19 Q. Who was your agent?

20 A. Jamie Hough.

21 Q. Do you remember who his agent was, Mr.
22 Roberts'?

23 A. No.

24 Q. And looking at the contract and based on
25 your testimony, the initial agreed-upon price was

1 about \$525,000?

2 A. Yes, sir.

3 Q. And is it accurate that the contract, as
4 initially drafted, included a contingency of a
5 dock permit?

6 A. Initially, yes, sir.

7 Q. Tell me about how that changed.

8 A. Since I had to -- the dock permit was
9 taken away and I went to an Administrative Judge
10 in Columbia, the dock permit was reinstated.
11 Since that's a state permit and I knew there could
12 possibly be complications, I wanted to know if --
13 by taking \$50,000 off the contract price, if you
14 ran into problems down the road, they're on you.
15 Don't come back at me.

16 Q. When did you initially have a discussion
17 about that particular issue?

18 A. I actually thought it was all done on
19 the same day of the closing, but it looks like it
20 was a month prior or close.

21 Q. Okay. Tell me what makes you think
22 that.

23 A. I looked it up.

24 Q. All right. Who was that conversation
25 with?

1 A. About the negotiating the 50 --

2 Q. Correct. When did you start thinking
3 about --

4 A. I could give you the exact date --

5 Q. Sure.

6 A. -- if you'd like. It looks like July
7 the 11th, 2005.

8 Q. Are you looking at page 4 of the
9 contract?

10 A. Yes.

11 Q. Where it says, "Contract not contingent
12 on dock permit"?

13 A. Correct. And then down at the bottom
14 it's dated.

15 Q. Whose initials are those next to that
16 sentence?

17 A. My initials.

18 Q. Did Mr. Roberts sign the contract with
19 that language in it?

20 A. Yes.

21 Q. What made you first decide to discuss
22 putting that language in the contract?

23 A. Because the -- when the dock permit was
24 taken away, it was complex to get the dock permit
25 back. It cost me a lot of money. And I didn't

1 know if he would run into problems after the fact.
2 If he did, I felt like if we subtracted \$50,000
3 from the contract price, this, in turn, could help
4 him resolve -- if he put a dock up, it, in turn,
5 could help him take the dock down.

6 Q. Did you discuss that with Mr. Roberts
7 face-to-face ever?

8 A. I don't -- I don't know.

9 Q. Did you both attend the closing?

10 A. Yes.

11 Q. Do you remember who else was there?

12 A. His closing attorney, Randall Drew;
13 Keith, Jamie Hough and me.

14 Q. Do you remember how long the closing
15 took?

16 A. Not long. Um, 45 minutes, maybe.

17 Q. How many real estate transactions have
18 you been involved in where you attended closings,
19 other than that one?

20 A. Two others.

21 Q. Was the one at issue shorter or longer
22 than the other ones?

23 A. About the same.

24 Q. Do you remember any discussions that
25 took place at the closing?

1 A. I said very little at the closing.

2 Q. Do you remember overhearing anyone else
3 talking about the dock permitting issues?

4 A. No.

5 Q. So were all the discussions that you had
6 with anyone on Mr. Roberts' behalf or with your
7 real estate agent regarding the dock permitting
8 issues?

9 A. They were with my real estate agent.

10 Q. So you relayed the information to him,
11 and then he would relay the information to Roberts
12 or Roberts' agent?

13 A. Correct. And that was the date that we
14 just saw, and apparently that was the day that
15 they agreed for this to happen.

16 Q. So basically, the parties to the
17 transaction knew that the Navy could possibly come
18 back and make claim on the marshland that would
19 impact the ability to build the dock --

20 MR. PENDARVIS: Object to the form.

21 Q. -- on the property?

22 A. They did.

23 Q. And based on that understanding, you
24 reduced the contract price by \$50,000?

25 A. That's correct.

1 Q. And you did that so that Mr. Roberts
2 could not come back against you down the road in
3 case those issues arose?

4 A. Correct.

5 Q. So if Mr. Roberts, for example, in this
6 lawsuit had tried to sue you, that would probably
7 have been a defense you would have raised?

8 A. I would show this paperwork that we have
9 in front us, and he cannot come back at me because
10 he agreed to the reduction in the price. And also
11 the dock permit -- there's a line in here, the
12 dock permit contingency, was taking -- taken off
13 of the contract. So there's no issue with the
14 dock --

15 Q. And that was --

16 A. -- as of the closing.

17 Q. All those measures were taken
18 specifically in light of the Navy's potential
19 claims?

20 A. Yes.

21 Q. So even though the ALJ order had been
22 rendered, there were still concerns at the closing
23 date that the Navy could come back and make a
24 claim?

25 MR. PENDARVIS: Object to the form.

1 Answer if you can.

2 A. Repeat the question.

3 Q. As of the closing date, despite the ALJ
4 order that reinstated the dock permit, there were
5 still concerns on behalf of the parties that the
6 Navy's potential claim could resurface?

7 MR. PENDARVIS: Same objection.

8 A. Yes, possibly. That was the reason for
9 the reduction. If I did not feel there would be
10 an issue, then obviously I would not have
11 subtracted the \$50,000.

12 Q. Do you remember if anyone told you one
13 way or another whether it was likely the Navy
14 would come back and make its claim after the ALJ
15 order had been rendered?

16 A. No.

17 Q. Was there a sense at the closing as to
18 whether that would happen?

19 MR. PENDARVIS: Object to the form.

20 Answer if you can.

21 A. There was a sense that it would not
22 happen because there was not a representative in
23 Columbia at the court case in front of Ralph
24 Anderson; Department of Navy or whoever it is,
25 federal government, did not have a representative

1 there. So we didn't know if, you know, they just
2 weren't going to pursue it further or not.

3 Q. Do you know why no one from the Navy
4 attended the ALJ case?

5 A. I didn't ask anybody. I don't know.

6 Q. You attended that hearing, though,
7 didn't you?

8 A. Yes, sir.

9 Q. I want to walk through your notes on
10 page 1. Let me ask you this, at the closing, did
11 Mr. Roberts know the dock could be an issue in the
12 future?

13 MR. PENDARVIS: Object to the form.

14 A. Yes, he did.

15 Q. Looking back at page 1 of your notes,
16 this might be a good way to run down the timeline.
17 July 2005, Started negotiations. That was with
18 Mr. Roberts?

19 A. Correct.

20 Q. Did you -- how did you market the
21 property?

22 A. Through Read & Read Realty.

23 Q. Did you have any offers other than Mr.
24 Roberts?

25 A. No offers.

1 Q. Did you negotiate with anyone else?

2 A. I had one other person look at the

3 property, but no money figures transpired.

4 Q. Do you know what the listing price was?

5 A. 525.

6 Q. And then the next date, August 17, 2005,

7 Closed on property.

8 A. Correct.

9 Q. I think I saw in the contract where the
10 parties had a 60-day due diligence period, but
11 that the closing took place prior to that. Do you
12 know why the closing took place when it did as
13 opposed to later?

14 A. I really don't.

15 Q. The next line under that says, 2001 -
16 applied for a permit. July 23, 2001, issued to go
17 through --

18 A. 2006.

19 Q. -- 2006?

20 A. Yes, sir.

21 Q. Do you remember when in 2001 you applied
22 for the permit?

23 A. I really don't, no, sir. I just know it
24 would be in 2001. So what's that? Seven months?
25 Somewhere in that window.

1 Q. As part of the application process, did
2 you have to provide notice to adjoining landowners
3 of your intent to get the dock permit?

4 A. The wording is adjacent landowners. I
5 did.

6 Q. How did you know which landowners were
7 adjacent?

8 A. I think we looked it up on the computer.

9 Q. Was that you or did Mr. -- you and your
10 wife?

11 A. Right.

12 Q. What is her name?

13 A. Mary.

14 Q. And then how did you provide that notice
15 to those landowners?

16 A. Um, I don't know if it was conversations
17 and letters. It could be both. But I remember --
18 I can't remember his name, but one of them is from
19 Atlanta. I think a letter to one, but --

20 Q. I think I saw one to someone out of New
21 York or something like that.

22 A. New York is actually one of the heirs.

23 Q. But the long and short of it is you
24 provided the notice that OCRM required to get the
25 dock permit?

1 A. I think the wording is adjacent to your
2 property, who is -- who are the adjacent
3 landowners?

4 Q. You said that word "adjacent." Why does
5 that word strike you as important?

6 A. Because that means to the right and the
7 left, not out in front of you.

8 Q. I guess that's become an issue because
9 the Navy asserted a claim on the marshland?

10 A. Correct..

11 Q. Is it fair to say you think the Navy's
12 position is incorrect?

13 A. No.

14 Q. Do you know whether it's correct?

15 A. They -- I'm just going to say that they
16 claim that part of the dock is going over a
17 section of marsh that is federal marsh. Not too
18 many feet for the length of the dock, but a
19 certain amount is crossing over federal marsh.

20 Q. All right. But it would be your
21 position with respect to the permitting issue that
22 you only had to provide notice to the adjacent
23 landowners?

24 A. Correct.

25 Q. So you close on the property in 2002,

1 after the dock permit was issued in July of 2001,
2 correct?

3 A. That's correct.

4 Q. And did you -- what did you do with the
5 property during the time that you bought it and
6 sold it to Mr. Roberts?

7 A. Put a little bit of money in it, cleaned
8 it up, took some trees out, bush-hogged it, just
9 simple stuff.

10 Q. You didn't start construction of a dock
11 or a house or anything like that?

12 A. Oh, no. I had no plans to do that.

13 Q. Did you talk to any of the neighbors out
14 there?

15 A. Yes.

16 Q. Do you remember which ones?

17 A. A man named Mr. Leopold; I talked to
18 him. I had to become a member of the homeowners
19 association, even though this really wasn't in the
20 homeowners association's parameters or whatever
21 you want to call it, but they said I had to become
22 a member to access this property and go down their
23 road.

24 Q. And Mr. Leopold ended up looking into
25 buying the property, didn't he?

1 A. He did.

2 Q. Tell me about that..

3 A. He walked over and said his son-in-law
4 and daughter were looking at a piece of property,
5 so he looked at this piece. He said, Can you give
6 me some details about it? And I said, I can. And
7 I told him the dimensions, how big it was; I said
8 I had a dock permit. He responded, I have looked
9 -- apparently, he might have looked into buying
10 this lot prior to me getting it. And he said, How
11 could you have a dock permit? And I said, I have
12 a dock permit in hand. He, in turn, started this
13 whole -- whatever.

14 Q. He had some inclination that a dock
15 permit might be a problem at that time?

16 A. Apparently, because he might have looked
17 into buying this piece of property or possibly the
18 adjacent piece of property that I mentioned was a
19 guy from Atlanta.

20 Q. Sure.

21 A. He looked into getting a dock permit,
22 must have contacted the Department of Navy and
23 they said that that wouldn't happen. So he, in
24 turn, questioned me. He made a phone call to the
25 Navy, and he cost me a lot of money and was

1 costing us a lot of time and --

2 Q. That's what started everything, right?

3 A. He started the whole thing.

4 Q. Kind of continuing down here, it says on
5 July 11, 2005, Roberts/Stone signed the contract,
6 not contingent on dock permit - 50,000 reduct.

7 A. Let me see. Let me get there. Gotcha.
8 Yes, sir.

9 Q. Do you know when Mr. Roberts signed the
10 contract that contained that adjustment? Was that
11 on or about July 11, 2005?

12 A. It was. We have that in another
13 exhibit.

14 Q. So he had about five weeks to address
15 any questions he had about that before the
16 closing?

17 A. Yes, sir.

18 Q. And the closing took place on August 17,
19 '05?

20 A. Yes, sir.

21 Q. And the last bit of your note says, Even
22 though we had a free and clear dock permit in hand
23 at the time of closing, both parties agreed to
24 \$50,000 price reduction knowing that there could
25 be issues with the Navy." Is that what that says?

Stone, Thomas

1 A. Yes, sir, it does.

2 Q. And then there's a line in the middle
3 there that's crossed out. What does that say?

4 A. "We did not know if the Department of
5 Navy would cause problems again." We were just
6 trying to get our wording better.

7 Q. Okay. That's the reason that that part
8 is crossed out? You thought the last sentence
9 better said what you wanted to say there?

10 A. Yes.

11 Q. And the last page of your notes is just
12 a visual timeline, essentially?

13 A. Timeline, yes, sir.

14 Q. After the closing, when is the first
15 time you heard anything about these issues with
16 the dock permit and the Navy's claim?

17 A. I don't know.

18 Q. Have you been to the property since the
19 closing?

20 A. I have.

21 Q. Was --

22 A. I went soon after the closing -- I don't
23 know if it was two weeks or three weeks -- just to
24 see if anything had happened out there.

25 Q. Have you seen it since the dock or the

1 house have been built?

2 A. I have.

3 Q. Is it fair to say that the Navy had
4 notice of your intent to obtain the dock permit
5 and did not object?

6 MR. PENDARVIS: Object to the form.

7 A. I would say that they did not know at
8 the time that we applied and the dock permit was
9 granted.

10 Q. But then the Navy knew about the ALJ
11 case and your intent to have the dock permit
12 reinstated?

13 A. Correct.

14 Q. And then didn't object?

15 A. Right.

16 Q. And you would agree, when you bought Lot
17 12, you didn't buy the adjacent marshland,
18 correct? You didn't take title to the marshland?

19 A. However far beyond my back line it might
20 have been lowland; I don't know how many feet of
21 the marsh was included.

22 Q. When you bought the property, did you
23 take title to the marshland, or was the marshland
24 titled in someone else's name, regardless of
25 whether it was the Navy or the State of South

1 Carolina?

2 MR. PENDARVIS: Form objection.

3 A. I would say it would be in someone
4 else's. I would assume the state.

5 Q. Did you ever have the property appraised
6 at any time?

7 A. I don't remember, but I don't think so.

8 Q. Do you know how you came to that 525
9 price initially?

10 A. I knew -- I just knew it was a nice
11 piece of property, extremely deep water. That's
12 what was appealing to me when I bought it.

13 Q. This handwritten language on the
14 contract that we reviewed, do you know who wrote
15 that, "The contract not contingent on dock
16 permit"?

17 A. Probably Jamie Hough.

18 Q. And to recap, you don't remember any
19 specific conversation with Mr. Roberts or anyone
20 else at the closing?

21 A. I really don't. I don't think I said
22 much at the closing.

23 Q. But the results of the closing was that
24 Roberts took title to the property and then the
25 dock permit was transferred to him?

1 A. Correct. With the additional 172 days
2 added to the permit. So it says "Permit
3 reinstated." It expires now on 1/11/07.

4 Q. But the results of the closing was he
5 took title to the property and had a valid dock
6 permit?

7 A. Yes.

8 Q. And he did that knowing that the Navy
9 could possibly come and make its claim on the
10 marshland that would impact the dock permit down
11 the road?

12 A. Correct.

13 Q. For jury selection purposes, can you
14 tell me the names of any family members in
15 Charleston County that are above the age of 18 so
16 we don't have them on our jury when this case goes
17 to trial?

18 A. My son, Thomas Harris Stone, Jr.; my
19 wife, Mary Stone; sister, Pat Stone; brother,
20 Marion Stone. I have an aunt, Mable Gay. That's
21 about it.

22 Q. What is your birthday?

23 A. 10/7/60.

24 Q. And you're not taking any medications or
25 under the influence of any drugs that would keep

1 you from testifying honestly today, are you?

2 A. No.

3 Q. You've understood all my questions?

4 A. Yes, sir.

5 MR. COUNTRYMAN: That's all I have.

6 CROSS-EXAMINATION

7 BY MR. PENDARVIS:

8 Q. Hey, Mr. Stone, Thomas Pendarvis. We
9 met briefly before the deposition. Did your wife
10 write up this note for you?

11 A. She did.

12 Q. That's what I thought. My handwriting
13 -- my wife's handwriting is much better than mine
14 as well. Was your wife -- your wife is Mary?

15 A. Mary.

16 Q. Was Mary involved in any of the lot sale
17 process -- she was helping you with the dock
18 permit?

19 A. Right.

20 Q. But once the permit was obtained, was
21 she involved in the petition to reinstate the dock
22 permit?

23 A. No.

24 Q. Was she involved in anything with the
25 sale?

1 A. No.

2 Q. Did she communicate with Mr. Howe (sic)

3 -- how do you pronounce his name?

4 A. Jamie Hough.

5 Q. Was she involved in the communications

6 with Mr. Hough?

7 A. No.

8 MR. PENDARVIS: That will be Plaintiff's

9 1.

10 (Plaintiff's Exhibit No. 1 was marked

11 for identification.)

12 Q. Take a moment and look over that, if you

13 would, Mr. Stone.

14 A. Okay.

15 Q. Is that your signature, the first

16 signature line on the right-hand side?

17 A. It is.

18 Q. This was signed on the day of the

19 closing; is that correct?

20 A. 17th day of August, yes, sir.

21 Q. And do you know who prepared this

22 document?

23 A. I guess the closing attorney. I assume.

24 Q. Were there any conversations about --

25 whoever is looking at the document can tell it's

1 dealing with whether there were any communications
2 with the Navy or any government agency about the
3 dock construction prior to the closing. And my
4 question is, was there any conversation about that
5 topic during the closing?

6 A. I don't think so, no, sir.

7 Q. Were you aware this document was going
8 to be hand -- put in front of you to sign for the
9 closing prior to August 17, 2005?

10 A. I'd say not. But obviously I signed it.

11 Q. Did you talk to -- Mary Shahid was the
12 attorney at McNair?

13 A. At McNair at the time, yes.

14 Q. Great lady.

15 A. She is.

16 Q. Were you speaking with her through the
17 summer of August -- up until August 17, '05?

18 A. No.

19 Q. Okay.

20 A. Because -- no. She had nothing to do
21 with it. She had no involvement with the dock,
22 except after the dock permit was taken away.

23 Q. Got it. So if I'm understanding, she
24 handled the reinstatement process?

25 A. Correct.

1 Q. Once that was finished, she was out of
2 the picture? Let me restate that.

3 A. She's not out of the picture. She has
4 worked other things for me also since then, a
5 couple other issues, but not involving this.

6 Q. So with regard to Lot 12 and the dock
7 permit and the reinstatement of the dock permit --

8 A. That's where she helped me.

9 Q. And Ms. Shahid's work on that dock issue
10 for Lot 12 was finished by August of '05?

11 A. Yes.

12 Q. I'll represent to you that we went
13 through Ms. Shahid's testimony and the order by
14 the -- by Judge Anderson that reinstated the
15 permit is dated May 2005.

16 A. All right. Let's start over. I'm
17 looking at this, and I'm getting confused. All
18 right. Give me the date that --

19 Q. I'm going to show you, Mr. Stone, this
20 is a copy of an exhibit that was used in Ms.
21 Shahid's deposition, Exhibit No. 7. And it is the
22 Final Order and Decision by Judge Anderson.

23 A. Okay.

24 Q. And the process through which the dock
25 permit was reinstated.

1 A. Correct.

2 Q. And it was -- I said May. Actually, my
3 mistake. It was signed June 3rd, 2005, by the
4 Judge. Do you see that?

5 A. And we were in court at what day?

6 Q. I think it was a February hearing.

7 MR. COUNTRYMAN: April.

8 MR. PENDARVIS: April? My apologies.

9 BY MR. PENDARVIS:

10 Q. The spring of '05. And I guess my point
11 I'm getting to --

12 A. And it took him this much time to rule
13 on it.

14 Q. Yes, sir. I'm just representing to you
15 that it was filed in the Administrative Law Judge
16 Court on June 3rd. And my question, getting back
17 to you, Plaintiff's Exhibit 1, is I'm sure Ms.
18 Shahid sent you a copy of this once it was clocked
19 in, correct.

20 A. Yes.

21 Q. You would have gotten a copy?

22 A. Absolutely.

23 Q. But her work to reinstate the permit was
24 essentially completed by the time this order was
25 entered; is that fair to say?

1 A. Yeah. Her work was done with me, yes,
2 sir.

3 Q. And I understand from what you've just
4 said that she might have done some other legal
5 matters for you?

6 A. But not involving Lot 12.

7 Q. And where I'm going is, from this
8 statement -- I'm not sure what you would want to
9 call this document, but this statement that you
10 signed that's been marked as Plaintiff's Exhibit 1
11 says that you've not had any communications after
12 -- let me read -- just make sure -- let me
13 withdraw that question for just a second.

14 Take a minute and read that first part.

15 A. Okay.

16 Q. You tell me when you're ready.

17 A. Okay.

18 Q. What is your understanding of what that
19 statement says without reading each word? What in
20 essence is it saying?

21 A. Have we had contact from a governmental
22 agency or the federal government concerning the
23 dock permit or the dock?

24 Q. And your statement -- your sworn
25 statement there was that you had not received any

1 contact?

2 A. Correct.

3 Q. And between June, the date of this order
4 that we looked at -- June 3rd, 2005, and August
5 17, Ms. Shahid had not called you to advise you of
6 any communications from the state or federal
7 government; is that correct?

8 A. June the 3rd. And what is the second
9 date?

10 Q. The date that you signed this exhibit.
11 In between --

12 A. The 17th of August. Between June the
13 3rd and the 17th of August, did I have any contact
14 with her?

15 Q. Did Ms. Shahid -- yes. Did you any
16 contact with Ms. Shahid in that gap between June
17 of '05 and August 17, '05?

18 A. I don't know.

19 Q. You weren't involved with any
20 discussions between Mr. Randall Drew and his
21 client, Keith Roberts, prior to the closing, were
22 you?

23 A. No discussions.

24 Q. So you don't know what warnings Mr. Drew
25 gave Mr. Roberts, if any, do you?

1 A. No.

2 Q. And --

3 A. Because I didn't know either one of them
4 until the closing.

5 Q. I just wanted to make sure -- I'm
6 closing doors, making sure --

7 A. No, I didn't know them.

8 Q. The fact that this lot was adjacent to
9 deep water and had a dock permit added value to
10 the property, didn't it?

11 A. Definitely.

12 Q. What do you think the property would be
13 worth -- maybe on the other side of the road of
14 Yellow House Road? Let me restate that. At the
15 time, in the summer of 2005, I know a --

16 A. Without having waterfront property?

17 Q. Yes, sir. If that lot had been on the
18 other side of the road, instead of 525, what would
19 it have been?

20 A. 225, 250.

21 (Plaintiff's Exhibit No. 2 was marked
22 for identification.)

23 Q. Take a moment and look that over, if you
24 don't mind, please.

25 A. Okay.

1 Q. Did you receive what's been marked as
2 Plaintiff's Exhibit 2, this fax from Mr. Leopold
3 to you?

4 A. I think I did.

5 Q. And there's a date at the top --

6 A. July 28th, 2004.

7 Q. Is that about the time you were talking
8 to Mr. Leopold about the property?

9 A. I think. It's probably close.
10 Something like that.

11 Q. Did you give this fax to Mr. Roberts or
12 -- let me back up for a second. Did you give a
13 copy of this fax to anybody?

14 A. I don't know. I wouldn't have, no.

15 Q. Did you give it to Mr. Hough, your
16 Realtor?

17 A. Probably.

18 Q. Do you know if Mr. Hough gave this
19 document to Mr. Roberts?

20 A. I don't know.

21 Q. Do you know if Mr. Hough gave it to Mr.
22 Roberts' Realtor?

23 A. I don't know.

24 Q. Did you ask anyone about the statement
25 in this letter from Captain Zalaskus, the second

1 sentence -- excuse me -- the third sentence in the
2 first paragraph says, "Therefore, you will not be
3 able to obtain permission to build a dock on the
4 marshland owned by the United States government."

5 A. Your question?

6 Q. You saw that. Did you advise anyone
7 that the United States government was claiming
8 they owned the marshland in the front of the lot?

9 A. I probably advised my attorney because
10 we had to attempt to get the dock permit back.
11 This is the -- I guess early reasons for the
12 permit being revoked.

13 Q. Do you know if you gave a copy of this
14 to Ms. Shahid?

15 A. I've got a question -- I would have
16 thought that I would have gotten a copy from Mary
17 Shahid. I don't think a copy of this was sent to
18 me. This is --

19 Q. I'm looking at the fax line that says,
20 To: Tommy Stone; from: L. Leopold, the
21 handwritten part.

22 A. Okay. Okay. That's the business next
23 door to me. Okay. Mr. Leopold sent this to me.
24 I've got it.

25 Q. From that, did you give this to Ms.

1 Shahid?

2 A. Yes. She's -- I'm sure she has a copy,
3 or I feel sure.

4 Q. You don't -- do you remember sending
5 this to her, or you just think you might have sent
6 it to her?

7 A. If I didn't send it to her, I probably
8 discussed it with her.

9 Q. The reason I'm asking, Mr. Countryman
10 and myself have gotten a lot of documents in this
11 lawsuit, and we didn't -- I haven't seen a copy of
12 this in Ms. Shahid's file, and this was obtained
13 through the U.S. government. Mr. Drew's -- excuse
14 me -- Mr. Roberts' attorney got this from the
15 United States government because they wrote the
16 letter.

17 A. Okay.

18 Q. And I'm just trying to find out if in
19 fact through you --

20 A. Did Mary Shahid get --

21 Q. Yes, sir.

22 A. If she didn't get a copy, I would assume
23 I discussed this with her.

24 Q. Okay. What do you remember about what
25 was said at the closing when it was time --

1 whenever you signed the papers?

2 A. Nothing. I truly don't think I spoke
3 ten words at the closing.

4 Q. Do you remember what anyone else might
5 have said at the closing?

6 A. I really don't. I mean, I think it was
7 -- I think it was pretty clear-cut, simple.

8 Q. Here are the documents?

9 A. Here are the documents. You need to
10 sign here, you need to sign here. We agreed on a
11 price. It's a done deal. That's the way I
12 remember it.

13 MR. PENDARVIS: I have no further
14 questions.

15 REDIRECT EXAMINATION

16 BY MR. COUNTRYMAN:

17 Q. Just a couple of follow-up questions.
18 Looking at this statement or Affidavit again --

19 A. Which one?

20 Q. The one that was signed apparently at
21 the closing that said you didn't have any contact
22 from the government or anyone about construction
23 of the dock or a dock permit -- right in front of
24 you, yellow tab.

25 A. Okay.

1 Q. Yeah. It says you haven't had any
2 discussion like that since the property had "been
3 placed on the market to sell or since the letter
4 written on my behalf by the McNair Law Firm."

5 Do you know when you put the -- what
6 date you were referring to when you said, "placed
7 the property on the market"?

8 A. When I initially placed the property on
9 the market to sell it?

10 Q. What were you referring to in this
11 Affidavit?

12 A. That I had no contact from the
13 government about the dock.

14 Q. Okay. And that's even -- how do we
15 explain this fax from Leopold?

16 A. Well, as we started out today, I had
17 forgotten about this. But Mr. Leopold is the
18 reason that this started. This particular
19 document, no, I -- until you showed it to me, I
20 had forgotten about it.

21 Q. So when you signed this statement at the
22 closing, you did not remember this letter from
23 Leopold?

24 A. No.

25 Q. All right.

1 A. Let me clarify: I don't remember the
2 letter. But I remember Mr. Leopold, and I
3 remember him pursuing it and telling me that, I
4 don't know how you can have a dock permit out
5 here. And, in turn, this is what started this
6 process.

7 Q. How does that comport with the statement
8 in the Affidavit that you didn't talk to anyone
9 about the dock or the dock permit? That's all I'm
10 trying to figure out. Because it looks like --

11 A. When I spoke to Mr. Leopold, he not only
12 asked about the dock, he was asking about the
13 property. And I told him the size of the
14 property, how wide it was, we pushed on to the
15 dock permit. And he ended up saying, Well, I
16 don't understand how you have a dock permit.

17 And at the time that I met him, whether
18 it's close to here or a week before, I had a dock
19 permit in hand. He just questioned it. So maybe
20 he was thinking he needs to check further into
21 this if he's considering buying my piece of
22 property or the adjacent piece.

23 Q. But when you signed the statement at
24 closing, to the best of your knowledge at the
25 time, that was truthful?

1 A. Yes.

2 Q. And you said you didn't remember
3 conversations at the closing. Is it possible that
4 conversations took place that you do not recall? ...

5 A. Rephrase.

6 Q. For example, if somebody else said they
7 remembered specific conversations at the closing,
8 would you be able to say whether or not those
9 conversations took place?

10 A. Probably not.

11 Q. And Mr. Roberts is saying that he did
12 not know that there could be any future issues
13 with the dock or the dock permit. And you're
14 saying that --

15 A. Mr. Roberts is saying what?

16 Q. He's saying that he did not know at the
17 closing that there could be any future issues with
18 the dock or the dock permit. My understanding --

19 A. That's strange.

20 Q. Why do you think that?

21 A. Because I'm out \$50,000. And that was
22 the agreement at the closing and prior or whatever
23 it was, July the 11th -- the agreement was the
24 dock contingency is taken off the table. I'm out
25 \$50,000. You're not supposed to call me; we're

1 not to have any discussions. I don't mind doing
2 this today. I didn't really enjoy the federal
3 deposition; that was scary. That was the deal:
4 You bought the piece of property. It has nothing
5 to do with the dock permit. I'm just giving you a
6 dock permit that I reclaimed from a court case.
7 That's it in a nutshell. You signed an agreement
8 saying we're taking the dock permit off of the
9 table. It has nothing to do with the sale.

10 So, you know, in turn, if this gets more
11 and more complex, I don't know why I'm not
12 entitled to my \$50,000.

13 Q. Why is that?

14 A. Why is that?

15 Q. Yeah.

16 A. Because I didn't think I'd ever get
17 called back on this. I'm out \$50,000 here.

18 Q. Because he was ready to pay 525?

19 A. And \$50,000 is a lot of money to me. So
20 he wanted the property; he knew going in if he ran
21 into any kind of problems, I want you to take that
22 \$50,000 that I took off of the price, you take
23 that and you take the dock down. That's the deal.

24 MR. COUNTRYMAN: That's all I have.

25 RECROSS-EXAMINATION

1 BY MR. PENDARVIS:

2 Q. But you didn't tell him you had a letter
3 from the Navy saying that they owned the marsh,
4 did you?

5 A. Did I tell him what, sir?

6 Q. You didn't tell Mr. Roberts that you had
7 what's been marked as Exhibit 2, that the Navy had
8 told you --

9 A. Why would --

10 Q. Let me finish.

11 A. -- I need to tell him that?

12 Q. I'm just saying, you didn't tell him you
13 had this, did you?

14 A. I don't know.

15 Q. Yes or no, and then you can explain.

16 A. I would say he's aware. It's not a yes
17 or no. He knew what he was getting into. All I
18 was giving him was a state-issued dock permit.
19 What he runs into with the federal government,
20 he's on his own. This is the reason for taking
21 the \$50,000 off.

22 Q. I hear you.

23 A. Okay.

24 Q. But your testimony is, Mr. Keith Roberts
25 did not have Exhibit 2 or did not have a chance to

1 look at Exhibit 2 prior to the closing, did he?

2 MR. COUNTRYMAN: Object to the form.

3 A. I don't know if he looked at it or not.

4 He's aware of it. I don't know if he looked at
5 that piece of paper, but he is aware of what he
6 was getting into. It's plain and simple, or he
7 wouldn't have signed the piece of paper where he
8 could leave the closing at \$475,000 instead of 5
9 and a quarter.

10 Q. Do you think if Mr. Roberts had a copy
11 of Exhibit 2 prior to the closing, he would have
12 still done the deal?

13 A. I don't think it made any difference. I
14 think he was dead set, and this is the reason why
15 he put a dock in. If I was there a week after or
16 two weeks after the closing, that dock is already
17 being built. He had it in his mind at the
18 closing, I want to build a dock as soon as I can
19 build it. And he's not worried about that issue.
20 It doesn't matter if he has that piece of paper or
21 not. He knew what he was getting in to. He knew
22 that I -- what the issues were with the dock. He
23 knew what I had to do to get the dock reinstated.
24 And he knew -- well, maybe he didn't know how much
25 money it ended up costing me to do this, but it

1 cost a lot of money to get a piece of paper back
2 that I had initially. A lot.

3 Q. And Mr. Roberts had a lawyer checking on
4 all of this too, right?

5 A. He did.

6 Q. Do you think Mr. Roberts had a right to
7 rely on his lawyer --

8 MR. COUNTRYMAN: Object to the form.

9 Q. -- for checking on whether things were
10 proper with the dock?

11 A. That's between him and his closing
12 attorney. It doesn't have anything to do with me.

13 MR. PENDARVIS: No further questions.

14 Thank you for your time.

15 (The deposition concluded at 2:05 p.m.)
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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Court Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 30th day of April, 2012, in the City of Charleston, County of Charleston, State of South Carolina.

EVE WILBANKS,
Registered Professional Court
Reporter and Notary Public

My commission expires:
December 16, 2014

Stone, Thomas



AGREEMENT TO BUY AND SELL REAL ESTATE (FOR GENERAL USE AND LOTS/ACREAGE)

1. **PARTIES:** This legally binding Agreement into on July 9 2005
between, Buyer(s), Keith Roberts, (hereinafter called "BUYER"), and
Seller(s), Thomas H. Stone, (hereinafter called "SELLER"). The
property shall be deeded in the name(s) of ~~Stone~~ Keith + Kathy Roberts

2. **PROPERTY TO BE SOLD:** Subject to terms and conditions herein, Seller agrees to sell and Buyer agrees to buy the following described property with improvements and fixtures thereon:

Lot _____ Block _____ Section _____ Subdivision _____
Address 0 Yellow House Place
Tax Map # 267-00-00-012 City Charleston Zip 29492
County of Berkeley, State of South Carolina.

3. **PURCHASE PRICE** shall be \$ ~~FIVE HUNDRED TWENTY FIVE THOUSANT~~ FIVE THOUSANT dollars. 475,000.00
4. **METHOD OF PAYMENT:** Purchase price shall be paid as follows: ☒ Cash, or ☐ Subject to Financing. Financing to be obtained by ☐ Conventional ☐ Seller ☐ VA ☐ FHA ☐ Other terms: _____

5. **EARNEST MONEY:** This offer is accompanied by an earnest money deposit of \$ 2000.00 UPON RATIFICATION. Buyer and Seller authorize PRUDENTIAL CAROLINA REAL ESTATE, as Escrow Agent, to hold and disburse earnest money according to the terms of this agreement. Earnest money paid by ☐ Cash, ☒ Check, or ☐ Other. Broker does not guarantee payment of a check or checks accepted as earnest money. All escrow money received shall be deposited as required by South Carolina law and South Carolina Real Estate Commission Rules and Regulations. At the consummation of this sale, the earnest money deposit shall be credited to the Buyer.

THE PARTIES UNDERSTAND THAT, UNDER ALL CIRCUMSTANCES, INCLUDING DEFAULT, THE BROKER HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT.

6. **LOAN PROCESSING AND APPLICATION:** Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum N/A % loan (loan-to-value ratio) within N/A days from the execution of this Agreement and shall provide Seller with written satisfactory loan approval within N/A days. Time is of the essence. The written loan approval shall contain no stipulations, and shall be subject only to the provisions of Paragraph 20 of this agreement. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's credit-worthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these above conditions, Buyer shall be in default of this agreement subject to the terms of paragraph 16. FHA Mortgage Insurance ☐ will ☒ will not be added to the mortgage. VA funding fee ☐ will ☒ will not be added to the mortgage.

7. **WELL, SEPTIC TANK, SEWER AVAILABILITY:** It shall be the responsibility of the Buyer to obtain approval from the South Carolina Department of Health and Environmental Control or other proper South Carolina authority prior to closing in the event a well and/or septic tank is needed to be placed on the property.

☒ BUYER ☐ BUYER ☐ SELLER ☒ SELLER HAVE READ THIS PAGE

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07/11/2005 10:19PM

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In the event that the Buyer applies for well or septic tank approval and DHEC or other proper authority denies approval or issues a preliminary opinion showing that the property is not suitable for the installation of a well and/or a conventional septic system suitable for the Buyer's intended home or other structure, then in such event, the Buyer may elect to rescind this Agreement and receive a refund of the earnest money deposit. If the property is capable of being connected to a water and/or sewerage line maintained by a private or public utility for a normal tap fee and at a cost to complete tap not to exceed \$ N/A, then in such event, the Buyer shall contract such authority to obtain confirmation that the subject property is properly tapped for water and sewer system or may be tapped into the water and sewerage system.

Seller represents that the property is connected to ☐ public sewer system or to ☐ septic tank or to ☐ public water or to ☐ well system or to ☐ other can be attached to septic/well system *E.H.S. 8/11/05*

8. **SURVEY:** Upon the acceptance of this offer, the property shall be surveyed by a licensed surveyor at the expense of the ☒ BUYER ☐ SELLER. The surveyor shall set and flag all property pins, showing encroachments and easements. Property must be x or having at least 3.2 acres. The survey to be approved in writing by Buyer prior to closing. The purchase price is based upon \$ per (acre, sq. ft., or front ft.) and shall be adjusted in accordance with the area set forth in such a survey, if applicable.

9. **CONVEYANCE SHALL BE MADE:** Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing, and transaction closed on or before Sept 9, 2005, no later than 9:00 p.m. Time is of the essence. Seller and Buyer authorize their respective attorneys and the settlement agent to furnish to Listing Broker and Selling Broker copies of the final HUD-1 settlement statement for the transaction for their review prior to closing. *Can be if satisfied of suitability*

10. **POSSESSION:** Possession of said property will be given to Buyer on the day of closing. Seller agrees to deliver property free of debris and in a clean condition. Possession by Buyer before closing or by Seller after closing shall be subject to the terms and conditions of a separate agreement to be executed prior to closing or occupancy.

11. **CONDITION OF PROPERTY:** The Seller shall not remove any timber, dirt, minerals or otherwise affect the condition of the property after the signing of this Agreement. All timber, dirt, minerals, etc., shall remain with the property and be a part of the property and be transferred to the Buyer. The Seller shall not bring any trash, refuse, debris, medical or hazardous waste, or other improper materials upon the property. In the event any condemnation proceeding is brought by any governmental authority, agency, utility, etc., prior to the closing, then the Buyer may elect to rescind the agreement.

12. **EXPIRATION OF OFFER:** The offer from Buyer shall be withdrawn at 12 o'clock AM on 7/11/2005 unless countered or accepted by Seller in written form prior to such time. Time is of the essence.

13. **SPECIAL STIPULATIONS/CONTINGENCIES:** The following stipulations concerning zoning, restrictions, and easements affecting desired use, drainage, hazardous waste, availability of water and sewer, soil test, wetlands study, subordination, lot releases, etc., should be included here. If conflicting with printed matter, the following stipulations shall control: (See addendum if applicable)

Contingencies: Clg on Buyer to have maximum of 60 days due diligence for suitability of use. Seller will have 48 hrs

Kick out clause if another Buyer comes along wants to exercise 15 day kick out

14. **ADJUSTMENTS:** Taxes, water, all sewer assessments, sewer charges, fuel oil, rents as when collected, insurance premiums, if applicable, and other assessments, including homeowner's association fees, shall be adjusted as of the date of closing. Tax prorations pursuant to this Agreement are to be based on the tax information available on the date of closing, and are to be prorated on that basis. **BUYER IS TO BE RESPONSIBLE FOR APPLYING FOR ANY APPLICABLE TAX EXEMPTIONS.** Property taxes and rent, as well as other expenses and income of the property, if applicable, shall be apportioned to the date of closing. Annual expenses or income shall be apportioned using 365 days. Monthly property expenses or income shall be apportioned by the number of days in month of closing. Prorations at closing shall be final. *must be in writing to Buyer's Agent dated Times.*

15. **NON-RESIDENT TAX:** Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

16. **ROLLBACK TAXES (IF ANY):** When rollback taxes are subsequently determined and billed to the Buyer, the Seller and Buyer agree that the rollback taxes shall be paid by ☐ Buyer or ☒ Seller.

☒ BUYER ☐ BUYER ☒ SELLER ☐ SELLER HAVE READ THIS PAGE

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17. RISK OF LOSS OR DAMAGE: In case the property herein referred to is destroyed wholly or partially by fire or other casualty prior to delivery of deed, Buyer or Seller shall have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Agreement.

18. DEFAULT: If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 19), or terminate this Agreement with a five day written notice. If terminated, both parties shall execute a written release of the other from this contract and both shall agree to hold the Escrow Agent harmless. If either Buyer or Seller refuses to execute release, Escrow Agent will hold the earnest money in trust until said releases are executed or until a court of competent jurisdiction dictates legal disposition.

19. ACTUAL COST INCURRED shall include all costs and expenses incurred or obligated for by Buyer, Seller or Broker in an effort to consummate this sale. Such costs shall include, but are not limited to, cost of credit report, appraisal, survey, inspections and reports, title examination, and Broker's fee or commission for this sale.

20. SURVEY, TITLE EXAMINATION, AND INSURANCE: The Listing and Cooperating Broker(s) and their Agent(s) recommend that Buyer have a survey of the subject property made, have examination as to the title to the property, obtain owner's title insurance, and that Buyer obtain appropriate hazard insurance coverage effective with the time of closing. All hazard insurance to be canceled and new policies furnished by Buyer at closing unless otherwise stipulated in this Agreement. Flood insurance, if required by Lender at Buyer's option, shall be assigned to Buyer with permission of carrier, and premium prorated to date of closing.

21. APPRAISED VALUE: The lot or parcel with building and improvements thereon, if any, must appraise, according to the lender's appraisal or other appraisal as agreed, for the selling price or more or the Seller may elect to sell for the appraised value. In such case, the Buyer agrees to proceed with the consummation of this sale at the reduced price. However, if Seller does not agree to sell at appraised value, the Buyer shall have the option of proceeding with the consummation of the Agreement without regard to the amount of the appraised valuation. *OK on APPRAISAL*

22. SPECIAL STUDIES AREA, WETLANDS, AND ENVIRONMENTAL PROTECTION MATTERS: All reports and certifications called for by the lending agencies and any governmental body, by the Buyer concerning any special study area, wetlands or for any environmental protection matter shall be at the expense of the Buyer. In the event such studies are wanted or required, the studies must be furnished by the proper parties within N/A days of complete execution of the agreement. The Buyer and Seller must have access to all studies within five (5) days of receipt of the studies. If Buyer fails to meet these deadlines, Buyer is deemed to have waived any and all rights under this paragraph. If the Buyer is not satisfied with the results, the Seller shall have the option of correcting the problem. If the Seller elects not to correct the problem, the Buyer's obligations under this Agreement terminate.

23. COASTAL TIDELANDS & WETLANDS ACT: In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures at [] Buyer's [X] Seller's expense.

24. DISCLAIMER BY BROKERS AND AGENTS: The parties acknowledge that the Listing and Cooperating Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the property or as to condition of or existence of improvement services or systems, thereto, included but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage, electric systems, and to the structure; (2) Give no warranty, express or implied, as to the merchantability or fitness for a particular purpose as to the property or such improvements thereto and any implied warranty hereby disclaimed; (3) Give no warranty as to title; (4) Give no guaranty on warranty concerning (a) any certification or inspection concerning the condition of the property, (b) any matters which would be reflected by current survey of the property, and (c) the accuracy of the published square footage of the property; (5) Buyer acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Buyer regarding (a) projected income or economic benefit for Buyer from rentals; (b) rental arrangements except that Buyer may rent the unit if Buyer so desires or (c) other economic benefits to the Buyer.

25. MEDIATION CLAUSE. Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this Agreement pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud.

☒ BUYER ☐ BUYER ☒ SELLER ☐ SELLER HAVE READ THIS PAGE

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Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; (e) the filing of an interpleader action to resolve earnest money disputes. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

26. ENTIRE BINDING AGREEMENT: This written instrument, including the additional terms and conditions set forth on any documents intended by the parties to be included, expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Seller. It can be changed only by a subsequently written instrument signed by both parties. Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein. The benefits and obligations shall inure to and bind the parties hereto and their heirs, assigns, successors, executors, or administrators. Whenever used, singular includes plural, and use of any gender shall include all.

27. SURVIVAL: If any provision herein contained which by its nature and effect is required to be observed, kept or performed after the closing, it shall survive the closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed.

28. FACSIMILE AND OTHER ELECTRONIC MEANS: The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the Internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

29. EXTENSION AGREEMENT: If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 10 consecutive days from the original closing date. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date. Time is of the essence.

30. CONTINGENCIES: These stipulations shall preempt printed matter herein: (attach and reference addendum if necessary)

Seller to provide ANY & ALL
INFORMATION ON LOT to
include COPY OF his SURVEY
& Dock permit, & WETLANDS STUDIES within 5 days.
seller to pay ANY rollback taxes

Contract not contingent on Dock Permit. 7/11/05

Buyer is willing to participate in a 1031 exchange
at no expense to them. 7/11/05

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THIS IS A LEGALLY BINDING AGREEMENT. BOTH BUYER AND SELLER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: [Signature] Date 7/9/05 Time 4:10 PM

WITNESS: Sheryl Hill Date 7/9/05 Time 4:10 PM

BUYER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

SELLER: Thomas A Stone Date _____ Time _____

WITNESS: _____ Date _____ Time _____

SELLER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

LISTING AGENT AND COMPANY James Hough Read's READ, Inc

SELLING AGENT AND COMPANY Sheryl F. Hill Prudential Carolina Real Estate

SELLING AGENT IS PRESENTING THIS OFFER AS A ☒ BUYER'S AGENT OR ☐ SUBAGENT OF THE SELLER.

ESCROW AGENT ACKNOWLEDGMENT Sheryl F. Hill

The foregoing form is available for use by the entire real estate industry. This use of the form is not intended to identify the user as a REALTOR®. REALTOR® is the registered collective membership mark which may be used only by real estate licensees who are members of the NATIONAL ASSOCIATION OF REALTORS® and who subscribe to its Code of Ethics. Expressly prohibited is the duplication or reproduction of such form or the use of the name "South Carolina Association of REALTORS®" in connection with any written form without the prior written consent of the South Carolina Association of REALTORS®. The foregoing form may not be printed, revised, or changed without the prior written consent of the South Carolina Association of REALTORS®.

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2950-43538

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EDISTO TITLE SERVICES, INC.

MEMORANDUM

To: Randall Drew
From: Todd Balish
Date: November 14, 2007
RE: Lot 12, Yellow House Place (Keith Roberts)
Our File 07-2699

Randy:

We have run the chain of title back as far as we can go and looked for possible deeds which might convey any interest in marshlands and find none.

We have also checked the Berkeley County Clerk of Court's records for any possible suits involving marshland and based on the information given we find none.

We might suggest you look for suits filed in District Court.

Should you have any questions let us know.

Todd



*Exhibit #6
(30 pgs)*

8535 RANDELL COURT, NORTH CHARLESTON, SOUTH CAROLINA 29420
PHONE: 843/813-2354 FACSIMILE: 843/552-0884 edistotitle@knology.net

Berkeley County
Cynthia B. Forte
Register of Deeds
Moncks Corner 294816120



53 2006 00050297

Instrument Number: 2006- 00050297

As
Deed

Recorded On: February 27, 2006

Parties: ROBERTS KEITH

To:

LOT 12 YELLOW HOUSE LLC

Recorded By: RANDALL J DREW LLC

Num Of Pages: 5

Comment:

**** Examined and Charged as Follows: ****

Deed	10.00					
Recording Charge:	10.00					
		Consideration Amount	RS#/CS#			
Deed Tax	0.00		D 5842		Deed County Tax	0.00
					Deed State Tax	0.00
EXEMPT						
Tax Charge:	0.00					

RECEIVED

Feb 27, 2006

ASSESSOR
BERKELEY COUNTY SC
JANET B. JURDACK
AUDITOR BERKELEY COUNTY SC

**** THIS PAGE IS PART OF THE INSTRUMENT ****

I hereby certify that the within and foregoing was recorded in the Clerk's Office For: Berkeley County, SC

File Information:

Document Number: 2006- 00050297
Receipt Number: 36235
Recorded Date/Time: February 27, 2006 03:36:17P
Book-Vol/Pg: Bk-R VI-5393 Pg-315
Cashier / Station: R Allen / Cash Station 4

Record and Return To:

RANDALL J DREW LLC
940 JOHNNIE DODDS BLVD
STE 201
MT PLEASANT SC 29464



Cynthia B. Forte
Cynthia B Forte - Register of Deeds

(2)

Doc # 00050297

00050297 Vol: 5393 Pg: 316

STATE OF SOUTH CAROLINA }
COUNTY OF BERKELEY }

QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, THAT I/WE, ~~ELI H. ROBERTS~~ ("Grantor") in the State aforesaid, for and in consideration of the sum of TEN DOLLARS (\$10.00) to them in hand paid at and before the sealing of these presents by LOT 12 YELLOW HOUSE, LLC, ("Grantee") in the State afore said, the receipt whereof is acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said LOT 12 YELLOW HOUSE, LLC, its heirs and assigns forever, the following described real property:

SEE EXHIBIT A ATTACHED HERETO

SUBJECT to all restrictions, easements and rights-of-way of record.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said LOT 12 YELLOW HOUSE, LLC, its heirs and assigns forever.

AND I/we do hereby bind ourselves and our heirs, executors and administrators, to warrant and forever defend, all and singular, the said Premises unto the said LOT 12 YELLOW HOUSE, LLC, its heirs and assigns, against them and their heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

(103)

00050297 Vol: 5393 Pg: 317

WITNESS their Hand(s) and Seal(s) this 27 day of January in the year of our Lord Two Thousand Six and in the Two Hundred and Thirtieth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

[Signature]
First Witness

[Signature]
KEITH ROBERTS

[Signature]
Second Witness

STATE OF SOUTH CAROLINA }
COUNTY OF BERKELEY }

PERSONALLY APPEARED before me the First Witness, and made oath that (s)he saw the within named KEITH ROBERTS sign, seal and as their act and deed, deliver the within Deed, and that (s)he, with the other witness witnessed the execution thereof.

[Signature]

SWORN to before me this
27 day of January, 2006

[Signature] (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: June 12, 2010

(f)

EXHIBIT A

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina. The said tract containing approximately three (3) acres, more or less, and is more specifically shown as Tract A on a plat entitled, "PLAT OF LAND "A" AND "B" OWNED BY OR FORMERLY OWNED BY HEIRS OF MINGO HEYWARD, SUBDIVIDED AS SHOWN "A" - DOROTHY H. BROWN AND ROSETTA B. JENKINS AND "B" - ROSA POWELL," prepared by James E. Shuler, RLS, dated December 18, 1976, and which was recorded in the RMC Office for Berkeley County in Book W at page 161; and reference to which is hereby craved.

SUBJECT to any and all restrictions, easements, rights of way, covenants and conditions of record.

BEING the same property conveyed to Keith Roberts by deed of Thomas H. Stone dated August 17, 2005 and recorded in Book 4929 at page 113 in the Berkeley County RMC Office, South Carolina.

TMS# 267-00-00-012

GRANTEE'S ADDRESS: -

MT Pleasant SC 29466

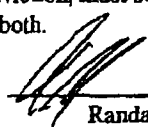
STATE OF SOUTH CAROLINA }
 COUNTY OF BERKELEY }

AFFIDAVIT

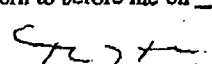
{Date of Transfer of Title
 {
 { January 27, 2006

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property is being transferred **BY KEITH ROBERTS TO LOT 12 YELLOW HOUSE, LLC ON January 27, 2006.**
3. **The DEED is** (check one of the following)
 - (a) ___ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) ___ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
 - (c) X EXEMPT from the deed recording fee because (exemption # 12).
 (Explanation if required) Quit Claim Deed - No Consideration
 (If exempt, please skip items 4-6, and go to item 7 of this affidavit).
4. Check one of the following if either item 3 (a) or item 3 (b) above has been checked.
 - (a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$.
 - (b) ___ The fee is computed on the fair market value of the realty which is \$.
 - (c) ___ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$.
5. Check YES ___ or NO X to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is \$.
6. The DEED Recording Fee is computed as follows:
 - (a) X the amount listed in item 4 above
 - (b) ___ the amount listed in item 5 above (no amount place zero)
 - (c) ___ Subtract Line 6(b) from Line 6(a) and place the result.
7. As required by Code Section '12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney.
8. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.


 Randall J. Drew

Sworn to before me on 1-27-06


 Notary Public for South Carolina
 My Commission Expires: 3-7-15

(6)

DEED ABSTRACT

Thomas M Stone

to

Keith Roberts

BOOK: 4929 PAGE: 113

DATED 8-17-05 RECORDED 8-18-05
CONSIDERATION: \$ 475,000.00
SIGNED TWO WITNESSES
PROBATED PROPERLY: ✓

"HEIRS AND ASSIGNS": GRANTING ✓
HABENDUM ✓
"ALL PERSONS WHOMSOEVER" ✓

RENUNCIATION OF DOWER

DATE: _____
DATE: _____
DATE: _____
DATE: _____

DOC. RETURNED TO Randall Drew

DESCRIPTION: (SAME AS: 5393-315); SEE ATTACHED _____); OR:

SUBJECT TO:

DERIVATION:

2651-231

EDISTO TITLE SERVICES, INC.

DEED ABSTRACT

re-recorded 3-14-02

Robert Smith, Ruth A. Phillips
also known as Ruth J. Phillips
Mildred Scantlebury also known
as Mildred E. Scantlebury

to

Thomas H. Stone

re-recorded 2651-231

BOOK: 2583 PAGE: 61

DATED 1-21-02 RECORDED 1-24-02
CONSIDERATION: \$ 135,000.00
SIGNED ☒ TWO WITNESSES ☒
PROBATED PROPERLY: ☒

"HEIRS AND ASSIGNS": GRANTING ☒
HABENDUM ☒
"ALL PERSONS WHOMSOEVER" ☒

RENUNCIATION OF DOWER

DATE: ☒
DATE: ☒
DATE: ☒
DATE: ☒

DOC. RETURNED TO Durickson & Bennett

DESCRIPTION: (SAME AS: _____; SEE ATTACHED ☒); OR:

SUBJECT TO:

DERIVATION:

EDISTO TITLE SERVICES, INC.

(8)

EXHIBIT "A"

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina. The said tract containing approximately three (3) acres, more or less, and is more specifically shown as Tract "A" on Plat entitled "Plat of Land" "A" and "B" owned or formerly owned by heirs of Mingo Heyward, subdivided as shown "A" - DOROTHY H. BROWN AND ROSETTA B. JENKINS and "B" - ROSA POWELL, prepared by James E. Shuler, RLS, dated December 18, 1976, and which was recorded in the RMC Office for Berkeley County in Book W at Page 161; and reference to which is hereby craved.

BEING the same property conveyed to Ruth A. Phillips (10%), Mildred Scantlebury (10%), Robert Smith (10%), Manigault Jenkins, Jr. (10%) and Earl Jenkins (10%) by Deed of Distribution of the Estate of Dorothy Heyward Brown, Case 1998-ES-10-0896, dated June 27, 2001 and recorded in the RMC Office for Berkeley County, South Carolina in Book 2330 at Page 138, being further conveyed to Ruth A. Phillips and Mildred Scantlebury by deed of Manigault Jenkins, Jr. and Earl Jenkins dated August 20, 2001 and recorded in the RMC Office aforesaid in Book 2404 at Page 242;

Also conveyed to Earl Alfred Jenkins, Manigault Jenkins, Ruth Phillips and Mildred Scantlebury, by Last Will and Testament of the Estate of Rosetta B. Jenkins, Case 1985-ES-10-01076; being further conveyed to Ruth J. Phillips and Mildred E. Scantlebury by deed of Earl Alfred Jenkins and Manigault Jenkins dated July 27, 1991 and recorded in the RMC Office aforesaid in Book 145 at Page 271.

TMS # 267-00-00-012

DEED ABSTRACT

title Not Examined

Manigault Jenkins Jr
Earl Jenkins

to
Milchad Seantlebury
Reeth A Phillips

BOOK: 2404 PAGE: 242

DATED 8-20-01 RECORDED 9-7-01
CONSIDERATION: \$ 1.00 LTA
SIGNED _____ TWO WITNESSES _____
PROBATED PROPERLY: _____

"HEIRS AND ASSIGNS": GRANTING _____
HABENDUM _____
"ALL PERSONS WHOMSOEVER" _____

RENUNCIATION OF DOWER

DATE: _____
DATE: _____
DATE: _____
DATE: _____

DOC. RETURNED TO Steinberg

DESCRIPTION: (SAME AS: _____); SEE ATTACHED (✓); OR:

SUBJECT TO:

DERIVATION:

EDISTO TITLE SERVICES, INC.

000046826 Bk:02404 Pg:00242

STATE OF SOUTH CAROLINA

TITLE TO REAL ESTATE

COUNTY OF BERKELEY

TITLE NOT EXAMINED BY STEINBERG LAW FIRM

KNOW ALL MEN BY THESE PRESENTS THAT, WE,

MANIGAULT JENKINS, JR. AND EARL JENKINS in the State aforesaid, for and,

In consideration of One and 00/100 (\$1.00) Dollar and love and affection for my

sisters to us in hand paid at and before the sealing of these presents by

MILDRED SCANTLEBURY AND RUTH A. PHILLIPS in the County aforesaid, the

receipt whereof is hereby acknowledged, have granted, bargained, sold and

released, and by these presents do grant, bargain, sell and release unto the said

MILDRED SCANTLEBURY AND RUTH A. PHILLIPS, their heirs and assigns, the

following described property, to wit:

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina. The said tract containing approximately three (3) acres, more or less, and is more specifically shown as Tract "A" and "B" owned or formerly owned by heirs of Mingo Heyward, subdivided as shown "A - DOROTHY H. BROWN AND ROSETTA B. JENKINS" and "B" - ROSA POWELL, prepared by James E. Shuler, RLS, Dated December 18, 1976, and which was to be recorded in the RMC Office for Berkeley County; and reference to which is hereby craved.

BEING the same property conveyed to Robert Smith (10%), Ruth A. Phillips (10%), Mildred Scantlebury (10%), Manigault Jenkins, Jr., (10%) and Earl Jenkins (10%) by deed of distribution from the Estate of Dorothy Heyward Brown dated 27th day of June, 2001 and recorded in the RMC Office for Berkeley County on July 11, 2001 in Book 02330, Page 00138.

RECEIVED

The Tax Map Reference Number is 267 00 00 012

09/07/2001

The Grantees' address is in care of Ruth A. Phillips,
Columbia, SC 29201.

Doc # 000046826 EXEMPT
FILED, RETURNED, INDEXED
09/07/2001 03:51:28PM
Rec Fee: 10.00 Pages: 4
Register of Deeds Berkeley Co. SC
Cynthia B. Forte
Issued to: STEINBERG LAW FIRM

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PROBATE COURT

IN THE MATTER OF DOROTHY HEYWARD BROWN

CASE NUMBER 1998-ES-10-00896

DEED OF DISTRIBUTION

WHEREAS, the decedent died on the 29th day of June, 1995; and

WHEREAS, the estate of the decedent administered in the Probate Court for CHARLESTON County, South Carolina in File # SEE ABOVE; and

WHEREAS, the grantee herein is either a beneficiary or heir at law, as appropriate, of the decedent;

WHEREAS, the undersigned Personal Representative is the duly appointed and qualified fiduciary in this matter; and

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release to:

Name: RONALD BROWN (10%)
RUTH J. PHILLIPS (10%)
MILDRED SCANTLEBURY (10%)
MANIGAULT JENKINS, JR. (10%)
EARL JENKINS (10%)

Doc # 000041563 EXEMPT
FILED, RECORDED, INDEXED
07/11/2001 11:56:09AM
Rec Fee: 10.00 Pages: 4
Register of Deeds Berkeley Co. SC
Cynthia B. Forte
Issued to: STEINBERG LAW FIRM

the following described property:

RECEIVED

07/11/2001

ASSESSOR
BERKELEY COUNTY SC

SEE ATTACHED FOR FULL LEGAL DESCRIPTION

TAX map number is 267-00-00-066.

The Grantees' address is c/o Ruth Phillips,
Columbia, SC 29201

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the said Ronald Brown, Ruth Phillips, and Mildred E. Scantlebury, Manigault Jenkins, Jr.

and Earl Jenkins, their heirs and assigns forever.

IN WITNESS WHEREOF, the undersigned, as Personal Representative of the estate of the decedent, has executed this Deed, this 27th day of June, 2001

SIGNED, SEALED AND DELIVERED Estate of: Dorothy Heyward Brown

IN THE PRESENCE OF:

by Signature: Ruth A. Phillips
Ruth A. Phillips
Personal Representative

Witness: [Signature]

Witness: [Signature]

COUNTY OF CHARLESTON
STATE OF SOUTH CAROLINA

PERSONALLY appeared before me the above witness and made oath that he/she saw the within named Personal Representative(s) sign, seal, and as their act and deed, deliver the within written Deed, and that he/she with the other witness witnessed the execution thereof.

SWORN to before me this
27th day of June, 2001

[Signature]
Witness Signature

[Signature] (SEAL)
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 4/16/08

BELOW, PLEASE SPECIFY THE EXACT NAME AND ADDRESS
OF THE PERSON(S) TO WHOM TAX BILL SHALL BE SENT:

NAME: RUTH PHILLIPS

ADDRESS: _____

CITY: COLUMBIA

STATE: SOUTH CAROLINA

ZIP CODE: 29201

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property being transferred by Estate of DOROTHY HEYWARD BROWN TO RONALD BROWN, RUTH PHILLIPS AND MILDRED SCANTLEBURY, MANIGAULT JENKINS, JR. AND EARL JENKINS, dated June 27, 2001
3. Check one of the following: THE DEED IS
 - (a) ___ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) ___ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - (c) x EXEMPT from the deed recording fee because this is a deed of distribution.
4. CHECK ONE OF THE FOLLOWING IF EITHER ITEM 3(a) OR ITEM 3(b) ABOVE HAS BEEN CHECKED.
 - (a) ___ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$.00
 - (b) ___ The fee is computed on the fair market value of the realty which is \$ _____
 - (c) ___ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____
5. CHECK YES ___ OR NO ___ to the following: A lien or encumbrances existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is approximately \$ _____
6. THE DEED RECORDING FEE IS COMPUTED AS FOLLOWS:
 - (a) .00 the amount listed in Item 4
 - (b) .00 the amount listed in Item 5 above
 - (c) .00 Subtract line 6(b) from Line 6(a) and place the result
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as the closing attorney.
8. Deed of Distribution - Attorneys Affidavit: Estate of Dorothy Brown Heyward deceased CASE NUMBER 09-ES-10-00896. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina, that (s)he has prepared the Deed of Distribution for the Personal Representative in the Estate of Dorothy Brown Heyward deceased and that the grantee(s) therein are correct and conform to the estate file for the above named decedent.
9. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

[Signature]
Grantor, Grantee, or Legal Representative
Connected with the Transaction.

SWORN to before me this
27th day of June, 2001

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 4/16/08

(14)

PROPERTY DESCRIPTION

ALL that certain piece, parcel or lot of land, situate, lying and being in the Township of Cainhoy, St. Thomas and St. Dennis Parish, Berkeley County, South Carolina, measuring and containing 2.50 acres and being delineated as LOT ONE (1), on a plat of Cleatwood E. Droze, RLS, dated January 20, 1988, entitled "Plat of Land-Subdivision as shown-owned by CALEB BROWN ESTATE", and being of record in Cabinet H, page 87, RMC Office for Berkeley County; the said tract having such location, measurements, shape, dimensions, buttings and boundings as are shown on said plat by reference thereto.

BEING the property conveyed to Dorothy Heyward Brown and Rosetta Jenkins by deed of Joseph Heyward, et al., recorded February 2, 1977, in Book A-332, page 167, RMC Office for Berkeley County. Thereafter, Dorothy Heyward Brown died testate in Charleston County seized and possessed of an undivided 50% interest in said property, and under the provisions of her Last Will and Testament she devised her interests in the property to Earl Jenkins, Mildred E. Scantlebury, Ruth A. Phillips, Manigault Jenkins, Jr. and Ronald Brown.

THE tax map number is 271-00-01-050.

THE Grantees' address is c/o Ruth A. Phillips,
SC 29201.

, Columbia,

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PROBATE COURT

IN THE MATTER OF DOROTHY HEYWARD BROWN

CASE NUMBER 1998-ES-10-00896

DEED OF DISTRIBUTION

WHEREAS, the decedent died on the 29th day of June, 1995; and

WHEREAS, the estate of the decedent administered in the Probate Court for CHARLESTON County, South Carolina in File # SEE ABOVE; and

WHEREAS, the grantee herein is either a beneficiary or heir at law, as appropriate, of the decedent;

WHEREAS, the undersigned Personal Representative is the duly appointed and qualified fiduciary in this matter; and

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release to:

Name: ROBERT SMITH (10%)
RUTH A. PHILLIPS (10%)
MILDRED SCANTLEBURY (10%)
MANIGAULT JENKINS, JR. (10%)
EARL JENKINS (10%)

Doc # 000041562 EXEMPT
FILED, RECORDED, INDEXED
07/11/2001 11:53:50AM
Rec Fee: 10.00 Pages: 4
Register of Deeds Berkeley Co. SC
Cynthia B. Forts
Issued to: STEINBERG LAW FIRM

the following described property:

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina; The said tract containing approximately three (3) acres, more or less and is more specifically shown as Tract "A" and "B" owned or formerly owned by heirs of Mingo Heyward, sub-divided as shown "A- DOROTHY H. BROWN and ROSETTA B. JENKINS-"B"- ROSA POWELL", prepared by James E. Shuler, RLS, dated December 18, 1976, and which was to be recorded in the RMC Office for Berkeley County; and reference to which is hereby craved.

BEING the same property conveyed to Dorothy Heyward Brown and Rosetta Jenkins by deed of Joseph Heyward, et al. recorded February 2, 1977, in Book A-332, page 167, RMC Office for Berkeley County. Thereafter Dorothy Heyward Brown died testate seized and possessed of an undivided 50% interest in said property, and under the provisions of her Last Will and Testament she devised the described property to Robert Smith (10%) and the remaining interests to Ruth A. Phillips, Mildred E. Scantlebury, Earl A. Jenkins, and Maingault Jenkins,

RECEIVED
07/11/2001
ASSESSOR
BERKELEY COUNTY SC

(4)

(16)

The Grantees' address is c/o Ruth Phillips,
Columbia, SC 29201

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the said Robert Smith, Ruth Phillips, and Mildred E. Scantlebury, Manigault Jenkins, Jr. and Earl Jenkins, their heirs and assigns forever.

IN WITNESS WHEREOF, the undersigned, as Personal Representative of the estate of the decedent, has executed this Deed, this 27th day of June, 2001

SIGNED, SEALED AND DELIVERED Estate of: Dorothy Hayward Brown

IN THE PRESENCE OF:

by Signature: Ruth Phillips
Ruth A. Phillips
Personal Representative

Witness: CW

Witness: Juan M. Scaffe

COUNTY OF CHARLESTON
STATE OF SOUTH CAROLINA

PERSONALLY appeared before me the above witness and made oath that he/she saw the within named Personal Representative(s) sign, seal, and as their act and deed, deliver the within written Deed, and that he/she with the other witness witnessed the execution thereof.

SWORN to before me this
27th day of June, 2001

Juan M. Scaffe
Witness Signature

(SEAL)

NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 4/16/08

(17)

BELOW, PLEASE SPECIFY THE EXACT NAME AND ADDRESS
OF THE PERSON(S) TO WHOM TAX BILL SHALL BE SENT:

NAME: RUTH PHILLIPS

ADDRESS: _____

CITY: COLUMBIA

STATE: SOUTH CAROLINA

ZIP CODE: 29201

(18)

000041562 Bk:02330 Pg:00141

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
 2. The property being transferred by Estate of DOROTHY HEYWARD BROWN TO ROBERT SMITH, RUTH PHILLIPS AND MILDRED SCANTLEBURY, MANIGAULT JENKINS, JR. AND EARL JENKINS, dated June 27, 2001

3. Check one of the following: THE DEED IS

(a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.

(b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.

(c) ☒ EXEMPT from the deed recording fee because this is a deed of distribution.

4. CHECK ONE OF THE FOLLOWING IF EITHER ITEM 3(a) OR ITEM 3(b) ABOVE HAS BEEN CHECKED.

(a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$.00

(b) The fee is computed on the fair market value of the realty which is \$ _____

(c) The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____

5. CHECK YES ☐ OR NO ☐ to the following: A lien or encumbrances existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is approximately \$ _____

6. THE DEED RECORDING FEE IS COMPUTED AS FOLLOWS:

(a) ☐ .00 the amount listed in item 4

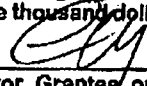
(b) ☐ .00 the amount listed in item 5 above

(c) ☐ .00 Subtract line 6(b) from Line 6(a) and place the result

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as the closing attorney.

8. Deed of Distribution - Attorneys Affidavit: Estate of Dorothy Brown Heyward deceased CASE NUMBER 09-ES-10-00896. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina, that (s)he has prepared the Deed of Distribution for the Personal Representative in the Estate of Dorothy Brown Heyward deceased and that the grantee(s) therein are correct and conform to the estate file for the above named decedent.

9. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.


 Grantor, Grantee, or Legal Representative
 Connected with the Transaction.

SWORN to before me this
 27th day of June, 2001


 NOTARY PUBLIC FOR SOUTH CAROLINA
 My Commission Expires: 4/16/08

(22)

RECORDING FEE 10.00 A. Brown
NOTARIAL FEE 4.00
STATE DUTY STAMPS 1.00
COUNTY STAMPS 1.00
BIRKLEY COUNTY
145 PAGE 271

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) TITLE TO REAL ESTATE

WHEREAS, ROSETTA B. JENKINS, late of the County of Charleston, State of South Carolina, died intestate on the 19th day of January, 1985, while claiming and owning an interest in the herein described parcel of Real Estate, and leaving in full force and effect, her last Will and Testament, bearing date of February 23, 1984, which was admitted to Probate in Common form in the Probate Court of Charleston County and is now on file therein, bearing Case No: 85ED10-01076; and

WHEREAS, the late ROSETTA B. JENKINS, in item II of her last Will and Testament provided as follows "I give, devise and bequeath all of my property, real, personal and/or mixed and wheresoever the same may be situated, unto my four children to wit: EARL ALFRED JENKINS, MANIGAULT JENKINS, RUTH J. PHILLIPS and MILDRED SCANTLEBURY, share and share alike, absolutely and forever" and

WHEREAS, the within named Grantors, EARL ALFRED JENKINS and MANIGAULT JENKINS acquired an interest in the subject property as tenants in common with the within named Grantees, RUTH J. PHILLIPS AND MILDRED E. SCANTLEBURY. As such, they are now mindful of conveying all of their undivided right, title and interest so acquired therein to their co-tenants, RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY; now therefore

KNOW ALL MEN BY THESE PRESENCE THAT

WE, EARL ALFRED JENKINS and MANIGAULT JENKINS, in the State

Grantor's Address:
100 East 93rd Street, Apt #C-407
Brooklyn, New York 11212

(22)

aforesaid, and for and in consideration of love and affection for our sisters and co-tenants, and the sum of tne (\$10.00) Dollars to us in hand paid, at and before the sealing of these presence by RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, 100 East 93rd Street, Apartment #C-407, Brooklyn, New York 11212, in the State aforesaid, and the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presence, do grant, bargain, sell and release unto the said RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, all of our undivided right, title and interest in and to the herein described parcel of Real Estate, to wit;

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND, situated, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, State of South Carolina; Measuring and Containing Three (3) acres, more or less; more specifically shown as Tract "A" on Plat entitled "Plat of Land" "A" and "B" owned by heirs of MINGO HEYWARD, sub-divided as shown "A-DOROTHY H. BROWN and ROSETTA B. JENKINS - "B"- ROSA POWELL", prepared by JAMES E. SHULER, R. L. S., dated December 18, 1976, to be recorded herewith in the Office of the Clerk of Court for Berkeley County in Plat Book _____, at Page _____, and reference to which is hereby craved; Butting and Bounding on the aforesaid Plat as follows, to wit:

NORTH along Marshland, a distance of 191.6 feet, more or less; Northeast along lands of the Heirs of TONY BENNETT, a distance of 1001 feet; Southeast along other land of the Heirs of MINGO HEYWARD, a distance of

(21)

129.8 feet; Southwest along Tract "B" on aforesaid map, a distance of 1141.5 feet.

BEING the same premises conveyed to DOROTHY H. BROWN and ROSETTA B. JENKINS, by Deed of JOE HEYNARD, et. al., dated January __, 1977, and recorded February 2, 1977, in Book A-332, at Page 167, in the R. M. C. Office for Berkeley County.

TMS # 267-00-00-012

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said premises belonging to in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, their heirs and assigns forever.

AND WE DO HEREBY bind ourselves, our Heirs, and our executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, their heirs and assigns, against us and our Heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS our hands and seal, this 22 day of July, in the year of Our Lord One Thousand Nine Hundred and Ninety One and in the Two Hundred and Fifteenth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED, AND DELIVERED
IN THE PRESENCE OF:

Herman L. Moore
EARL ALFRED JENKINS

Lance Brown Maingault Jenkins
MAINGAULT JENKINS

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, the undersigned witness and made oath, that he/she saw the within named EARL ALFRED JENKINS and MAINGAULT JENKINS, sign, seal, and as their act and deed, deliver the within written deed, and that he/she with the other witness whose signature appears above, witnessed the execution thereof.

Herman L. Moore

SWORN to before me
this 20th day of July, 1991.

Lance Brown
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3-1-2000

FILED-RECORDED
AUG 20 11 58 AM '92
CYNTHIA S. FORTE
REGISTER
MESSING CONVEYANCES
BERKELEY COUNTY, SC

RECORDED THIS 20th DAY
OF August 1992
BY [Signature]
CLERK, BERKELEY COUNTY, S.C.

RECORDED THIS 20th DAY
OF Aug 1992
IN BOOK 145 PAGE 274
FEE \$ 1.00
[Signature]
CLERK, BERKELEY COUNTY, SC

755

State of South Carolina,

COUNTY OF BERKELEY,

WE, THE SOLE SURVIVING HEIRS OF MINGO HEYWARD,

KNOW ALL MEN BY THESE PRESENTS, THAT
We, Joe Heyward, Agnes Heyward, Lillian Dingle, Clara White, Anna Williams,
Ethel Brown, Francena Williams, Lillie Simmons, Rosa Powell, Eddie Heyward,
Rosetta Dingle, Joseph Shaw, Earnestine Shaw, Charles Shaw, Isaac Heyward,
Rebecca Washington, George Shaw, and Clarence Shaw,

in the State aforesaid for/and in consideration of the sum of
One Dollar (\$1.00)..... DOLLARS,
to us in hand paid at and before the sealing of these presents by DOROTHY H. BROWN and
ROSETTA B. JENKINS, 30 Carolina Street, Charleston, S. C.

in the State aforesaid County aforesaid the receipt whereof is hereby
acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and
release unto the said Dorothy H. Brown and Rosetta B. Jenkins, their Heirs and

Assigns, the following described Real Property, to-wit:
ALL that certain piece, parcel or tract of land, situate, lying and being
near Daniel Island, St. Thomas Parish, Berkeley County, State of South
Carolina; MEASURING AND CONTAINING Three (3) acres, more or less; more
specifically shown as Tract "A" on plat entitled "Plat of Land "A" & "B"
Owned by Heirs of Mingo Heyward Sub-divided as shown "A - Dorothy H. Brown
& Rosetta B. Jenkins - "B" - Rosa Powell", prepared by James E. Shuler,
R.L.S., dated December 18, 1976, to be recorded herewith in the Office of
the Clerk of Court for Berkeley County in Plat Book _____, at page _____,
and reference to which is hereby craved; BUTTING AND BOUNDING on the afore-
said plat as follows, to-wit: North along marsh land a distance of 191.6
feet, more or less; northeast along lands of the Heirs of Tony Bennett a
distance of 1001 feet; Southeast along other lands of the Heirs of Mingo
Heyward a distance of 129.8 feet; Southwest along Tract "B" on aforesaid
map a distance of 1141.3 feet.
SAME being a portion of land conveyed to Mingo Heyward by Susan B. Heyward
by deed of record in the R.M.C. Office in Charleston County in Deed Book
Y-18, at page 294.

Deed Drawn - Title Not Examined.
Noel N. Newell
Attorney at Law
Moncks Corner, S. C.

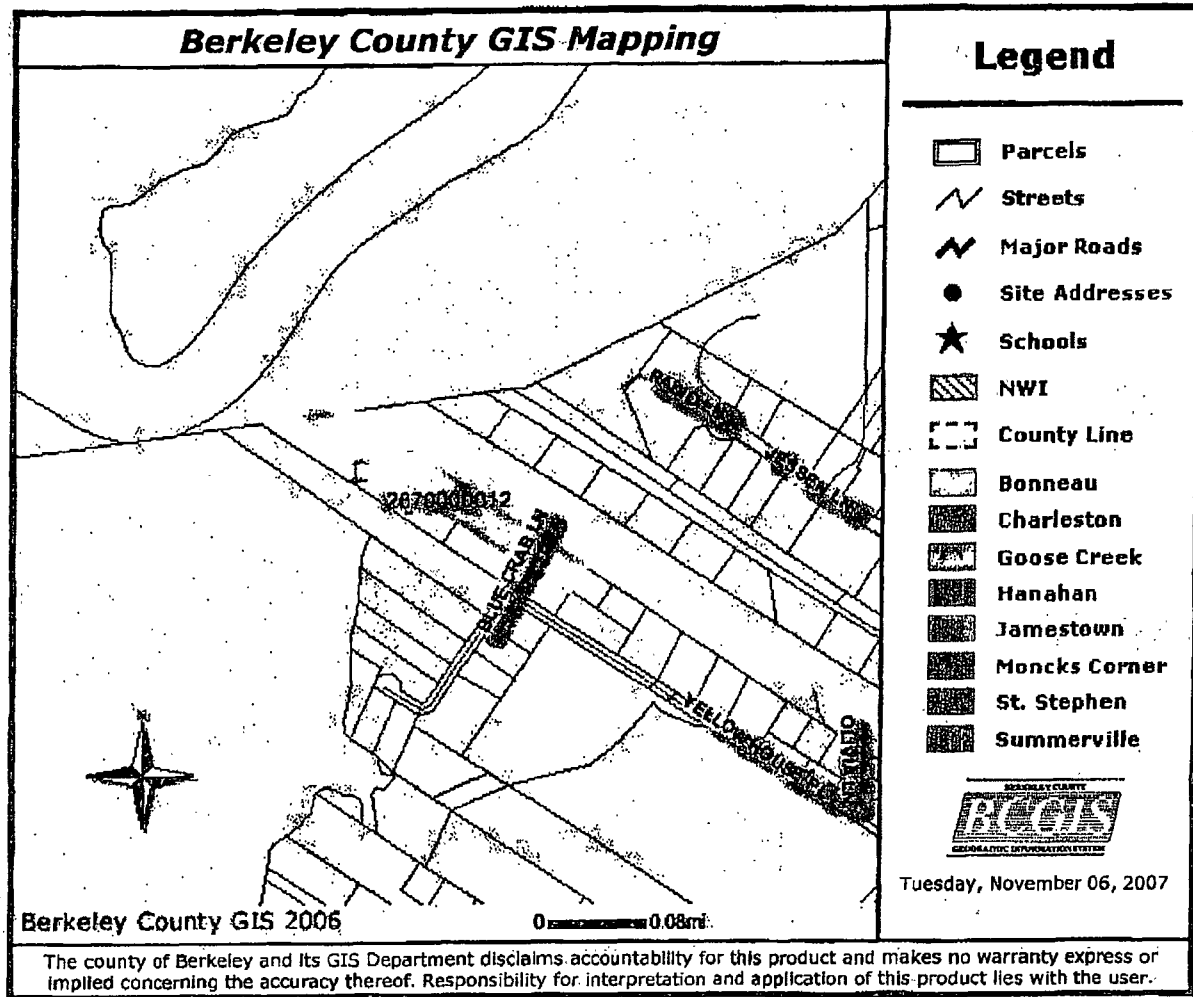
TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

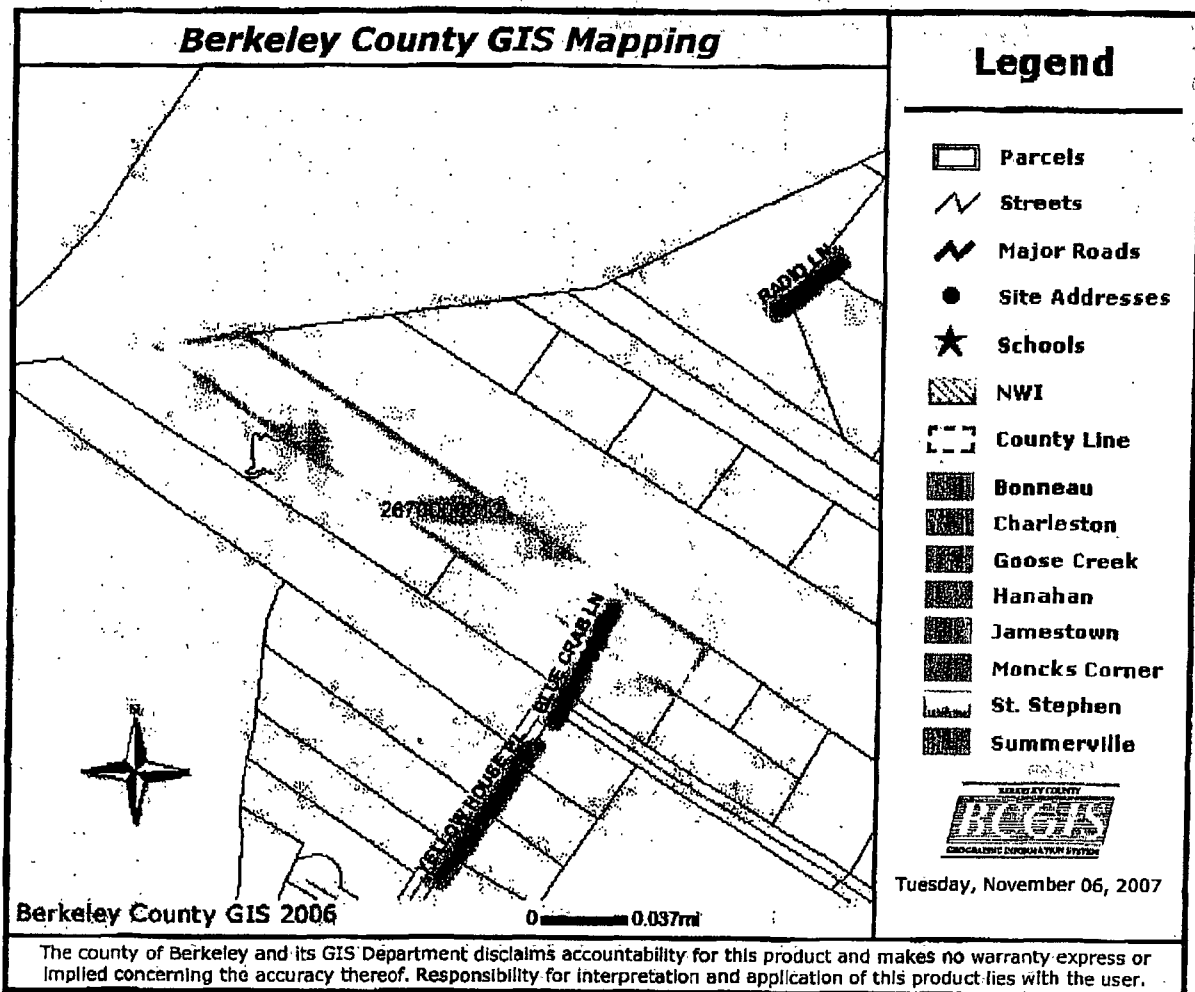
TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Dorothy H. Brown and Rosetta B. Jenkins, their Heirs and Assigns forever.

A323

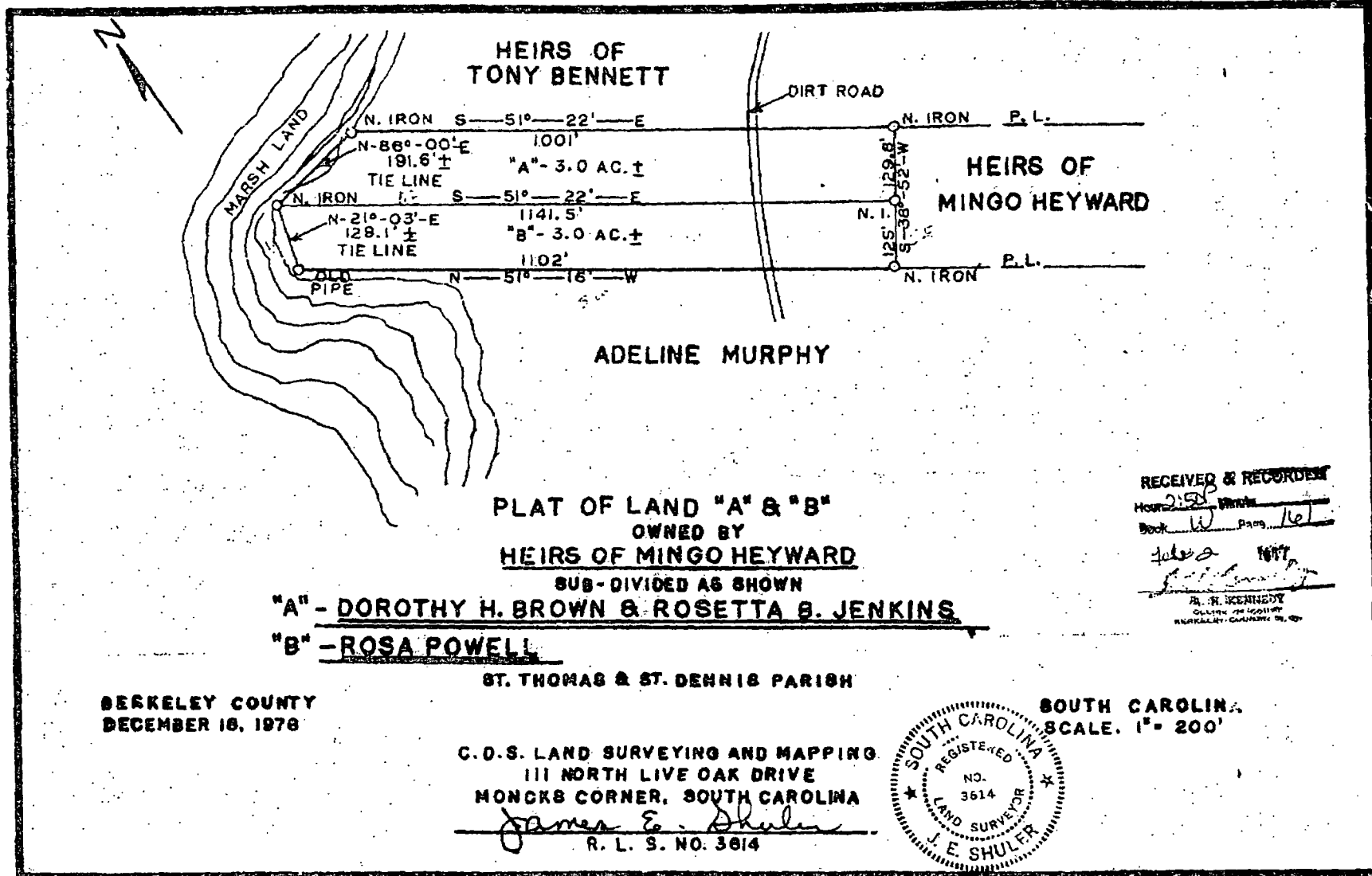
(26)
116'

758





Carllock-Drew00481



Drew 00481
2950-43538

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-10-3241

Keith Roberts and LOT 12 YELLOW
HOUSE, L.L.C.,

Plaintiff,

vs.

Randall J. Drew,

Defendant.

**PLAINTIFFS' RESPONSES TO
DEFENDANT'S
DISCOVERY REQUESTS
(DATED MAY 19, 2011)**

Plaintiffs, Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C. (hereafter "Plaintiffs"), hereby respond to DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS, DEFENDANT'S FIRST SET OF REQUESTS FOR PRODUCTION TO THE PLAINTIFFS, and DEFENDANT'S REQUESTS FOR ADMISSION TO THE PLAINTIFFS as follows:

INTERROGATORIES

1. Give the names and addresses of persons known to the parties or Counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: See **Exhibit 1**, attached. No written or recorded statements have been taken.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the parties that relates to the claim or the defense in the case.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335;

Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Barnett00015-Barnett00018; Barnett01723, Barnett01819; Barnett01836-Barnett01839; Barnett01877, Barnett01952-Barnett01953, Barnett02206-Barnett02209; Barnett02719-02720; Barnett02846-Barnett02849; Barnett02961-Barnett02963, Barnett02965, Barnett03725-Barnett03727, Barnett03860, Barnett03871-Barnett03872; Barnett03890-Barnett03907.

3. Set forth the names and addresses of all insurance companies which have liability, uninsured or underinsured insurance coverage on the parties and set forth the number or numbers of the policies involved and the amount or amounts of coverage provided in each policy.

RESPONSE: Not applicable to Plaintiffs.

4. Set forth here a statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

RESPONSE: What follows is a preliminary statement of Plaintiffs' damages:

Description	Amount
Contract sale price to Bowen	\$2,200,000
Purchase price of Lot	-\$475,000
Approximate construction costs	-\$1,200,000
5% Real estate sales comm. (if sale)	-\$110,000
Lost profits from sale of property to Bowen ¹	\$415,000

¹ No taxes deducted because tax will be paid on any recovery obtained in this lawsuit.

Description	Amount
Approximate attorney's fees incurred defending suit by United States of America	\$60,000
Approximate attorney's fees incurred in defending foreclosure lawsuit by lender	\$5,000
Presently unquantified maintenance expenses	TBD
Projected amount of personal deficiency judgment against Plaintiff, Keith Roberts	\$520,000
Approximate damage total	\$1,000,000

As with all the other interrogatory responses, Plaintiffs intend to supplement their response upon discovery or receipt of any additional responsive information.

5. Identify all evidence of which you are currently aware supporting your claim for damages.

RESPONSE: Documents related to Plaintiffs' contract with Robert Bowen dated October 29, 2006 titled, "Agreement to Buy and Sell Real Estate - Residential" to purchase subject property for \$2.2M; documents related to Plaintiffs' contract with Robert Bowen dated January 16, 2007 titled, ""Release of Agreement to Buy and Sell Real State" thereby terminating the agreement to purchase dated October 29, 2006; documents related to Plaintiffs' acquisition of the subject property for approximately \$475,000; documents related to the approximate \$1.2M in costs Plaintiffs' incurred to construct the approximate 6000 ft. foot house on the subject property; documents related to the approximate \$60,000 in attorneys fees Plaintiffs have incurred to defend the pending lawsuit brought by the United States government; documents related to the lender's pending foreclosure lawsuit, in which Plaintiffs understand the lender will be making \$850,000 bid to purchase the

property and seeking an approximate \$520,000 deficiency judgment against Plaintiff, Keith Roberts. As with all the other interrogatory responses, Plaintiffs intend to supplement their response upon discovery or receipt of any additional responsive information.

6. List the names and addresses of any expert witnesses whom the parties propose to use as a witness at the trial of the case.

RESPONSE: Brian L. Boger, J.D.
PO Box 65
Columbia SC 29202

7. List all materials you have provided to your expert for review, as well as the date you provided each expert with said materials.

RESPONSE: On November 15, 2010, Mr. Boger was provided with the legal description and the TMS number for Lot 12/

8. What is the status of the foreclosure action, case 2010-CP-0801870? If a judgment was rendered or settlement reached, please describe the judgment or settlement terms.

RESPONSE: Remains pending, and Plaintiffs understand a foreclosure sale is imminent and that the lender intends to bid \$850,000 for the property and seek an approximate \$520,000 personal deficiency judgment against Plaintiff, Keith Roberts. Shawn M. French, J.D. is the attorney representing Plaintiff in defending the foreclosure action. See documents with a Bates range of French00001-00042.

9. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: See Response to Interrogatory No.1.

10. List your full name, address, social security number, driver's license number, and date of birth.

RESPONSE: Keith W. Roberts
Mt. Pleasant, SC 29466
DL
DOB: 12/30/51

11. List each address where you have lived in the past ten years.

RESPONSE: Same as Response to Interrogatory No. 10.

12. Have you ever been arrested? If so, please state the charge, date of charge, and the disposition.

RESPONSE: No.

13. Have you ever been married? If so, please list the names of your spouse(s) and the dates of said marriages.

RESPONSE: Yes. Kathy Roberts, date of marriage 2/28/1987.

14. Are you currently employed? If so, please list the name and address of your employer as well as your job title.

RESPONSE: Hoover Automotive
195 Mary Meade Drive
Summerville, SC 29483
Vice-President/General Manager

15. List each place of employment you have worked in the past ten years and the name of your supervisor at each.

RESPONSE: Same as Response to Interrogatory No. 14.

16. State your educational background.

RESPONSE: High School.

17. List all lawsuits to which you (each Plaintiff) have been a party, including the case name, case number, date of case, brief description of subject matter, and the attorney(s) who represented you.

RESPONSE: Aside from the litigation stemming from Lot 12/Blue Crab Lane, I was involved in a class action lawsuit, LP Trim Board Claim, through Nexsen Pruet in 2009.

18. State the function of Lot 12 Yellow House, LLC. If it is a business, state the type of business and include the principal place of business, the document evidencing the encumbrance and where and when the document was filed (if it was filed).

RESPONSE: Lot 12 Yellow House, LLC is a limited liability company created for the purpose of the construction project at Lot 12/ in Wando, SC. See documents with a Bates range of Roberts02026-Roberts02036.

19. List all assets Lot 12 Yellow House, LLC has owned since 2004.

RESPONSE: The only asset of the LLC is the house and dock constructed at Lot12/

20. List all real estate closings (each Plaintiff) to which you have been a party prior to 2006.

RESPONSE: To the best of my personal knowledge, information and belief, the only other real estate closings have been the purchase and subsequent refinance of my home, in which Randall Drew was my attorney. There have been no other real estate closings for Lot 12 Yellow House, LLC other than Lot 12/Blue Crab Lane.

21. Please list every closing Defendant Drew has handled for the Plaintiff(s) as referenced in Paragraph 6 of your Complaint.

RESPONSE: See response to Interrogatory No. 20.

22. State with specificity the when Roberts advised Defendant Drew of his interest in acquiring the lot at issue as described in paragraph 7 of your Complaint.

RESPONSE: Sometime in June/July of 2005.

23. Provide dates for all the events described in paragraph 16 of your Complaint.

RESPONSE: Plaintiff has no way to know the dates that the purchaser learned of this information. Notice from the purchaser of his refusal to close was given in writing through his real estate agent Susan Bryant, dated November 16, 2006 and January 18, 2006; see documents with a Bates range of Cogan00486-Cogan00489.

24. If you denied Request to Admit No. 1, list every encumbrance on the property that you allege was not disclosed at/prior to the closing.

RESPONSE: See Plaintiffs' responses to Request to Admit No. 1.

25. State with specificity the date you learned the area where the dock was to be built was owned by the United States government as described in paragraph 11 of your Complaint.

RESPONSE: Plaintiffs do not have the information sufficient to respond to this interrogatory and Plaintiffs' Complaint may need to be amended to state that the United States government *claims* that it owns the marsh area beneath the dock Plaintiffs built adjacent to Lot 12. While considering whether to purchase and prior to closing on the purchase of the subject lot Plaintiffs were aware of issues with the Navy / United States of America's claims regarding the marsh area and whether the existing dock permit held by the owner of the property was sufficient to allow the construction of a dock in light of the Navy's claim. Before the closing on the purchase, Defendants told Plaintiffs words to the effect that he had researched the issue and based upon his research provided Plaintiffs with his legal opinion that they could build and maintain a dock over the marsh adjacent

to Lot 12. In addition, Defendants advised Plaintiffs that in the unlikely event the Navy / United States of America were able to successfully obtain a court order requiring them to remove the dock, which he doubted, they would be fully compensated as such an event would constitute a Takings protected by the Fifth Amendment to the United States Constitution.

After losing the contract for sale with Robert Bowen in January 2007 and sometime later in November or December 2007, Plaintiffs approached Defendants with their renewed concerns about the United States of America's claims regarding the property in light of Defendants prior statements and assurances that there would be no problems with Plaintiffs' construction of a dock on the marsh adjacent to Lot 12 back when they purchased the property. Defendants again assured Plaintiffs words to the effect that their title to Lot 12 was good, that the dock permit conveyed with the property allow them to construct the dock over the marsh adjacent to Lot 12, and that the United States of America's claims regarding Plaintiffs' right and ability to construct and maintain a dock were not valid. Plaintiffs relied on Defendants' statements in delaying the commencement of this lawsuit.

In February 2009, the United States of America brought suit against Plaintiffs seeking injunctive relief based on Plaintiffs' alleged trespass. In those proceedings, the United States of America filed a motion for summary judgment based on a claim that it owns title to the marsh adjacent to Lot 12. The United States District Court for the District of South Carolina still has not ruled on the United States of America's motion for summary judgment, the result of which will provide greater clarity on whether Defendants'

statements to Plaintiffs were accurate and whether the statements in the Complaint are also accurate.

26. State the date of the closing referenced in paragraph 14 of your Complaint.

RESPONSE: February 27, 2006.

27. List all documents/material evidencing the \$925,000 cost to construct the dock listed in paragraph 14 of the Complaint.

RESPONSE: The \$925,000 was to construct the *house and* dock. See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Cogan00081-Cogan00083; Cogan00504-Cogan00629; Roberts00001-Roberts00484; Roberts00494-Roberts01277; Roberts01399-Roberts01407; Roberts01413; Roberts01555-Roberts01689.

28. List the dates of construction of the dock.

RESPONSE: The Construction Authorization was issued October 4, 2005; see Barnett002048. The invoice for completion of the dock is dated November 21, 2005 in the amount of \$82,890; see documents with a Bates range of Barnett001799.

29. Is the dock still in place? If not, please state when it was removed/dismantled.

RESPONSE: The dock is still in place.

30. State the date you entered into the agreement referenced in paragraph 15 of your Complaint?

RESPONSE: October 29, 2006. See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Cogan00470-Cogan00481.

31. State the method by which and the date the Navy demanded you remove and dismantle the dock as described in paragraph 16 of your Complaint.

RESPONSE: The demand was made at a March, 2007 meeting. See documents with a Bates range of Barnett00043-Barnett00047.

32. List every reason of which the purchaser informed you he based his refusal to close on the property as described in paragraph 16 of your Complaint.

RESPONSE: Notice from the purchaser of his refusal to close was given in writing through his real estate agent Susan Bryant, by letters dated November 16, 2006 and January 18, 2006; see documents with a Bates range of Cogan00486-Cogan00489.

33. State the method by which and the date the Navy demanded that you remove the dock as described in paragraph 17 of your Complaint.

RESPONSE: See response to Interrogatory 31.

34. Who represented Plaintiffs as described in paragraph 20 of your Complaint?

RESPONSE: Stanley E. Barnett, J.D.

35. Exactly how much did Plaintiffs pay to counsel as described in paragraph 20 of your Complaint?

RESPONSE: Stan Barnett has been paid \$29,000 to date. There is presently an outstanding balance for services rendered to date of \$27,500.

36. What is the status of the case referenced in paragraphs 19-20 of your Complaint?
If the case is over, please explain the result/final ruling.

RESPONSE: The case has been pending for over one year awaiting a decision by The Honorable C. Weston Houck on the United States of America's motion for summary judgment that is based on a claim that it owns title to the marsh adjacent to Lot 12.

37. List every "publicly filed document" referenced in paragraph 35 of your Complaint.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Barnett01812-Barnett01816; Barnett01956-Barnett02103.

38. What ordinary skill and knowledge do you allege Defendant Drew failed to exercise as referenced in paragraph 36 of your Complaint?

RESPONSE: See the Affidavit of Brian L. Boger attached to the Complaint. Plaintiffs will rely on the testimony of Mr. Boger to identify and describe the ordinary skill and knowledge Defendant Drew failed to exercise in his representation of Plaintiffs.

39. List every specific action you maintain Defendant Drew failed to take that he should have taken regarding the title search of the subject property.

RESPONSE: See the Affidavit of Brian L. Boger attached to the Complaint. Plaintiffs will rely on the testimony of Mr. Boger to identify and describe every action Defendant Drew failed to take that he should have taken regarding the title search of the subject property and regarding his representation of Plaintiffs.

40. Explain the factual basis of your allegation that Defendant Drew acted in a grossly negligent, willful, wanton and reckless manner regarding the subject closing.

RESPONSE: See the Affidavit of Brian L. Boger attached to the Complaint. Plaintiffs will rely on the testimony of Mr. Boger to explain the factual basis of Plaintiffs' claims that Defendant Drew acted in a grossly negligent, willful, wanton and reckless manner regarding the subject closing and regarding his representation of Plaintiffs.

41. State the case name, case number, and county of the foreclosure lawsuit referenced in your Complaint.

RESPONSE: *First Citizens Bank and Trust Company, Inc. v Lot 12 Yellow House, LLC and Keith Roberts*, Berkley County Case No. 2010-CP-O8-1870.

42. Did you make a claim with your owner's title insurance company regarding the title issues referenced in your Complaint? If not, please explain why. If so, please explain the result of the title claim.

RESPONSE: No, because title policy does not cover the marsh area in controversy.

43. Have you retained anyone to perform an independent title search of the property? If so, please state who, when, and provide the results of any such title searches performed.

RESPONSE: Yes. Plaintiffs hired Defendant Randall J. Drew to perform a title search on the property. Plaintiffs understand the Defendants hired Edisto Title sometime on or about November 14, 2007 to perform a title search, which was conducted by Todd Bailish. See documents with a Bates range of Cogan 00440-Cogan00469. Plaintiffs also understand that their expert, Brian L. Boger, may also have performed the title search of the property.

44. Did you sign a fee agreement or other contract with Defendant Drew outlining the scope of services he was to provide regarding the property? If so, please describe the terms of the agreement in detail.

RESPONSE: No. Defendant Drew did not propose a written fee agreement or other written contract outlining the scope of services you provide regarding the property. Plaintiffs understood and believed that the scope of services Defendants were to provide to Plaintiffs included an obligation to provide Plaintiffs with an accurate report and

information advising that the marshland upon which the dock was to be built was owned or could be claimed to be owned by the United States Government.

REQUESTS FOR PRODUCTION

1. Any and all reports, findings, records, or any other documents, letters or other items of documentary or tangible evidence which prove, support or constitute evidence of any fact or circumstance upon which you base the allegations contained in your Complaint.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042.

2. Any and all letters, emails, contracts, or other documents in possession of the Plaintiffs that relate to the claims of this case.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042.

3. All statements of possible witnesses, whether written, oral, summarized, or otherwise reproduced in any manner, relating to the allegations as set forth in the Complaint.

RESPONSE: No written or recorded statements have been taken.

4. All documents, statements, correspondence, reports, photographs, or any other documents referred to in your Answers to Interrogatories.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042.

5. All written (including electronic) correspondence between you and Defendant Drew.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042.

6. All documents and material you provided to Brian Boger for review in this case. Include all correspondence between you/your office and Mr. Boger (including emails, text messages, faxes, letters, or any other transcribed method of communication). Also include any reports or notes of Mr. Boger (including all drafts of correspondence).

RESPONSE: On November 15, 2010, Mr. Boger was provided with the legal description and the TMS number for Lot 12/

7. All documentation of the agreement referenced in paragraph 15 of your Complaint.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335;

Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Cogan00470-Cogan00481.

8. If the purchaser notified you in writing of the refusal to close on the purchase of the property as described in paragraph 16 of your Complaint, produce said writing/documentation.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Cogan00486-Cogan00489.

9. All documents representing encumbrances on the property you allege Defendant Drew failed to discover prior to closing.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Barnett01812-Barnett01816; Barnett01956-Barnett02103.

10. All "publicly filed documents" referenced in paragraph 35 of your Complaint.

RESPONSE: All "publically filed documents" are equally accessible to Defendants as the are to Plaintiffs. Plaintiffs are producing all of the "publically filed documents" in their possession, custody, or control, but are not representing that the portion of the "publically filed documents" the are producing represent all of the materials referenced in Paragraph

35 of their Complaint. See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Barnett01812-Barnett01816; Barnett01956-Barnett02103.

11. Copies of any contract regarding the provision of legal services between you and Defendant Drew.

RESPONSE: No contract was signed with Defendant Drew.

12. All documentation of any damages you are claiming in this lawsuit.

RESPONSE: See compact disc enclosed containing the following documents: Cogan00001-Cogan00631; Internet00001-Internet00016; Roberts00001-Roberts02335; Barnett00001-Barnett03907; and French00001-French00042. See more specifically: Cogan00081-Cogan00083; Cogan00504-Cogan00629; Roberts00001-Roberts00484; Roberts00494-Roberts01277; Roberts01399-Roberts01407; Roberts01413; Roberts01555-Roberts01689.

REQUESTS FOR ADMISSIONS

1. Admit you received clear and marketable title to Lot 12 at the subject closing.

RESPONSE: Objection. Plaintiffs are unable to admit or deny this Request for Admission because it is not clear whether Defendants' reference to "Lot 12" includes the marsh area adjacent to Lot 12 over which the subject dock was constructed. Subject to the foregoing objection, Plaintiffs admit they received clear and marketable title to Lot 12

if that request does not include reference to the right and ability to construct the dock over the marsh area adjacent to Lot 12. Prior to and at the closing for the purchase of the property and later again in November or December 2007, Defendants assured Plaintiffs words to the effect that their title to Lot 12 was good, that the dock permit conveyed with the property allow them to construct the dock over the marsh adjacent to Lot 12, and that the United States of America's claims regarding Plaintiffs' right and ability to construct and maintain a dock were not valid. Otherwise, Plaintiffs never would have purchased this lot.

2. Admit that you were assigned a dock permit at the subject closing.

RESPONSE: Admitted.

3. Admit you knew about the Navy's interest in the marshland adjacent to the property prior to the closing.

RESPONSE: Objection. Plaintiffs are unable to admit or deny this Request for Admission because it is not clear what Defendants mean by "the Navy's *interest* in the marshland." Based on and consistent with Defendants' statements and assurances to Plaintiffs that they had a right to build a dock over the marsh area adjacent to Lot 12 prior to and at the closing for the purchase of the property and later again in November or December 2007, Plaintiffs were aware that the Navy had *claimed* or was *claiming* rights over the subject marsh area, but understood from Defendants that the Navy's claim had been resolved and would not prevent them from building a dock over the marsh area adjacent to Lot 12.

4. Admit that Defendant Drew never orally or in writing assured you that you would be able to build a dock at Lot 12.

RESPONSE: Denied. Defendants assured Plaintiffs that they had a right to build a dock over the marsh area adjacent to Lot 12 prior to and at the closing for the purchase of the property and later again in November or December 2007, which was the purpose of purchasing Lot 12.

5. Admit that you did build a dock after purchasing the property.

RESPONSE: Admit.

6. Admit that when purchasing Lot 12, you did not intend to purchase the marshland adjacent to the property.

RESPONSE: Plaintiffs admit that at the time of the purchase of Lot 12 they did not intend to purchase the marshland adjacent to Lot 12, but understood from Defendants that they had a right to build a dock over the marsh area adjacent to Lot 12. Defendants made these statements and assurances to Plaintiff prior to and at the closing for the purchase of the property and later again in November or December 2007. Plaintiff purchased Lot 12 because they understood that they had a right to construct a dock over the marsh that is adjacent to the property.

7. Admit that the marshland adjacent to Lot 12 is not part of the property conveyed to you at the subject closing.

RESPONSE: Plaintiffs admit that at the time of the purchase of Lot 12 they did not purchase title to the marshland adjacent to Lot 12, but understood from Defendants that they had a right to build a dock over the marsh area adjacent to Lot 12. Defendants made these statements and assurances to Plaintiff prior to and at the closing for the purchase of the property and later again in November or December 2007. Plaintiff purchased Lot 12 because they understood that they had a right to construct a dock over the marsh that is adjacent to the property.

8. Admit that a dock permit is a revocable license.

RESPONSE: Plaintiffs admit that in general, a dock permit is a revocable license, but also state that OCRM, the governmental entity that issued the dock permit to construct a dock over the marsh adjacent to Lot 12 has not revoked that permit. Plaintiffs further respond that at the time of Plaintiffs' purchase of Lot 12, the dock permit was appropriately conveyed. Plaintiffs further admit that *after* the closing and *after* they had constructed the house and the dock on Lot 12 Defendant Drew provided Plaintiffs with his legal opinion that the dock permit was a license that could be revoked in the future.

9. Admit that all of the events described in paragraph 16 of your Complaint took place prior to May 1, 2008.

RESPONSE: Plaintiffs admit that while all of the events described in paragraph 16 of their Complaint took place prior to May 1, 2008, they approached Defendants with their concerns about the United States of America's claims regarding the property in light of Defendants prior statements and assurances that there would be no problems with

Plaintiffs' construction of a dock on the marsh adjacent to Lot 12 back when they purchased the property. Defendants again assured Plaintiffs words to the effect that their title to Lot 12 was good, that the dock permit conveyed with the property allow them to construct the dock over the marsh adjacent to Lot 12, and that the United States of America's claims regarding Plaintiffs' right and ability to construct and maintain a dock were not valid. Plaintiffs relied on Defendants' statements in delaying the commencement of this lawsuit. In addition, the United States District Court for the District of South Carolina still has not ruled on the United States of America's motion for summary judgment against Plaintiffs in the federal lawsuit that is based on a claim that it owns title to the marsh adjacent to Lot 12, the result of which will provide greater clarity on whether Defendants' statements to Plaintiffs were accurate.

10. Admit your contract to purchase the property from Stone contained a provision stating the contract was not contingent on a dock permit.

RESPONSE: Admitted. Plaintiffs further aver that as part of the closing, Plaintiffs were provided with a copy of administrative law judge's answer regarding the validity of the dock permit, and Plaintiffs were led to believe by statements from Defendants, among other things, that there would be no issue with the construction of a dock at Lot 12.

11. Admit that a dock permit does not bestow any ownership rights in the license holder.

RESPONSE: Objection. Plaintiffs are unable to admit or deny the foregoing Request to Admit because this request does not define or clarify what Defendants intended

by the phrase “the license holder,” does not identify any relevant time periods, and does not define what is intended by the phrase “ownership rights.”

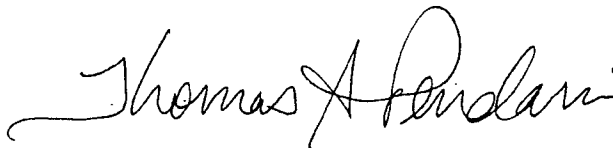
12. Admit that Defendant Drew told you the dock permit was a license that could be revoked in the future.

RESPONSE: Plaintiffs admit that *after* the closing and *after* they had constructed the house and the dock on Lot 12 Defendant Drew provided Plaintiffs with his legal opinion that the dock permit was a license that could be revoked in the future.

13. Admit that prior to closing, Defendant Drew told you the dock permit did not grant you any ownership rights in the marshland adjacent to Lot 12.

RESPONSE: Plaintiffs admit that prior to closing Defendant Drew may have told them the dock permit did not grant any ownership rights in the marshland adjacent to Lot 12, but Defendant Drew did tell them words to the effect that their title to Lot 12 was good, that the dock permit conveyed with the property allow them to construct the dock over the marsh adjacent to Lot 12, and that the United States of America’s claims regarding Plaintiffs’ right and ability to construct and maintain a dock were not valid.

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Thomas A. Pendarvis
500 Carteret St., Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com

Attorney for Plaintiffs

Beaufort, South Carolina

June 23, 2011

Roberts v Drew; Plaintiffs' Witnesses - Persons

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Full Name	Addresses	Role In Case
Paul K. Ahrens	Rincon GA 31326	Owner of a dock downstream from the subject property, which also crosses government property
Madelyn H. Robinson, AICP	PO Box 6122 Moncks Corner, SC 29461-6120	Planning/Zoning Administrator - Berkley County Planning and Zoning
Christopher F. Amer		State Underwater Archaeologist; USC
Todd Bailsh	N. Charleston, SC 29420	Title abstractor with Edisto Title Services, Inc. who performed a title search on the subject property
H. Wayne Beam		
James Berry	Charleston, SC 29407	Received payment for access to Yellow House Road.
Robert Bowen		Prospective purchaser who entered into a contract to purchase the subject property for \$2.2M on October 27, 2006
Susan Bryant	824 Johnnie Dodds Blvd. Mt. Pleasant SC 29464	Realtor with Preferred Group, Inc. d/b/a Agent Owned Realty involved with Robert Bowen who made an FOIA inquiry of South Carolina Office of Coastal Resource Management in November 2006 seeking information the status of the Dock permit, PIN OCRM-OI300-R
Glenn Campbell	Charleston, SC	Owner of an adjacent property who objected to South Carolina Office of Coastal Resource Management over the proposed large pierhead but did not object to the planned walkway.
Richard Chinnis		Dock permit, PIN OCRM-OI300-R Coordinator; South Carolina Office of Coastal Resource Management
Jim Clyburn	181 E Evans Street, Suite 314 Florence, SC 29506	Congressman who was asked for help with US Navy issue.
Patrick Cogan	Wando SC 29492-8265	Plaintiff client and principal in Lot 12 Yellow House, L.L.C.



Roberts v Drew; Plaintiffs' Witnesses - Persons

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Full Name	Addresses	Role In Case
Thomas Dickerson		Friend of Keith Roberts who wrote to Congressman Jim Clyburn
Robert Duncan		Environmental Program Director, SC Dept of Natural Resources
James W. Farren	Land Surveyor / Cadastral Custodian NAVFAC SE Box 30, Bldg 903 Jacksonville FL 32212	Records custodian for Naval Facilities Engineering Command Southeast cadastral files, who is also a registered surveyor in contracts for land surveys Naval Facilities Engineering Command Southeast may want.
Cindy Glover	1037 Chuck Dawley Blvd Ste 100 Bldg F PO Box 1542 Mt Pleasant SC 29465	Paralegal for Stan Barnett, J.D.
Lindsey O. Graham	530 Johnnie Dodds Blvd., Suite 202 Mt. Pleasant, SC 29464	US Senator who was looking into matter with US Navy.
Sheryl F. Hill	567 Crowfield Blvd Goose Creek. SC 29445	Realtor w Prudential Carolina Real Estate
Lindsay O. Graham, The Hon.	530 Johnnie Dodds Boulevard, Suite 202 Mt. Pleasant SC 29464	United States Sen. for the State of South Carolina
Ralph King Anderson, III, The Hon.		Administrative Law Judge presiding over
Jamie Hough		Realtor with Read & Read Realtors, Inc.
Bruce W. Joseph, J.D.		US Navy Associate Counsel
C. Joseph Roof, J.D.	PO Box 11497 Columbia, SC 29211-1497	Attorney with Sherrill Roof Millender, LLP who was engaged as an expert in property law by the United States in United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C., Civil Action No.: 2:09cv428.
Fran Trapp, J.D.	1441 Main Street, Suite 500 Columbia, SC 29201	Assistant US Attorney representing the United States in United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C., Civil Action No.: 2:09cv428

Roberts v Drew; Plaintiffs' Witnesses - Persons

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Full Name	Addresses	Role In Case
Harry Clayton Walker, Jr., J.D.	P.O. Box 61140 Columbia, SC 29260	Attorney representing Keith Roberts
Leslie S. Riley, J.D.		Attorney representing South Carolina Department of Health and Environmental Control in South Carolina Department of Health and Environmental Control v. Thomas Stone, Administrative Law Court, Action No. 2005-ALJ-07-0003-CC
Mary D. Shahid, J.D.	100 Calhoun Street, Suite 400, Charleston, SC 29401	Attorney representing South Carolina Department of Health and Environmental Control in South Carolina Department of Health and Environmental Control v. Thomas Stone, Administrative Law Court, Action No. 2005-ALJ-07-0003-CC
Randall J. Drew, J.D.	1124 Park West Blvd. Mt. Pleasant SC 29466	Defendant lawyer who handled parts transactions involving the subject property
Robert J. Donaldson, III, J.D.		Closing attorney for Thomas Stone
Shawn French, J.D.	1476 Ben Sawyer Blvd., Ste. 3 Mt. Pleasant, SC 29464	Attorney for Lot 12 Yellow House, L.L.C., Keith Roberts and Patrick Cogan in foreclosure action with First Citizens Bank.
Stan Barnett, J.D.	1037 Chuck Dawley Blvd Ste 100 Bldg F PO Box 1542 Mt Pleasant SC 29465	Attorney with Smith, Bundy, Bybee & Barnett, P.C. representing in United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C., Civil Action No.: 2:09cv428
Thomas Waring, J.D.	40 Calhoun Street, Suite 300 Charleston, SC 29401-3535	Attorney for First Citizens Bank in foreclosure action.
W. Walter Wilkins, J.D.	1441 Main Street, Suite 500 Columbia, SC 29201	US Attorney for the District of South Carolina representing the United States in United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C., Civil Action No.: 2:09cv428
John H. Douglas, JD.	151 Meeting Street, Suite 200 Charleston, SC 29401	Assistant US Attorney representing the United States in United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C., Civil Action No.: 2:09cv428

Roberts v Drew; Plaintiffs' Witnesses - Persons

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Full Name	Addresses	Role In Case
Curtis Joyner		Critical Area Permitting Manager - South Carolina Department of Health and Environmental Control, South Carolina Office of Coastal Resource Management
John Kicklighter		Employee of Charleston Dock Company
Betty Lackey	Kingsport, TN 37663	Offered to purchase in 2009.
Jeffrey Lackey	Kingsport, TN 37663	Offered to purchase in 2009.
Mike Mauk		Naval Weapons Station, Director of Facility Management
Chuck Mimms	824 Johnnie Dodds Blvd. Mount Pleasant SC 29464	Agent with Preferred Group, Inc. d/b/a Agent Owned Realty involved with contract with Robert Bowen
Jeremiah D. McMichen, PLS		Surveyor with GEL Engineering, LLC who surveyed subject property
Robert Riggs	1037 Chuck Dawley Blvd., Ste. 100, Bldg. F Mt. Pleasant, SC 29465	Expert for defendants in US Navy case
Keith Roberts		Plaintiff client
Tess Rodgers		South Carolina Office of Coastal Resource Management employee
Jay Rogers	1233 Spoon Court Mt. Pleasant, SC 29466	Real Estate Broker for potential buyer for
Virginia Sawyer		Employee of Atlantic Shield Insurance Group, LLC
Jack H. Schurlknight	PO Box 1582 Moncks Corner, SC 29461	Berkley City Council
Larry Setzler		Engineering Project Manager; Ports Authority
F.M. Steaughane	PO Box 102 Naval Air Station	Commander of a US Navy Region Southeast

Roberts v Drew; Plaintiffs' Witnesses - Persons

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Full Name	Addresses	Role In Case
**	Jacksonville, FL 32212-0102	**
Thomas Stone		Defendant in
Robert Sturm		Realtor for Betty Lackey, Jeffrey Lackey
Jim Zimmerman	1230 Main Street Columbia, SC 29201	Senior VP of First Citizens Bank

Roberts v Drew; Plaintiffs' Witnesses - Organizations

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Full Name	Role In Case	Address: Business
	Provided services for	PO Box 2048 Mt. Pleasant, SC 29465
31-W Insulation Co., Inc.	Provided services for	PO Box 306010 Nashville, TN 37230
84 Lumber	Provided services for	704 Johnnie Dodds Blvd. Mt. Pleasant, SC 29464
A-1 Service	Provided services for	1717 Pineview Road Charleston, SC 29407
ABC Supply Co, Inc.	Provided services for	4001 Dorchester Road N. Charleston, SC 29405
Absolute Marble	Provided services for	278 Palm Street Mt. Pleasant, SC 29464
Access Portable Toilets, Inc.	Provided services for	3753 Ashley Phosphate Rd. N. Charleston, SC 29418
Preferred Group, Inc. d/b/a Agent Owned Realty		824 Johnnie Dodds Blvd. Mount Pleasant SC 29464
American Elevator Company	Provided services for	975 Bacons Bridge Road Suite 148 PMB 313 Summerville, SC 29485
Atlantic Shield Insurance Group, LLC	Provided homeowners insurance for	P.O. Box 2336 Mt. Pleasant, SC 29465
Beam & Associates		6326 St. Andrews Road, Suite 201 Columbia SC 29212
Berkley County Planning and Zoning		PO Box 6122 Moncks Corner, SC 29461-6120
Berkley County Treasurer	Recipient of property taxes paid for	PO Box 6122 Moncks Corner, S.C. 29461-6120
Blue Flame Gas	Provided services for	PO Box 519 Mt. Pleasant, SC 29465
Boral Bricks, Inc.	Provided services for	121 Mellenchamp Road

Roberts v Drew; Plaintiffs' Witnesses - Organizations

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Full Name	Role In Case	Address: Business
**	**	Summerville, SC 29483
Bradco Supply Corp.	Provided services for	420 Jessen Lane Wando, SC 29492
Builders First Source	Provided services for	1507 W. 5th Street N. Summerville, SC 29483
Builders Hearth & Supply	Provided services for	4955 Dorchester Road, Suite 3 North Charleston, SC 29418
Carolina Building Materials and Salvage Company	Provided building materials at	2440 Meeting Street Charleston Heights, SC 29405
Carolina Custom Security	Provided services for	P.O. Box 1784, Mt. Pleasant SC 29465
Carolina's Finest Cabinets & Carpentry, LLC	Provided services for	401 Twelve Oak Drive Charleston, SC 29414
Carolina Supplies & Materials, Inc.	Provided services for	2115 Monrovia Street Charleston, SC 29405
Carolina Waste	Provided waste service at	
Carpet Gang	Cleaned carpets at	2140 Melbourne Avenue Charleston, SC 29405
Charleston Area Appraisals	Provided appraisal for	255 King Street Charleston, SC 29401
Charleston Dock Company	Provided proposal to remove dock	
Charleston Homes for Sale Realty	Broker for potential buyer for	1233 Spoon Court Mt. Pleasant, SC 29466
Charleston's Rigging	Provided supplies for	1304 Meeting Street Charleston, SC 29405
Chubb Insurance	Provided property and contents coverage for	P. O. Box 7247-0187 Philadelphia, PA 19170
Culligan of North Charleston	Provided services at	131 Hanniford Drive North Charleston, SC 29418
Coastal Concrete, Inc.	Provided services for	PO Box 220

Roberts v Drew; Plaintiffs' Witnesses - Organizations

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Full Name	Role In Case	Address: Business
**	**	Bluffton, SC 29910
Condo Building Concepts, Inc.	Provided services for	802 Coleman Blvd., Suite D Mt. Pleasant, SC 29464
US Corps of Engineers		
C.T. Lowndes	Provided insurance services for	136 S. Main St. Summerville, SC 29483
Custom Shower Door & Mirror, LLC	Provided services for	474-A Jessen Lane Charleston, SC 29492
US Department of Justice		
South Carolina Department of Health and Environmental Control		1362 McMillan Avenue, Suite 400 Charleston, SC 29405
East Cooper Lock & Safe, Inc.	Provided services for	4253 Hwy. 17 North Awemdaw, SC 29429
Edisto Title Services, Inc.	Title search company who performed a title search on the subject property	8535 Randell Court, N. Charleston, SC 29420
EM Seabrook, Jr., Inc.	Provided dock survey at	PO Box 96 Mt. Pleasant, SC 29465
ERA Tides Realty	Represented Betty Lackey, Jeffrey Lackey in offer to purchase	
Ernest Jones Plumbing	Provided services for	5288 Mauss Hill Rd Yonges Island, SC. 29449
Ferguson Enterprises, Inc.	Provided services for	PO Box 100286 Atlanta, GA 30384
First Citizens Bank	Foreclosed on	1230 Main Street Columbia, SC 29201
Flooring Services Incorporated	Provided services for	2220 Technical Parkway N. Charleston, SC 29406
Fogel Services, Inc.	Provided services for	9561 William Aiken Avenue Ladson, SC 29456

Roberts v Drew; Plaintiffs' Witnesses - Organizations

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Full Name	Role In Case	Address: Business
Foremost Insurance Co.	Provided insurance for	PO Box 2057 Kalispell, MT 59903
Francisco Negreiros Roofing	Provided services for	
GEL Engineering, LLC	Company that performed survey of property	PO Box 30712 Charleston, SC 29417
Graphically Speaking, Inc.	Provided services for	1125 Johnnie Dodds Blvd. Mt. Pleasant, SC 29464
Guy C. Lee Building Materials	Provided materials for	PO Box 1786 Mt. Pleasant, SC 29465
Hoffman & Hoffman, CPA, PA	CPA for Keith Roberts	PO Box 31212 Charleston, SC 29417
James Blake	Provided services for	377 Jessup Farm Lane Huger, SC 29450
J. Hilton Gooze Design Group. Inc.	Provided services for	2561-8 Oscar Johnson Dr. North Charleston, S.C. 29405
John Deere Landscapes	Provided supplies for	637 Marina Drive Charleston, SC 29492
Lawyer's Title Insurance Corporation	Provided title insurance for	P.O. Box 27567 Richmond, Virginia 23261-7567
Lisle Construction	Provided services for	200 Huntington Road Summerville, SC 29783
Litchfield Seamless Gutters & Windows	Provided services for	209 Whitesville Road Moncks Corner, SC 29461
Lloyds of London	Provided insurance for	
Lot 12 Yellow House, L.L.C.		
Low Country True Value	Provided services for	1640 N Highway 17 Mount Pleasant, SC 29464
Lowe's	Provided supplies for	1104 Market Center Blvd. Summerville, SC 29465

Roberts v Drew; Plaintiffs' Witnesses - Organizations

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Full Name	Role In Case	Address: Business
Maner Builders Supply Co.	Provided services for	PO Box 204598 Augusta, GA 30917
Martin & Sons Drywall, Inc.	Provided services for	449 Fisher Road Summerville, SC 29486
McComb Landscaping		
McNair Law Firm, P.A.	Law firm representing South Carolina Department of Health and Environmental Control in South Carolina Department of Health and Environmental Control v. Thomas Stone, Administrative Law Court, Action No. 2005-ALJ-07-0003-CC	100 Calhoun Street, Suite 400 Charleston, SC 29401
Mendez Construction	Provided services for	119 Hope Dr Summerville, SC 29485
Mitchum Well Drilling, Inc.	Provided services for	1134 Bethera Road Bonneau, South Carolina 29431
Moon's Electric, LLC	Provided services at	407 Clayton Drive Charleston, SC 29414
Moore & Van Allen, PLLC	Attorneys for First Citizens Bank	40 Calhoun Street, Suite 300 Charleston, SC 29401-3535
MVP Natural Stone	Provided services for	500 Deanna Lane Wando, SC 29492
US Navy		
Newkirk Environmental	Expert for defendants in US Navy case.	1037 Chuck Dawley Blvd., Ste. 100, Bldg. F Mt. Pleasant, SC 29465
Naval Weapons Station		
South Carolina Office of Coastal Resource Management		
Office Depot	Provided supplies for	1491 Highway 17 North Mt. Pleasant, SC 29464
Palmetto Sand Co., Inc.	Provided services for	PO Box 1893 Summerville, SC 29484

Roberts v Drew; Plaintiffs' Witnesses - Organizations

6/22/2011 12:19 PM

Full Name	Role In Case	Address: Business
Paul K. Moore & Associates, Inc.	Prepared appraisal for	528 Johnnie Dodds Blvd., Suite #102 Mt. Pleasant, SC 29464
Phillip Rogers Blacksmith	Provided services for	700 King Street Charleston, SC 29403
PNL Construction, LLC	Provided services for	P.O. Box 148 Mt. Pleasant, SC 29464
Port City Block & Foundation	Provided services for	
Port City Supply, Inc.	Provided services for	1980 Harley Street North Charleston, SC 29406
Prudential Carolina Real Estate		567 Crowfield Blvd Goose Creek, SC 29445
Raul Martinez Masonry	Provided services for	511 Holiday Drive Summerville, SC 29483
RB's Trim, Inc.	Provided services for	214 Windwood lane Moncks Corner, SC 29461
Read & Read Realtors, Inc.		
Royall Ace Hardware	Provided supplies for	833 Ben Sawyer Blvd. Mt. Pleasant, SC
Sahnonsen Appraisals, Inc.	Provided appraisal for	21B Gamecock Avenue Charleston, SC 29407
SCE&G	Provided services for	1277 Chuck Dawley Blvd Mt Pleasant, SC 29464
Seabreeze Doors, Inc.	Provided services for	PO Box 934 Mt. Pleasant, SC 29465
Sherrill Roof Millender, LLP		PO Box 11497 Columbia, SC 29211-1497
Simon Franco Campos Painter	Provided services for	
Skywalker Tree Co.	Provided services for	2118 Chancellory Lane Charleston, SC 29414

Roberts v Drew; Plaintiffs' Witnesses - Organizations

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Full Name	Role In Case	Address: Business
Slick Finish, LLC	Provided services for	8633 Hwy 17 N McClellanville SC 29458
Smith, Bundy, Bybee & Barnett, P.C.		1037 Chuck Dawley Blvd Ste 100 Bldg F PO Box 1542 Mt Pleasant SC 29465
Smith Millwork, Inc.	Provided services for	P.O. Drawer T Lexington, NC 27293
Southeastern Electrical Distributors, Inc.	Provided services for	6470 Dorchester Road Charleston, SC 29418
Southern Cabinetry & Design	Provided services for	451 Jessen Lane, Suite B Charleston, SC 29492
Summerville Insurance Solution	Provided insurance for	129 Jigsaw Road Summerville, SC 29485
Terminix	Provided services for	1171 Pleasant Oaks Drive Mt. Pleasant, SC 29464
Tony's Landscaping	Provided services for	100 Tradewind Lane Wando, SC 29492
United States of America		
Wholesale Appliance, LLC	Provided services for	1533 Hwy 17 North Mt. Pleasant, SC 29464
WilliamSmith Fireplaces, LLC	Provided services for	4955 Dorchester Rd. Unit 3 North Charleston, SC 29418
W.S. Branton Lumber Corp.	Provided services for	10650 Dorchester Road Summerville, SC 29485
Yellow House POA	Received POA dues for	509 Yellow House Place Wando, SC 29492
Zurich Assurance Company	Provided insurance services for	New York, NY 10038

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW HOUSE,
L.L.C.,

Plaintiffs,

vs.

Randall J. Drew,

Defendant.

**AFFIDAVIT OF
EXPERT OPINION OF
BRIAN L. BOGER, ESQ.**

PERSONALLY APPEARED before me Brian L. Boger who, being duly sworn, deposes and says that:

After reviewing the testimony given by the parties and witnesses in this matter and after reviewing additional evidence I had not reviewed and testimony taken after April 28, 2011 when I signed my initial affidavit in this matter, this affidavit supplements my expert opinion, held to a reasonable degree of professional certainty, that the defendant lawyer committed acts of professional negligence proximately damaging the plaintiffs, as more particularly set forth below:

The Lawyer-Client Relationship and Scope

Defendant, Randall J. Drew, ("Drew") had a lawyer-client relationship with Plaintiff, Keith Roberts, with regard to Roberts' acquisition of a deep-water lot with a dock permit, and later representing Drew regarding the formation of Plaintiff, LOT 12 YELLOW HOUSE, L.L.C., (collectively "Roberts") and Roberts' transfer of the deep-water lot to LOT 12 YELLOW HOUSE, L.L.C. Since there was no written retainer agreement, the scope of the representation is determined by the client's objectives for which the lawyer was employed to obtain and also from the advice given by the lawyer. When a lawyer undertakes specific tasks, even on a voluntary basis, those tasks must be done with reasonable care.

Facts

On July 11, 2005, Roberts, as purchaser, and Thomas H. Stone ("Stone"), as seller, entered into an "Agreement to Buy and Sell Real Estate (For General Use and Lots/Acreage)" ("the Contract") for the purchase of a parcel of real property on deep water with a dock permit. (EX 1: Carlock-Drew00421-425). The property is located at Lot 12 on Yellow House Road in Berkeley County, South Carolina ("Lot 12").

Notwithstanding the existence of a permit to construct a dock issued by the South Carolina Department of Health and Environmental Control, Office of Coastal Resource Management (OCRM), critical to the decision to proceed with the purchase of Lot 12 was the ability to construct and maintain a dock appurtenant to Lot 12 in light of OCRM's then-recent attempts to revoke that permit based on claims by the United States Department of the Navy ("Navy") that it owned a portion of the marsh over which the permit allowed a dock to be constructed. (EX 2: Drew Deposition, February, 14, 2012, 43:19-24).

Around July 11, 2005, Drew accepted the representation to provide Roberts with legal advice and counsel as to whether to purchase Lot 12 depending on its compatibility with Roberts' development plans to build a house with a dock on deep water. (EX 3: Roberts Deposition, November 14, 2011, 18:16-19:21 and 21:2-17); (EX 2: Drew Deposition, February 14, 2012, 12:22-13:5).¹ The Contract included a contingency provision allowing Roberts "to have maximum of 60 days due diligence for suitability of use" providing sufficient time to investigate the status of the dock permit. (EX 4: Roberts02015-2019, p. 2, ¶ 13). In addition the Contract also contained a provision that the "[c]ontract [was] not contingent on dock permit." (EX 4: Roberts02015-2019, p. 4, ¶ 30). In fact, Stone had reduced the \$525,000 purchase price by \$50,000 to remove a contingency proposed by Roberts concerning the dock, making the final purchase price \$475,000. (EX 5: Stone Deposition, September 16, 2009, 34:9-16); (EX 6: Stone Deposition, April 25, 2012, 13:3-15).

Roberts testified that during the due diligence phase he informed Drew that the some of reasons he was interested in purchasing Lot 12 were because it was on deep water, had a dock permit, and appeared to have the characteristics suitable for construction of a residential home and dock with strong potential for sale with a substantial profit. (EX 3: Roberts Deposition, November 14, 2011, 36:25-37:5). Roberts also testified that during the due diligence phase he discussed with Drew the claim by the Navy that it owned the marsh or a portion of the marsh between the high ground on Lot 12 and the deepwater on Yellow Creek over which the dock permit appeared to allow a dock to be constructed. (EX 3: Roberts Deposition, November 14, 2011, 18:16-19:6, 20:8-12, 28:4-10, 43:10-19, 46:5-9, 46:13-18, 50:10-15, 75:17-24, 78:25-79:9, 132:23-133:5, 138:4-10).

Roberts testified effectively that some of the primary reasons he retained Drew were to obtain advice regarding 1) the Navy's marsh ownership claim, 2) whether dock could be constructed notwithstanding the Navy's claim, and 3) if Drew's legal advice and opinions were either that the Navy's claim was not valid or if it was valid, that a dock could be constructed without a material risk the Navy could or would take actions adverse to Roberts, then Drew was to handle the closing on Roberts' purchase of Lot 12. (EX 3: Roberts Deposition, November 14, 2011, 18:16-19:6, 20:8-12,

¹ There are several examples of factual disputes in the parties' testimony, such as the scope of the representation and what advice Drew actually gave to Roberts prior to closing. The opinions expressed in this affidavit assume the finders of fact believe Robert's testimony concerning the scope of the representation and what advice Drew provided to Roberts prior to closing. In my opinion, if Roberts' version of those conversations and events are true, then Drew's representation and advice were below the standard of care as further explained in this affidavit.

28:4-10, 43:10-19, 46:5-9, 46:13-18, 50:10-15, 75:17-24, 78:25-79:9, 132:23-133:5, 138:4-10).

Drew's Duties

Given Roberts' objective to purchase a deep water lot with a dock permit and given the circumstances surrounding the Navy's claim, the scope of the attorney-client relationship between Drew and Roberts included duties for Drew to 1) search the title to the marsh adjoining Lot 12 to determine the validity of the Navy's claim of ownership, 2) certify to Roberts whether the Navy's ownership or claim of ownership of the marsh would interfere with or prevent building and maintaining a dock, 3) provide an opinion to Roberts as to the likelihood the Navy would allow the dock to be built or take legal action if a dock were built, and 4) provide advice as to available alternatives under the Contract with Stone, including terminating the Contract and requesting return of the earnest money, in the event Drew's legal analysis and opinion were that building a dock would not be allowed or would subject Roberts to legal consequences or legal action by the Navy / United States government.

If the title search, legal analysis, and Drew's opinion were that the Navy's claim was invalid or that the Navy's interests would not limit or prevent construction of the dock then the scope of the attorney-client relationship between Drew and Roberts would also have included for Drew what I would characterize as fairly standard duties for closing lawyers handling closings on waterfront property such as 1) searching the title to Lot 12 to ensure Stone had good and marketable title, 2) certifying to Roberts that Stone held good title to Lot 12, 3) preparing the deeds to convey the property, 4) handling the closing on the commercial real estate transaction to ensure all necessary documents were executed properly, and 5) recording Stone's deed for Lot 12 to Roberts, and 5) handling the assignment of the dock permit from Stone to Roberts to ensure all the necessary documents were in place to maintain the rights to construct the dock.

Relevant Information Available For Performance of Drew's Legal Duties

At this point in my opinion and testimony a review of the relevant information that was available to Drew is appropriate for determining whether his representation of Roberts met or fell below the standard of care.

The evidence reveals that in April 1964, around the time the Navy was expanding its base in Charleston, a "Land Acquisition Map for FBM Replenishment Facilities, U.S. Naval Base, Charleston, SC" was prepared and later marked as Exhibit "B" to two Lis Pendens and other documents that were filed along with a Declaration of Takings the Navy filed in 1965. (EX 7: Carlock-Shahid00219). In addition to land acquired for the actual Naval Base facilities, additional land was acquired to create a safety zone or safety arc for public protection in the event of a weapons explosion or accidental discharge.

In August and October, 1965, the United States condemned 80.30 acres, more or less, located in Berkeley County, South Carolina through two Declarations of Taking and Lis Pendens filed along

with the estimated compensation in Civil Action No. 8795 in the Eastern District of South Carolina, filed in October 1965 and captioned "*United States of America v. 72.50 acres of land, more or less, in the County of Berkeley, State of South Carolina, Adeline R. Murphy, et al., and Unknown Others, Defendants*" pursuant to 40 U.S.C. § 3115 (formerly 40 U.S.C. § 258a) for the purpose of providing the necessary property for the U.S. Naval Ammunition Depot. (EX 8: Carlock-Drew00379-394); (EX 9: Carlock-Drew00395-420); (EX 10: Barnett00855-881); (EX 11: Carlock-Shahid00160-166). The property descriptions of all properties affected by the Declaration of Taking were described in exhibits attached to the Declaration of Taking and filed in the United States District Court for the District of South Carolina in Civil Action No. 8795 and also filed in the Office Clerk of Court for Berkeley County in Judgment File 541 and Lis Pendens Book 3, Page 194. (EX 12: Barnett00145-250); (EX 13: Barnett01932-1933). The second Declaration of Taking filed in Civil Action No. 8795 was dated March 23, 1966 and took fee simple estate in 7.80 acres under the provisions of The Declaration of Taking Act, 40 U.S.C. § 258a (currently 40 U.S.C. § 3115). The Lis Pendens and Declaration of Taking No. 2 was filed with the Clerk of Court for Berkeley County, South Carolina. (EX 8: Carlock-Drew00379-394).

The property descriptions of all properties affected by the Declaration of Taking signed March 23, 1966 were attached to the Declaration of Taking and filed in the United States District Court for the District of South Carolina in Civil Action No. 8795 and also filed in the Office Clerk of Court for Berkeley County in Judgment Roll 541 and Lis Pendens Book 3, Page 194. (EX 8: Carlock-Drew00379-394); (EX 9: Carlock-Drew00395-420). The Lis Pendens for Declaration of Taking No.1 was filed in the Clerk of Courts Office for Berkeley County, South Carolina in Book 3, Page 194, on October 27, 1965 and the Lis Pendens for Declaration of Taking No.2 was filed in the Clerk of Courts Office for Berkeley County, South Carolina in Book 3, Page 259, on June 3, 1966. (EX 8: Carlock-Drew00379-394); (EX 9: Carlock-Drew00395-420). Both of the Lis Pendens contain the following language making reference to Exhibit "B" (EX 7: Carlock-Shahid00219):

NOTICE IS HEREBY GIVEN that as the result of the filing of the Declaration of Taking and Complaint in condemnation on October 23, 1965, in the Office of the Clerk of the United States District Court for the Eastern district of South Carolina, Charleston, South Carolina, the above-captioned matter is pending in said court, which action was convened by plaintiff against the defendants set forth in Exhibit "A" attached hereto, for the purpose of condemning a fee simple title for use in connection with the United States Naval Ammunition Depot, Charleston, South Carolina, of the property described in Exhibit "B" attached hereto and made a part hereof. (Emphasis added).

As to the marsh areas presumptively owned by the State of South Carolina that were within the property taken in 1965 and 1966, a "Stipulation" was filed on January 3, 1967, in Civil Action No. 8795 in the Eastern District of South Carolina, wherein the United States and the State of South Carolina reached an agreement whereby South Carolina would not contest the federal condemnation of the marshland within the safety arc. (EX 14: Carlock-Shahid00155-156). The United States

District Court issued its final judgment in Civil Action No. 8795 on December 5, 1969, which of course, was filed with the Clerk of Court for the United States District Court. (EX 15: Carlock-Shahid00149).

The evidence and testimony revealed that in Berkeley County, South Carolina prior to the 1970's the property records, including deeds, lis pendens, and judgments were filed and maintained in the Office of the Clerk of Court. *See, e.g.*, (EX 8: Carlock-Drew00379-394) (Cover letter filing Lis Pendens and Declaration of Taking No. 2 was sent to Clerk of Court for Berkeley County, South Carolina). Berkeley County did not begin using a Register of Mesne Conveyances ("RMC") until sometime in the 1970's. (EX 16: Barnett00130-140, p. 4, ¶ 24); (EX 17: Barnett00537-554, pp. 7-9). Therefore, a competent title search of property in Berkeley County, with reference to Lot 12, would have involved a search of the records in the office of the Clerk of Court for Berkeley County, as well as the Berkeley County RMC, and the Clerk of Court for the United States District Court for the District South Carolina.

In July 2001, the South Carolina Department of Health and Environmental Control - Office of Coastal Resource Management ("DHEC-OCRM") issued to Stone a dock permit, Permit Number OCRM-01-300-R (the "Dock Permit") authorizing the construction of a dock appurtenant to Lot 12 across a substantial span of marsh to the deep water of Yellow House Creek, which flows into the Wando River. (EX 18: Carlock-Drew00440-448).

The Dock Permit contained two relevant "general conditions" germane to Drew's evaluation of the Navy's claim of marsh ownership and Robert's development considerations, to wit:

General Condition No. 5 states "[T]hat **this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.**" (Emphasis added).

General Condition No. 16 states "[T]hat extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and SCDHEC-OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit."

On or about July 28, 2004, a Captain from the U.S. Navy, R.M. Zalukus, sent a letter to an individual named Lowell Leopold, who had apparently inquired into the ability to build a dock over the marsh adjacent to Lot 12, after speaking to Stone. (EX 19: Carlock-Drew00185); (EX 6: Stone

Deposition, April 25, 2012, 23:17-25:1). Capt. Zalukus' letter states in relevant part as follows:

We have reviewed your request to build a private dock on property owned by the United States Government. Federal law prohibits the use of federal property for personal gain. **Therefore, you will not be able to obtain permission to build a dock on the marshland owned by the United States Government.** (Emphasis added).

On or about August 6, 2004, Mr. Leopold faxed the foregoing letter from Capt. Zalukus to Stone. Stone's real estate agent, Jamie Hough, testified repeatedly that he was confident the letter from Capt. Zalukus had been delivered to Drew at or prior to the closing when Roberts purchased Lot 12 on August 17, 2005 (see, e.g., EX 20: Hough Deposition, May 21, 2012, 13:9-15), which is consistent with the fact that this document was in Drew's file (EX 19: Carlock-Drew00185) and Drew testified that he reviewed it (EX 21: Drew Deposition, September 30, 2009, 38:8-39:17).

In November 2004, DHEC-OCRM issued to Stone a notice to revoke the Dock Permit on the grounds that it had received information from "the Department of Navy, illustrating the Navy's ownership of the marsh tract" over which the dock was to be constructed and had been provided "copies of Civil Action #8795 to which the U.S. Government was a party which proves ownership of the tract as well as two surveys, one from 2004 and one from 1965." (EX 22: Carlock-Shahid00036-37); (EX 23: Barnett00367-379, p. 7, ¶ 34). After the Dock Permit was formally revoked or during that process, Stone retained Mary Shahid, Esq. ("Shahid") to file an appeal of the Dock Permit revocation to the Administrative Law Court in Columbia, South Carolina. (EX 24: Shahid Deposition, April 25, 2012, 11:19-25).

Prior to the hearing on the appeal, Robert J. Donaldson, III, Esq. ("Donaldson"), the lawyer who represented Stone with regard to Stone's purchase of Lot 12, was engaged to assist in Shahid's efforts on behalf of Stone to have the Dock Permit reinstated. Shahid sent a letter to Donaldson stating in relevant part as follows:

It is my understanding that you are willing to provide us copies of your initial title search performed prior to Mr. Stone's acquisition of this property, and to search records at the Berkeley County RMC Office in order to determine if the United States Navy has provided any record notice of its claim to this land. You have also agreed, if necessary, to assist us in trial by testifying to the results of your title examination. *I believe that we are more likely to succeed at trial in reinstating this permit if we can demonstrate that the Navy has done nothing to alert adjoining upland owners of its ownership of the marsh.*

(EX 25: Carlock-Shahid00027-28).

I believe it is important to note here that Shahid, the attorney for Stone with substantial experience with wetland and marsh ownership issues, implicitly acknowledged the Navy's ownership of the marsh at this early stage in Stone's appeal. The focus of the arguments to have the Dock Permit reinstated was on the lack of notice of the Navy's ownership of the marsh and not a serious challenge to its actual ownership.

Donaldson signed an affidavit that was provided to Shahid and a copy of which was in Shahid's files and which stated, among other things, that Donaldson had "been provided a copy of the Complaint filed in Federal District Court in the early 1960's" and that

Had I known of the Navy's claim, and had the opportunity to understand their position related to construction of docks, I would not have advised Mr. Stone to purchase Lot 12 when he only had permission from the State to construct the dock. (Emphasis added).

(EX 26: Carlock-Shahid00463-465).

Similarly, Shahid testified in this lawsuit that she does not doubt that the Navy owns a "property interest" in the marsh adjacent to Lot 12. (EX 24: Shahid Deposition, April 25, 2012, 24:1-4).

In April 2005, a hearing on Stone's appeal from the Dock Permit revocation was held before the State of South Carolina, Administrative Law Court ("ALC"), Docket No. 05-ALJ-07-0003-CC). In June 2005, the ALC issued a "Final Order and Decision" that reinstated the Dock Permit in favor of Stone on the grounds that a) OCRM failed to prove Stone omitted information concerning the Navy's alleged ownership of adjoining marsh, b) the Navy did not appear at the hearing to submit proof of its ownership of the marsh, c) the evidence submitted by OCRM did not establish that the Navy actually owned the adjoining land or marsh, and d) the Order issued in the federal lawsuit when the Navy acquired the marsh in 1969 did not specifically identify the lands that were the subject of the Order. (EX 27: Carlock-Drew00432-439). The ALC's Order did not, however, determine or conclude that the Navy did not own any of the marsh between the high land of Lot 12 and the deep water of Yellow House Creek.

Drew's Research

It appears that Roberts entered into the Contract with Stone shortly after the ALC Order was issued and retained Drew at or about that time to provide advice as to whether acquiring Lot 12 with plans to build a dock and resell the property was a viable business venture. (EX 3: Roberts Deposition, November 14, 2011, 18:16-19:21 and 21:2-17); (Roberts Deposition, November 14, 2011, 19:7-21);(EX 2: Drew Deposition, February 14, 2012, 12:22-13:5).

In general, the testimony and evidence reveals that Drew obtained a copy of the Contract, then the ALC Order, followed by conducting a title search at the Berkeley County RMC and Clerk

of Court offices, obtained a copy of some materials from the federal takings lawsuit in the 1960s from Donaldson, then had conversations with an individual associated with the Navy, and concluded his research and due diligence with a conversation with Shahid.

Drew testified that he began to search the title on Lot 12 after he obtained a copy of the Contract and that later he obtained a copy of the ALC Order. (EX 21: Drew deposition, September 30, 2009, 13:9-13; 14:23-15:1; and 36:9-14).

Drew testified that after receiving the contract he went to the RMC Office for Berkley County and the Clerk of Court's Office for Berkley County to search the title for Lot 12 from the existing titleholder, Stone, back for forty (40) years to determine if there liens, encumbrances, or other transfers in the chain of title. (EX 21: Drew Deposition, September 30, 2009, 16:5-19:12). Drew also testified that he specifically recalled searching the judgment rolls in the Berkley County Clerk of Court's office, but only looked back for ten (10) years because "judgments are only good for – standard judgment is only good for 10 years. So I would have only looked back 10 years on the judgment." (EX 21: Drew Deposition, September 30, 2009, 18:14-16 and 20:15-21:1); (EX 2: Drew Deposition, February 14, 2012, 163:3-7). Drew acknowledged, however, that judgments reflecting the taking of property by the United States government have no expiration and certainly last longer than ten years. (EX 2: Drew Deposition, February, 14, 2012, 84:1-9).

Drew testified that he did not check the United States District Court records prior to Roberts' acquisition of Lot 12. (EX 21: Drew Deposition, September 30, 2009, 23:14-16).

Drew testified that "the declaration from taking of 1965 is too vague to plot, so you couldn't [determine the metes and bounds] – there's no starting point." (EX 21: Drew deposition, September 30, 2009, 44:4-6); (EX 2: Drew Deposition, February 14, 2012, 78:3-12). Drew testified that he obtained from Donaldson a copy of the judgment from the United States' takings lawsuits from the 1960s, but those papers did not contain a copy of Exhibit "B," the plat to which the Declaration of Taking legal descriptions refer. (EX 2: Drew Deposition, February 14, 2012, 81: 23-82:5). He has testified that he did not have a copy of Exhibit "B", (EX 21: Drew Deposition, September 30, 2009, 44:22-45:12); and without Exhibit "B" he was not able to identify the specific area of marsh adjacent to Lot 12 taken by the Navy. (EX 21: Drew deposition, September 30, 2009, 46:10-11). Drew testified that "[w]hen I was delivered a copy of the recorded – judgment is . . . no one has ever provided me with a copy of this drawing [Exhibit "B" to the Declaration of Takings]." (EX 21: Drew deposition, September 30, 2009, 45:5-12). I have seen no evidence that Drew made any effort to obtain a copy of Exhibit "B" prior to the closing on August 15, 2005.

Drew testified that after performing the title search he obtained a copy of Capt. Zalukus' letter dated July 28, 2004 (EX 19: Carlock-Drew00185), specifically warning that the Navy would not give permission for anyone to build a dock appurtenant to Lot 12. (EX 21: Drew Deposition, September 30, 2009, 38:21-39:2). Aware that information from the Navy was the basis on which OCRM had attempted to have Stone's Dock Permit revoked and aware of the Navy's warning that it would not permit a dock to be constructed, Drew testified that he contacted the Navy to inquire

whether the Navy was continuing to object to the construction of the dock. (EX 21: Drew deposition, September 30, 2009, 62:1-64:23). Drew was asked in the deposition taken in the federal lawsuit about what he did to evaluate the viability of the Dock Permit, to which Drew testified as follows:

Well, after talking to [Roberts], I talked to Stone, and asked him if he had any further contact with the Government regarding the permit. Then I spoke to – I called – I didn't know who was in control of the purported marshlands, so I called the RDA office. They referred me over to another office. And then they referred me – they gave me a number for – I spoke to RDA office. They referred me to Linda Davis, who referred me to Robert Ryan or Raymond Nelson. And I spoke to someone at that office and they said that the permit had been litigated.

(EX 21: Drew deposition, September 30, 2009, 24:17-25:3).

Drew began by calling the Naval Base Redevelopment Authority, a state agency managing the property of the former Naval Station in Charleston. He was referred to an office with the Navy and ultimately to the office of Raymond Nelson, Director of the Naval Facilities Engineering Command's Real Estate. Drew testified that although he did not recall with whom he spoke to in Mr. Nelson's office, whether it was Nelson himself or someone else, someone told him that the Navy considered the matter of the Dock Permit for Lot 12 "litigated" and closed and that the Navy intended to take no further action with respect to the Dock Permit. (EX 21: Drew Deposition, September 30, 2009, 62:1-64:23).² Drew testified that he specifically informed someone in Nelson's office that he represented someone who wanted to build a dock but was never told that the Navy had any objections or that the Navy would take action if a dock were built. *Id.* Drew also acknowledged, however, that he never received anything in writing from the Navy confirming his belief after the telephone conversations with the Navy personnel that the Navy intend to take no action against Roberts if Roberts constructed a dock. (EX 2: Drew Deposition, February 14, 2012, 93:5-11). Shahid testified – consistent with the South Carolina Statute of Frauds – that oral communications regarding real property on not binding; only written communications can bind a party. (EX 24: Shahid Deposition, April 25, 2012, 100:16-101:12).

Drew was asked what he did after speaking with the individuals in the RDA office, to which Drew testified about his conversation with Shahid as follows:

I spoke to [] Shahid. . . . , because I wanted to find out what her opinion was on the fact that [the Navy was] aware [the Permit] had been litigated, what did that mean to her. And she said that there

² A few days before his deposition, on September 28, 2009, Drew sent a letter to a lawyer for the United States stating, "I was told by one of those parties that the permit for Stone had already been litigated." (EX 28: Carlock-Drew00511); (EX29: Carlock-Drew00512).

hadn't been an appeal and that she had reinstated the permit.

(EX 21: Drew deposition, September 30, 2009, 27:9-15).

Shahid testified that she did not recall her conversations with Drew, including whether she had provided copies of documents in her files to Drew, but did not dispute testimony by Drew that he had received documents from her office. (EX 24: Shahid Deposition, April 25, 2012, 49:5-11, 72:14-24 and 92:3-10). Shahid also acknowledged that a copy of Exhibit "B" was in her files, which means it was available to Drew prior to the closing. (EX 7: Carlock-Shahid00219); (EX 24: Shahid Deposition, April 25, 2012, 90:15-91:3). Similarly, Donaldson's affidavit was in her file and therefore would have been available for Drew's consideration as well.

Drew gave the following testimony in the federal lawsuit:

Q. [W]hen you did your original title work for Mr. Roberts and the closing, at that point, you didn't pay any attention to the chain of title on the marsh? You didn't search the title for the marsh?

A. I did not specifically do a – I don't specifically know what that's called, but I wasn't specifically looking for a King's Grant or something on the marsh. ***I wasn't specifically looking at the marsh.*** I was looking at the title to the upland, which is what I was going to insure for the title to the property. And then I was also looking at the permit, and the administrative law judge and the parties who had been involved in the litigation of that permit and the reinstatement of the permit as to whether they thought it was still valid and whether or not I could form opinion, and I thought it was a valid permit based on – ***I thought it was reasonable to rely on an administrative law judge order.*** (Emphasis added).

(EX 21: Drew deposition, September 30, 2009, 48:18-49:11). See also (EX 2: Drew Deposition, February 14, 2012, 95:24) ("A. I didn't – I didn't search the marsh.")

Q. Going out here to where the dock is in the marsh and then out at Yellow House Creek, did your original title search and your opinion in any way deal with chain of title for that property?

A. The title search, no, sir.

(EX 21: Drew deposition, September 30, 2009, 52:23-53:2).

Q. In terms of determining the ownership of this portion which is shown cross-hatched on Exhibit 12, identified as U.S. Government property, you spoke with the individuals you've talked about, Mary

Shahid, Donaldson . . . your client, you read the administrative law judge's decision and you saw the letters from Leopold to the CO and the CO to Leopold, and you made those phone calls that are –

A. Right, noted.

Q. – noted on that?

A. And we also had that letter from OCRM to the Navy saying, you know, it's been appealed, we are going to hold their placard and then so, yes, I reviewed those documents. And I relied on the administrative law judge's order that the permit was valid. And based on his order, the State of South Carolina was the one that he's presuming had the jurisdiction to grant that permit.

(EX 21: Drew deposition, September 30, 2009, 53:3-22).

Q. Okay. At no time, either by letter to the Navy or letter to U.S. Attorney's Office, did you allege to anyone that someone from the Navy had explicitly given permission to your client to build the dock, did you?

A. I haven't alleged now that they explicitly gave me permission, no.

(EX 21: Drew deposition, September 30, 2009, 55:18-24).

Drew also testified that prior to Roberts purchase of the property, Drew had actual notice that the United States was claiming an ownership interest in the marsh between the high land of Lot 12 and the deepwater on Yellow House Creek. (EX 21: Drew Deposition, September 30, 2009, 9-17). Drew acknowledged, however, that having Exhibit "A" and Exhibit "B" to the Declarations of Takings would allow someone to determine the specific metes and bounds of the marshland taken by the Navy. (EX 21: Drew deposition, September 30, 2009, 44:14-46:11); (EX 2: Drew Deposition, February 14, 2012, 78:16-19, 85:7-19, 89:6-8, and 90:23-91:3). Drew testified, however, that he did not know why he did not ask the Berkley County Clerk of Court's office, Shahid, or Donaldson for assistance in getting a copy of Exhibit "B." (EX 2: Drew Deposition, February 14, 2012, 81:13-16, 85:7-19, and 91:17-23).

Drew's Advice to Roberts

Drew agreed that "a client has a right to expect his lawyer will investigate all the necessary facts and research the necessary law before providing legal advice, (EX 2: Drew Deposition, February 14, 2012, 5:2-6), and that it is the lawyer's "job to look through the materials to give the client the advice." (EX 2: Drew Deposition, February 14, 2012, 16:10-13).

Drew testified that he advised Roberts "it was okay to build the dock." Drew testified as follows:

Q. And based on the decision that Judge Anderson made, based on, he says in his footnote, the evidence that the Navy provided to the court, which did not include witnesses, based on your conversations with the Navy people to whom you were referred, *you advised your client that it was okay to build the dock?*

A. Based on the administrative law judge order, the conversation with the people over at RDA and the Navy, and the conversations I had with Mary (Shahid) and her opinions on the permit and the validity now of the permit based on the administrative law order and the appeal period passing; I discussed all those with my client.

(EX 21: Drew Deposition, September 30, 2009, 64:24-65:12) (Emphasis added).

Drew acknowledged that he did advise Roberts to proceed with the purchase of Lot 12, notwithstanding having actual notice of the Navy's ownership or claim of ownership of the marsh adjacent to Lot 12. Drew testified he never told Roberts that the Navy owns the marsh in front of Lot 12 and that Roberts needed to be careful about building a dock.

Q. But you testified earlier that you never told Mr. Roberts that the Navy owns the marsh in front of Blue Crab Lane and you need to be careful if you build a dock because the Navy definitely owns it.

A. That's because the Navy still hasn't proven that the Navy owns it as far as I know.

(EX 2: Drew Deposition, February 14, 2012, 145:18-146:1).

After Drew gave testimony regarding his review of the materials from the federal takings lawsuit in the 1960s, he was asked to identify what other materials he relied on to advise Roberts on whether to proceed with the purchase of Lot 12. Drew testified as follows:

Q. Did you rely on any other communications or materials to advise Mr. Roberts about whether to proceed with the purchase of this lot?

A. I relied on the title exam I did on the lot and I relied for the permit on Mary, who was, still is, a – the guru of docks. She worked for OCRM, she knows her way in and out and around them. And the administrative law order and the fact that there was a valid transfer of that permit to Keith so I talked – and I also had made a phone call to the Navy and they had advised me that the permit had been litigated.

(EX 2: Drew Deposition, February 14, 2012, 92: 2-14).

After this legal malpractice suit was filed, Drew provided testimony somewhat inconsistent with the testimony he gave a few years earlier in the federal lawsuit when asked questions about the advice he would have given Roberts if he had a copy of Exhibit "B" prior to the closing. His testimony was as follows:

Q. And, in fact, you told Mr. Roberts that if he proceeded with the purchase of the property, he would be able to build a dock on that property, didn't you?

A. I told him that – specifically I told him that it was a revokable license, that there was a valid permit at the time based on my discussion with Mary Shahid and with – and based on the administrative law order.

(EX 2: Drew Deposition, February 14, 2012, 12:22-13:1).

Q. Would anything have changed in terms of your advice to Mr. Roberts if you'd have had this plat referenced as Exhibit B, these papers in your hands at the time?

A. If I could follow that and it showed that any portion – if it could clearly show a portion being owned by the Navy, yes.

Q. What would your advice have been if it clearly showed a portion owned by the Navy?

A. Then I would have said then they have – they have a valid claim.

Q. And what would that have meant, a valid claim with regard to building a dock over land over which the Navy has a valid claim?

A. I would have told them that you risk them telling you to remove it from the property.

Q. But you didn't tell Mr. Roberts that in 2005, did you?

A. I told Mr. Roberts that the Navy could make a claim because they had already made a claim.

(EX 2: Drew Deposition, February 14, 2012, 86:25-87:19).

Drew testified that he told Roberts several years later that he wished before the closing that he had a copy of the Navy's recent plat because it shows where "it" (i.e., the part of the marsh owned by the Navy) is located. (EX 2: Drew Deposition, February 14, 2012, 129:15-25).

Drew acknowledged that he never sent Roberts a letter prior to the closing expressing any concerns about risks associated with acquiring Lot 12 with plans to construct a dock. (EX 2: Drew Deposition, February 14, 2012, 131:16-132:4).

Drew acknowledged that he never ruled out the Navy's claim to ownership of the marsh, never identified specifically what portion of the marsh was owned by the Navy, and never reviewed

any of the Berkley County records concerning the marsh prior to the closing. (EX 2: Drew Deposition, February 14, 2012, 69:1-4 and 71:15-19). Drew also acknowledged that he did not read or review the Stipulation where the State of South Carolina conveyed the marsh adjacent to Lot 12 to the United States government prior to the closing on August 17, 2005. (EX 2: Drew Deposition, February 14, 2012, 88:4-14).

Drew acknowledged that notwithstanding his inability to rule out the Navy's claim to marsh ownership, prior to the closing he did not suggest that Roberts obtain some form of assurance, guaranty, or contingency from Stone regarding the Dock Permit. (EX 2: Drew Deposition, February 14, 2012, 167:13-24). I have seen no evidence suggesting that Drew advised Roberts not to proceed with acquiring Lot 12, and proceed with building a dock in light of the Navy's claim of marsh ownership.

Roberts also testified that he relied exclusively on Drew for all of the information about the Navy's claim of marsh ownership. (EX 30: Roberts Deposition, August 25, 2009, 20:8-21:1); (EX 3: Roberts Deposition, November, 14, 2011, 46:5-9). Roberts testified that Drew told him that because "there was a dock permit" he would be "fine" to build a dock. (EX 30: Roberts Deposition, August 25, 2009, 8:9-13). Roberts testified further that prior to the closing Drew told him there was an issue with the Navy's claim of marsh ownership, but told him repeatedly that the issue had been resolved by the ALC's Order and it was good to proceed with purchase of Lot 12 because he had a valid permit to build a dock. (EX 3: Roberts Deposition, November, 14, 2011, 28:4-10, 30:22-25, 36:25-37:5, 43:10-19, 46:13-18, and 132:23-133:5).

Roberts testified that if Drew had advised him that he "would have issues with the federal government," such as being sued for trespass by the United States of America, he "never would have bought [Lot 12]," (EX 30: Roberts Deposition, August 25, 2009, 37:21-38:4); (EX 3: Roberts Deposition, November, 14, 2011, 37:21-38:4), or that if Drew had advised him the Navy did, in fact, own a portion of the marsh adjacent to Lot 12 that he would not have purchased the property. (EX 3: Roberts Deposition, November 14, 2011, 87:19-24 and 138:4-10). It is Roberts' contention that Drew should have advised him not to purchase the property because of the issues with United States government's claims to marsh ownership. (EX 3: Roberts Deposition, November, 14, 2011, 38:22-39:6).

The Closing

On August 17, 2005, the closing on Roberts' purchase of Lot 12 took place at Drew's office in Mt. Pleasant, South Carolina with Drew serving as counsel for Roberts. (EX 31: HUD Stmt., Carlock-Drew00244-45); (EX 32: Title to Real Estate, Carlock-Drew00250-252).³ Before or during the closing, Stone signed a statement declaring that he had not "received any contact, either written

³ A title insurance policy was issued for Lot 12, but there is no dispute in this litigation that the policy provided any coverage for disputes regarding the dock. *See e.g.*, (EX 2: Drew Deposition, February 14, 2012, 35:25-36:4).

or verbal, from governmental agency or any other person regarding the construction of a dock and/or a dock permit since [Lot 12] had been placed on the market to sell or since the letter written on [his] behalf by the McNair Law Firm.” (EX 33: Carlock-Drew00249). Stone conveyed title to Lot 12 to Roberts (EX 32: Carlock-Drew00250-52) and assigned the Dock Permit.

After the Closing

In the fall of 2005, Roberts constructed a walkway leading to a pierhead and floating dock as per the terms of the Dock Permit. (EX 34: Invoice for dock construction, dated November 21, 2005, Roberts00483); (EX 3: Roberts Deposition, November 14, 2011, 61:15-17).

In January 2006, Roberts signed a Commercial Note and Mortgage in favor of First Citizens Bank in the amount of \$1,065,300 to finance the construction costs for a residence on Lot 12. (EX 35: Commercial Note, dated January 27, 2006, Roberts02004-05); (EX 3: Roberts Deposition, November 14, 2011, 115:8-21).

In February 2006, Drew formed LOT 12 YELLOW HOUSE, LLC for Roberts and Roberts conveyed title to Lot 12 to the LLC by Quitclaim Deed (no consideration), which was recorded (Book-Vol / Pg: Bk-R VI-5393 Pg. 315) in Berkeley County, South Carolina by Drew. (EX 36: Roberts 01279-83); (EX 2: Drew Deposition, February 14, 2012, 39:8-10).

On October 27, 2006, Roberts entered into an “Agreement By and Sell Real Estate, Residential” with Robert Bowen (“Bowen”), in which Bowen agreed to pay \$2.1M for the house and dock Roberts had constructed on Lot 12. By February 7, 2007, however, counsel for Bowen had “discovered” the Navy’s claim to ownership of the marsh underneath a portion of the dock appurtenant to Lot 12. Bowen’s lawyer, Ben A. Hagood, Jr., sent a letter, a copy of which was delivered to Drew, setting forth the basis for Bowen’s termination of the contract purchase Lot 12. (EX 37: Carlock-Drew00426-427). Bowen’s primary objection was stated as follows:

Section 3 of the Agreement provides in part that the Seller shall deliver marketable title to the Buyer free and clear of encumbrances. **It has come to the Buyer's attention that the United States Government owns marshlands abutting the Property.** This claim of ownership could result in the Government's demanding that the Seller's dock, which crosses the aforementioned marshlands, be removed. This encumbrance could clearly prohibit the Seller from delivering marketable title to the Property. (Emphasis added).

It is my understanding that Bowen’s contract purchase Lot 12 was terminated, the earnest money was returned, and Roberts continued to own the property.

On August 8, 2007, the United States Department of Justice sent a letter to Drew, as Registered Agent for LOT 12 YELLOW HOUSE, LLC advising that the dock constructed on Lot 12

crossed over marsh belonging to the United States, that Roberts was trespassing, and was subject to claims for actual and punitive damages. (EX 38: Carlock-Drew00492-493). The letter provided Roberts, and Drew with an opportunity to present any available defenses, plans or other efforts to resolve the situation.

In October 2007, Drew sent a letter to a title abstractor requesting "a 40 year title search for Lot 12" and requesting "a copy of a judgment . . . showing how the Navy got the marsh in front of the above property from the District Court back in 1969." (EX 39: Carlock-Drew00451). The title abstractor responded advising that he had not been able to locate "deeds which might convey any interest in marshlands," had been unable to locate any lawsuits involving marshland in the Berkley County Clerk of Court's records "based on the information given", and suggested Drew "look for suits filed in District Court." (EX 40: Carlock-Drew00452).

On February 6, 2008, a lawyer for the United States Department of Justice sent a second letter to Drew summarizing prior communications beginning in August 2007 in which the government asserted that the dock constructed on Lot 12 crossed over marsh belonging to the United States. (EX 41: Carlock-Drew00490-491). The letter advised that, unless Roberts removed the portion of the dock trespassing over the property belonging to the United States, a lawsuit would be filed.

On July 7, 2008, a lawyer for the United States Department of Justice sent a third letter to Drew again summarizing prior communications and advising that, unless Roberts removed the portion of the dock trespassing over the property belonging to the United States, a lawsuit would be filed. (EX 42: Roberts00069-72).

On February 20, 2009, the United States of America filed a lawsuit against Roberts styled, "*United States of America v. Keith Roberts and Lot 12 Yellow House, LLC*," 2:09-cv-428, asserting a claim for trespass and seeking removal of the portion of the dock over the marsh owned by the United States, injunctive relief to prohibit Roberts from using that portion of the dock, and actual damages. (EX 16: Barnett00130-140). On June 25, 2009, the United States of America filed a second lawsuit against Roberts styled "*United States of America v. Keith Roberts and Lot 12 Yellow House, LLC*," 2:09-cv-01696-CMH, asserting claims for construction of a dock in violation of the Rivers and Harbors Act. (EX 43: Carlock-Drew00325-335). I will refer to these two lawsuits as "the Federal Lawsuits."

In the Federal Lawsuits, the United States government filed discovery responses commenting on alleged errors in the ALC's Order stating in relevant part as follows:

The ALJ in his order made at least two major errors.

First, the ALJ placed some importance on a lack of notice of the 1965 condemnation in the Office of the Register of Mesne Conveyances for Berkeley County. ALC Order at 4. There was no Register of Mesne

Conveyances in Berkeley County prior to January of 1979. Prior to January of 1979, the Clerk of Court for the Court of Common Pleas for Berkeley County handled filing of deeds, as well as filing of judgments and notices of lis pendens. While the United States was not required to comply with state filing statutes when condemning property, the United States did file a Notice of Lis Pendens, with related documents, with the Clerk of the Court of Common Pleas for Berkeley County (the appropriate filing location) on October 27, 1965, and those documents are located in Judgment File 541 and Lis Pendens Book 3, Page 194. Additionally, as to the ALJ's finding that there was no way for Mr. Stone to have discovered that the United States owned the property he was planning to build a dock across, it should be noted that the Tax Map System of Berkeley County plainly showed that the United States owned that property, as the ALJ was obviously aware, since he discussed that tax map in his order. In addition, the declarations of taking and the notices of lis pendens for the two condemnation actions in 1965 had been properly filed with the Clerk of Court for Berkeley County, South Carolina, and would have been found by any competent title searcher investigating the ownership of the marsh tracts over which Defendants built their dock. Defendants had, in any event, been directly informed of the status of the title in the marsh tracts in question and had no need to be indirectly advised of the claim of the United States to the property by reference to any records office.

(EX 17: Barnett00537-554, pp. 7-9).

On June 15, 2009, C. Joseph Roof, Esquire, a well-known lawyer in South Carolina with expertise in real estate matters, issued a "Preliminary Expert Report" that was used by the United States in support of its claims in the Federal Lawsuits. EX 44: Carlock-Drew00345-366). In Mr. Roof's cover letter he states that his opinion "may not be, in form, the type of opinion to which you are accustomed, but I usually give opinions on the conduct of attorneys, not parties to a transaction. Obviously, however, *failures by attorneys become those of the parties.*" (EX 44: Carlock-Drew00345-366, p. 1). Mr. Roof's report contained the following opinions:

After reviewing the documentation and applicable law, it is my opinion that Defendants breached the duty and standard of care generally required of reasonably competent parties to a real estate transaction in the following particulars:

- (a) *failing, in general, to obtain competent representation by an attorney at law in the protection of the interests of Plaintiff;*

- (b) failing to seek independent, candid advice, particularly economic and legal considerations; and specifically in failing to recognize the rights of the Plaintiff (United States);
- (c) failing to fulfill their acquisition responsibilities;
- (d) failing to recognize duties to diligently determine the rights of others in the real property;
- (e) failing to accomplish an acquisition that would avoid assumptions as to the rights of others, specifically those of Plaintiff;
- (f) failing to abide by and adhere to standards of due diligence required of a party to a real estate transaction; and
- (g) failing to examine and understand the significance of public records.

(EX 44: Carlock-Drew00345-366) (Emphasis added).

It is my understanding that cross motions for summary judgment were filed in the Federal Lawsuits and arguments were made on April 28, 2010, but the presiding United States District court judge has not issued a ruling on either of those motions. It is my understanding that Roberts has incurred in excess of \$60,000 in attorney's fees defending the Federal Lawsuits.

In May 2010, First Citizens Bank commenced a foreclosure action against Roberts foreclosing on its mortgage making claims under the promissory notes and guarantees. (EX 45: Carlock-Drew00285-316). In March 2011, a hearing was held before the Berkeley County Master-In-Equity during which Roberts were found to be in default on the promissory note, which was secured by a mortgage on Lot 12. An Order was subsequently entered awarding First Citizens a judgment against Roberts in the amount of \$1,312,540.19, ordering the sale of Lot 12, and also finding that the dock was an appurtenance that accompanied Lot 12 as part of the mortgage foreclosure sale. (EX 46: French00029-39).⁴ In July 2011, an "Order Confirming Deficiency Judgment Against Defendant, Keith W. Roberts a/k/a Keith Roberts" was entered showing that First Citizens had acquired Lot 12 at the foreclosure sale in exchange for its bid of \$850,000 and entering a deficiency judgment against Roberts for \$462,541.19 plus legal interest at the judgment rate.

Expert Opinions

It is my opinion, held to a reasonable degree of professional certainty, that Drew committed acts of professional negligence proximately damaging Roberts. I agree with the legal opinions

⁴ I have not seen a clocked copy of the foreclosure order, but understand from counsel for Plaintiff that the original of the unsigned copy was signed by the Master-in-Equity and has been recorded.

concerning Drew's representation as expressed by Mr. Roof and Mr. Hagood set forth earlier in this affidavit, which I incorporate herein by reference.

It is clear that the United States of America owns a portion of the marsh between the high land of Lot 12 and the deepwater along Yellow House Creek, based upon the Stipulation that was filed on January 3, 1967, in federal takings lawsuits and in the Declarations of Takings, Judgments, and other papers that included the property descriptions and plat referenced as Exhibit "B." (Carlock-Shahid00155-156) and (Carlock-Shahid00219).

1. Drew's Representation Fell Below the Standard of Care When He Failed to Advise His Client Not to Purchase Lot 12.

It is my opinion that like Donaldson's statement in his affidavit, a prudent lawyer representing a client in circumstances identical or similar to those affecting Roberts in July - August 2005, should have advised Roberts not to proceed with the purchase. Drew's representation was below the standard of care because he did not advise Roberts not to purchase Lot 12 when it was clear that Lot 12 was not suitable for Roberts' development purposes. If the client refused to follow such advice insisting on proceedings with the purchase, the standard of care would have required a prudent lawyer to advise the client in writing prior to the closing of the lawyer's advice and of the legal risks associated with constructing a dock, including the possibility of being named as a defendant in a lawsuit brought by the United States of America.

Unlike Donaldson, however, Drew had actual notice of the Navy's claim and a copy of a letter from the Navy specifically stating that no permission would be given to build a dock appurtenant to Lot 12. In addition and again unlike Donaldson, Drew had copies of at least some of the filings in the federal lawsuit where the United States acquired property around the Naval Base. In order to meet the standard of care before advising Roberts to proceed with the purchase, at a minimum, Drew needed to have documents conclusively establishing that the Navy / United States did not own and had not taken any of the marsh over which the Dock Permit allowed a dock to be built or have a formal, binding agreement with the United States allowing a dock to be constructed. Even in the former alternative, a prudent lawyer would still have provided a letter to the client advising there was a risk the United States might not agree with the lawyer's determination.

2. Drew's Representation Fell Below the Standard of Care When He Failed to Examine the Title to the Marsh.

In my opinion, Drew had a duty to examine not only the Sellers' title to Lot 12, but also title to the marsh adjacent to Lot 12. Drew's testimony that he did not search the title to the marsh prior to Roberts' purchase of Lot 12 on August 17, 2005, supports my opinion that Drew's failure to search title to the marsh is below the standard of care.

Notwithstanding any factual disputes between the parties concerning the scope of the representation, it is my opinion that once Drew began inquiring into the status of the Dock Permit

and advising Roberts about such research, the scope of the representation would have included those legal tasks and Drew was then obligated to meet the standard of care in performing them.

Drew, in examining title to Lot 12 and evaluating the Dock Permit, functioned as a legal advisor to Roberts, and had a duty to advise Roberts whether an appurtenant dock could be constructed without adverse legal and financial consequences in light of the Navy's marsh ownership claims. This advice was central to whether Stone's title to Lot 12 was marketable as a deep-water lot. Drew had a duty to advise Roberts of any adverse legal and financial consequences in light of the Navy's marsh ownership claims. If the finder of fact were to agree with Roberts' testimony of Drew's legal advice, it is my opinion that Drew failed to meet the standard of care.

Knowing that the dock permit was integral to Roberts purchase of the property, Drew failed to perform a title search on the marshland adjacent to Lot 12 over which the dock for Lot 12 was placed. A competent examination of the records known to Drew and a competent examination of the other records available to Drew concerning the Navy's claim of marsh ownership of the marsh adjacent to Lot 12 prior to the closing would have revealed to a reasonably competent attorney that there were substantial risks the Navy would take action, including legal action, if a dock were constructed. As a result, a competent examination would have revealed, therefore, that the Dock Permit did not provide any rights to build a dock over the marsh owned by the United States. This meant that Stone did not have marketable title to Lot 12 as a deep-water lot with a viable permit allowing the construction of a dock with the typical general conditions that usually control other docks constructed appurtenant to similar residential lots.

Stone's title to Lot 12 with the associated assignment of the Dock Permit meant the property was unmarketable as a deep-water lot with a dock permit because acquisition of the subject property and construction of a dock over marshland owned by the United States was likely to subject Roberts or any purchaser to the risk of litigation over the United States' ownership claims.

Drew failed to meet the minimum standard of care and thereby breached his duties to perform competent and prudent legal services to Roberts when he failed to competently examine the title to the marsh adjacent to Lot 12 and when he failed to report to Roberts the true state of the title to the marsh adjacent to Lot 12.

3. Drew's Representation Fell Below the Standard of Care When He Failed to Advise His Client of the Risks in Purchasing the Property With Plans to Construct a Dock.

Certainly, this real estate transaction, like any other, involves some aspect of risk. Anyone who has either dealt in real property or has advised a client who has, can attest to this. The risks present real challenges for the lawyer advising a client in a transaction. The lawyer's role as a counselor is also one of an advisor. As a result, in the context of a contemplated real estate purchase, lawyers are obligated to notify the client about potential legal consequences for various courses of action involving the property. The lawyer need not advise and caution of every possible alternative,

but the standard of care requires a lawyer to advise the client about the issues that could result in adverse consequences if not considered.

4. Drew's Representation Fell Below the Standard of Care When He Failed to Fully Investigate the Facts Necessary to Provide Accurate Legal Advice.

It is my opinion that the lawyers must conduct themselves in a spirit of loyalty to their clients, assuming a position of the highest trust and confidence, which means lawyers are obligated to explore and develop methods, avenues to help their clients achieve their objectives or at least avoid harm or liability. Although lawyers must give their clients advice consistent with the law, it is not sufficient and does not meet the standard of care to give only a partial legal analysis or position. In addition, the lawyer must investigate the facts and research the law to the degree necessary to enable the lawyer to provide accurate legal advice.

In this case, it is clear that Drew did not complete the factual investigation necessary to advise Roberts about the purchase of Lot 12, certainly with regard to whether construction of a dock would lead to legal consequences with regard to the Navy. Drew admitted that he did not search the title to the marsh adjacent to Lot 12 prior to the closing when Roberts acquired the property. Had Drew properly performed the title search for marsh adjacent to Lot 12 prior to the closing, the Navy's ownership of the marsh would have been discovered putting Drew – for the first time – in a position to have the factual information necessary to provide Roberts with legal opinions and advice that met the standard of care.

Prior to the closing on Lot 12, Drew reviewed the Declaration of Taking, which referenced Exhibit B. Exhibit B was not attached to the copies of the Declaration of Takings and other papers from the condemnation proceedings that Drew reviewed. The standard of care, however, prevented a reasonably prudent lawyer in Drew's position from giving any advice to Roberts on whether to proceed with the purchase of Lot 12 until obtaining Exhibit B or other information necessary to determine whether the United States owned any of the affected marsh. Had Roberts obtained and reviewed Exhibit B to the Declaration of Taking, he would have discovered clear proof that the United States owned or likely owned the marsh property and that a dock could not be built there.

Based upon the state of the publicly filed documents and the documents available to Drew from sources such as Shahid, Donaldson, and OCRM, determination of the status of the Dock Permit did not involve Drew's exercise of professional judgment because he did not have all of the factual information reasonably available on which to exercise his professional judgment. Drew's errors in searching the title to the marsh adjacent to Lot 12 were not a result of the exercise of professional judgement, but were instead errors resulting from Drew's failure to exercise ordinary skill and knowledge.

Shahid testified generally that when there is an expectation of waterfront usage, including the construction of the dock, the closing attorney is obligated to investigate claims of ownership of the marsh even when it is difficult "to detect these claims because of the lack of the normal public

records substantiating them.” (Shahid Deposition, April 25, 2012, 65:11-66:3). Shahid also testified that after the conclusion of the ALC trial, there was still a known risk that the Navy would continue to assert its claim to marsh ownership. (Shahid Deposition, April 25, 2012, 66:4-16). Shahid testified that the ALC Order did not extinguish any of the Navy’s ownership rights in the marsh. (Shahid Deposition, April 25, 2012, 77:19-24). Shahid testified that would have been prudent for Drew to have put in writing to Roberts any warnings about the risks associated with the Navy’s claims of marsh ownership. (Shahid Deposition, April 25, 2012, 107:8-19).

I agree with Shahid’s conclusions. From Roberts’ testimony it is clear that Drew had knowledge and understood prior to the closing that Roberts had an expectation of waterfront usage with regard to his intent to build a dock. Furthermore, there was no evidence the Navy was precluded, by operation of law or fact, from contesting the construction of a dock appurtenant to Lot 12. And I have seen no evidence Drew sent Roberts any written warnings about the Navy’s claims of marsh ownership or otherwise advised Roberts not to proceed with the purchase.

5. Drew’s Representation Fell Below the Standard of Care When He Gave His Client Inaccurate Advice.

Roberts testified that prior to closing, Drew advised Roberts that it was okay to purchase Lot 12 because the “worst case scenario” was that if the Navy ordered him to remove the dock the Navy would have to pay him “just compensation” for “taking” his dock. This advice was below the standard of care because the United States government already owned the marsh property adjacent to Lot 12 and Roberts’ dock would be trespassing on government property.

7. Drew’s Failures to Meet the Standard of Care Proximately Caused Significant Financial Damages to His Client.

Roberts’ damages proximately resulting from Drew’s errors include the loss of the benefit of its bargain on the true value of Lot 12, the \$475,000 purchase price Roberts paid for Lot 12, the loss of the funds paid to the lender on the construction loan for the house built on Lot 12, the \$462,000 deficiency judgment, the injury to Roberts’ credit worthiness, the \$60,000 or more in attorney’s fees paid in defense to the Federal Lawsuits, and the pecuniary value of any adverse judgment entered against Roberts in the Federal Lawsuits are all natural consequences of Drew’s breach of his duties to Roberts because such damages were reasonably foreseeable at the time Drew accepted the legal representation of Roberts in this commercial real estate closing.

Miscellaneous

In reaching these expert opinions, I have reviewed and relied on the following evidence and other materials, which are the kinds of factual sources customarily relied upon by experts in this field:

1. Defendant’s file materials created and obtained in the course of his representation of

Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C., including emails, faxes, closing documents, correspondence, agreements, research, including all the materials cited in this affidavit containing the bates number prefix "Carlock-Drew";

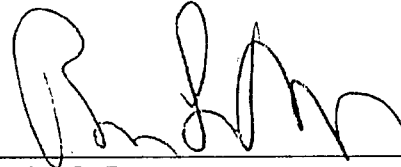
2. Pleadings, deposition transcripts, and exhibits from the federal lawsuits;
3. Discovery responses and deposition transcripts from depositions taken in this case;
4. Other documents and correspondence referenced in this affidavit.

My resume, attached as Exhibit A, demonstrating my qualifications to serve as an expert witness and qualifications to conduct the review required by S.C. CODE ANN. § 15-36-100(B).

I have been retained as an expert witness by counsel for plaintiff. I offer this affidavit to express my expert opinions in this case.

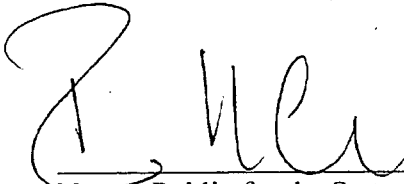
Discovery is continuing in this case. As a result, my expert opinions are necessarily subject to modification following my review of additional materials, to reflect new information, knowledge and insights.

The Affiant further sayeth not.



Brian L. Boger
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME
this day of June 6th, 2012.



Notary Public for the State of South Carolina

My Commission Expires: 6/15/2013

Curriculum Vitae

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EDUCATION: B.A. DEGREE, UNIVERSITY OF VIRGINIA, 1973

LEGAL EDUCATION: J.D. UNIVERSITY OF SOUTH CAROLINA, 1976

PROFESSIONAL WORK HISTORY:

1976 TO OCTOBER, 1979:

ASSOCIATE, LAW OFFICES OF CROMER AND CRAIG
1225 PICKENS STREET
COLUMBIA, S.C.
GENERAL PRACTICE, EMPHASIS ON REAL ESTATE AND
CIVIL TRIAL WORK

OCTOBER 1979 TO JANUARY 1984:

BEGAN OWN PRACTICE WITH APPROXIMATELY 50% OF
WORK IN RESIDENTIAL REAL ESTATE CLOSING AND
50% CIVIL TRIAL WORK

JANUARY 1984 TO 1992

PRACTICE MIX CHANGED TO APPROXIMATELY 60% REAL
ESTATE AND 40% CIVIL TRIAL WORK

1992 TO 2001

PRACTICE MIX CHANGED TO APPROXIMATELY 80% REAL
ESTATE AND 20% CIVIL TRIAL WORK INCLUDING
FORECLOSURES AND PROBATE WORK

2001 TO PRESENT

BEGAN HANDLING CONSUMER CASES. FORECLOSURE

DEFENSE, PREDATORY LENDING MATTERS. BECAME
ACTIVE IN THE NATIONAL ASSOCIATION OF CONSUMER
ADVOCATES

PUBLICATIONS AND OTHER BAR ACTIVITIES:

1981-1985	SPEAKER, FAMILY LAW SOUTH CAROLINA TRIAL LAWYERS ASSOCIATION CONVENTION
1986	CHAIRMAN, FAMILY LAW COMMITTEE SOUTH CAROLINA TRIAL LAWYERS ASSOCIATION
1986	MODERATOR, SC BAR ASSOCIATION CONTINUING LEGAL EDUCATION TOPIC: A REAL ESTATE PRACTITIONERS GUIDE TO REAL ESTATE
1989	COMMISSIONED BY THE SOUTH CAROLINA REAL ESTATE COMMISSION TO WRITE THE LEGAL CHAPTERS (16) OF <u>THE SOUTH CAROLINA REAL ESTATE COMMISSION MANUAL.</u>
1996	BEGAN AS THE REAL ESTATE LEGAL ADVISOR ON TALK RADIO EVERY SUNDAY MORNING
1997	BEGAN HOSTING A TALK RADIO PROGRAM FOR ONE HOUR EACH SUNDAY ENTITLED "TALK LEGAL" ON NEWS TALK STATION WVOC, 560
1998	TAUGHT COURSE, "KEYS TO SUCCESS IN A REAL ESTATE TRANSACTION IN SOUTH CAROLINA" FOR NATIONAL BUSINESS INSTITUTE, JANUARY, 1998
1998	AUTHORIZED LECTURER TO WACHOVIA EMPLOYEES IN THE LOAN ORIGATION DEPARTMENT (NORTH AND SOUTH CAROLINA EMPLOYEES)
1998	TAUGHT COURSE "SOUTH CAROLINA TITLES AND TITLE INSURANCE", MARCH, 1998
1998	TAUGHT COURSE "PARALEGAL'S ROLE IN REAL ESTATE TRANSACTION IN SOUTH CAROLINA, AUGUST, 1998
2000	MODERATOR AND SPEAKER FOR SOUTH CAROLINA BAR SPONSORED SEMINAR "KEYS TO SUCCESSFUL REAL ESTATE TRANSACTION"
2004	ONE OF THE AUTHORS FOR THE SC BAR ASSOCIATION'S BOOK ENTITLED <i>SOUTH CAROLINA DAMAGES</i> . MR. BOGER'S SECTION OF THE BOOK WAS ON DAMAGES AS IT RELATES

TO REAL ESTATE CONTRACTS.

- 2005 APPOINTED AS STATE COORDINATOR FOR THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
- 2006 PUBLISHED ARTICLE IN THE SOUTH CAROLINA TRIAL LAWYERS MAGAZINE. ARTICLE TITLED "THE REAL ESTATE APPRAISAL OVERVALUATION PHENOMENON"
- 2006 ELECTED TO BOARD OF GOVERNORS OF THE SOUTH CAROLINA TRIAL LAWYERS ASSOCIATION
- 2007 SPEAKER AT THE SC BAR CONVENTION ON CONSUMER LAW. TOPIC: OVERVALUATION OF REAL ESTATE: AMERICAN DREAM OR AMERICAN NIGHTMARE?
- 2007 SPEAKER AT THE SC TRIAL LAWYERS ASSOCIATION CONVENTION. TOPIC: REAL ESTATE: HOW HARD CAN IT BE?
- 2009 ONE OF THE AUTHORS FOR THE SC BAR ASSOCIATION'S FOLLOW UP BOOK, *SOUTH CAROLINA DAMAGES, VOLUME TWO*. SPEAKER AT THE SEMINAR CONCERNING THE PUBLICATION
- 2010 SPEAKER AT CONSUMER LAW CLE TRAINING SPONSORED BY SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER, TOPIC: MORTGAGE LITIGATION: WINNING FOR YOUR CLIENT
- 2011 PUBLISHED NOVEL: *SOUTHERN FATE*

an action in the Administrative Law Court ("ALC Case") in efforts to have the permit reinstated, and Judge Ralph King Anderson, III issued an Order on June 3, 2005, ordering that the dock permit be reinstated because the Navy had not proven its ownership claim to the marshland adjacent to the Property. See Ex. B, Order of Judge R. K. Anderson, III (Jun. 3, 2005).¹

Prior to the closing, Roberts was aware of the Navy's claim and impact on the dock permit, as well as the ALC Case:

Roberts: I was aware there was an issue with the -- with the administrative law judge.

Def. Counsel: What was your understanding of that issue?

Roberts: That there were some issues with the dock permit and -- with Mr. Stone and he had to go before the administrative law judge, present his case, and then the dock permit was reissued, reinstated, reissued.

Def. Counsel: Who told you that information?

Roberts: I believe we got the information from Randy Drew.

Def. Counsel: When?

Roberts: At some time in between July 9th and closing. Depo. K. Roberts 16-19:6.

In light of the Navy's claim and the dock permitting issues, Stone agreed to reduce the purchase price by \$50,000 in exchange for a release of liability related to future dock permitting issues.

Def. Counsel: So can you tell me one way or another whether you agreed to the reduction in price in exchange for a release of liability of Mr. Stone related to any issues that might arise regarding the dock permit?

Roberts: I believe I did. Dep. K. Roberts 23:14-18.

¹ For some unexplained reason, the Navy refused to participate in the ALJ case despite having been notified of it.

In fact, in light of the potential permitting issues, the parties amended the contract to include the language "[c]ontract not contingent on dock permit." According to Roberts, he knew prior to closing that the government claimed ownership of the marshland adjacent to the Property and the permit had been revoked and reissued as a result of the ALC Case:

Def. Counsel: What prompted the inclusion of this language about the dock permit in the contract then?

Roberts: I don't -- I don't know.

Def. Counsel: Going down a little further, I think you referenced this note earlier, it says, "Contract not contingent on dock permit." Do you see that?

Roberts: Yes.

Def. Counsel: Is that part of the contract that you agreed to?

Roberts: Yes.

Def. Counsel: And again, if the dock permit was valid at the time you signed the contract, do you recall why the contingency language would be included in the contract?

Roberts: I would imagine it was because they had an issue prior to.

Def. Counsel: Right. Did you know at the time what that issue was?

Roberts: Yes.

Def. Counsel: What was it?

Roberts: That the government was saying -- let me rephrase that. I knew there was an issue with the dock permit, that there was an issue concerning the government and the marshland, that's what I recall about that.

Def. Counsel: Well, is it fair to say that at this time, at this point in time today, we know that the government, the Navy has said it owns the marshland and, therefore, you don't have permission to build a dock there?

Roberts: Absolutely, at this day, I know that.

Def. Counsel: Did you know when you signed this contract that the government was making or had made a claim of that nature?

Roberts: I knew they had a claim of some nature, but until -- until after all of this, when I started really -- when we got into digging into it did I know the magnitude of it. Dep. K. Roberts 26:11-27:21.

The closing took place on August 17, 2005, at which time Roberts received title to the Property and Stone transferred the dock permit to Roberts for the negotiated purchase price of \$475,000. Dep. K. Roberts 23:24-24:1; 51:15-52:1 and Ex. C, "Assignment/Transfer Form." Roberts later transferred title to the Property to his LLC, Lot 12 Yellow House, LLC. Dep. K. Roberts 49:9-11. He then built a dock at the Property in or around September 2005 and began construction of a house in April 2006. *Id.* at 55:2-12 and 61:18-20. Plaintiffs took out a \$1.065 million loan on the Property to finance construction around that time as well. *Id.* at 62:20-63:1. Sometime in 2006, Roberts began marketing the Property for sale and signed a contract to sell it to William Bowen for \$2.2 million. *Id.* at 65:2-66:15. This deal was set to close by January 8, 2007. *Id.* at 70:23-71:7.

Then on November 13, 2006, Roberts received an email from real estate agent Chuck Mims indicating that the Navy considered the dock a trespass over the marshland adjacent to the Property and demanded the dock be removed. *See* Ex. D, email from C. Mims to K. Roberts (Nov. 13, 2006) and Depo. K. Roberts 71:14-73:18. The email was a forward Mims received from Susan Bryant, Bowen's real estate agent. In it, Bryant stated "[w]e have a serious issue regarding the lawsuits with the Navy... I received a phone call from E. R. Nelson, I believe, who told me the dock has to be removed and to call the Navy's attorney..." *Id.* Roberts admitted reading this email on or around November 13, 2006, and stated it was the first notification to him following purchasing the Property that the Navy was going to continue to pursue its claim of

ownership of the marshland that could have an impact on the dock permit. Id. at 72:21-73:18; 74:6-75:7.

On November 16, 2006, Bryant sent Mims a letter formalizing her client's concern regarding the Navy's claim to the marshland adjacent to the Property and its impact on the ability to maintain a dock there. Ex. E, Letter from Bryant to Mims (Nov. 16, 2006). The letter states the following in pertinent part:

[T]he ownership of the land/marsh that the dock crosses appears to be in dispute with the United States government Department of the Navy, according to the records of SCDHEC, Berkeley County, phone conversations, and the correspondence from the Navy and others. This is a matter of paramount importance and must be addressed to the satisfaction of the buyer before he will agree to proceed with the purchase of the property... Id.

Roberts read this letter on or around November 16, 2006. Dep. K. Roberts 77:6-77:8. In his deposition, Roberts plainly admitted he was aware of the Navy's claim by November 28, 2006:

Def. Counsel: So is it fair to say that as of November 28th, 2006, that you were at least aware of the Navy's claim of ownership of the marsh adjacent to the property?

Roberts: Yes. Id. at 79:21-25.

Roberts then retained Mary Shahid to investigate these issues in December 2006. Ex. F, letter from M. Shahid to K. Roberts (Dec. 6, 2006). According to Roberts, he paid Ms. Shahid around \$500 for her services. Dep. K. Roberts 81:11-82:15.

On January 18, 2007, Bowen canceled the contract to purchase the Property from Roberts via a letter from his real estate agent Susan Bryant. Ex. G, ltr. S. Bryant to C. Mims (Jan. 18,

2007).² According to the letter, Bowen was canceling the contract for a number of reasons, the majority of which were related to the Navy's claim of the marshland adjacent to the Property. Id. According to Roberts, the Navy's claim of ownership of the marshland caused Bowen to cancel the contract. Dep. K. Roberts 91:15-20.

When Bowen canceled the contract, Roberts initially refused to refund Bowen's earnest money. Id. at 93:20-23. However, Bowen retained a lawyer who wrote Roberts' real estate agent on February 7, 2007, reiterating the cancellation of the contract and citing the Navy's claim as a reason for the same. Ex. H, ltr. B. Hagood to C. Mims (Feb. 7, 2007). Roberts received this letter and faxed it to Randy Drew on February 18, 2007. Dep. K. Roberts 94:3-13.

Next, Roberts attended a meeting with Randy Drew and lawyers from the Navy in March 2007, the purpose of which was to discuss the dock permit having been issued for construction over marshland the Navy claimed it owned. Id. at 76:17-23 and 96:18-97:12. According to Roberts, the Navy demanded he remove the dock at this meeting. Id. at 97:13-20.

On June 26, 2007, Mary Shahid forwarded Roberts a letter she received from the Department of Justice ("DOJ"), along with a response to the DOJ she sent on Roberts' behalf. Ex. I, ltr. M. Shahid to K. Roberts (Jul. 26, 2007). Roberts admitted receiving Shahid's letter and the attached correspondence around this time. Dep. K. Roberts 99:21-100:0. Of note, the letter from the DOJ accused Roberts of trespassing over its marshland via the dock, demanded the dock be removed, and threatened to sue for damages in the event Roberts failed to remove the dock:

² The letter is dated Jan. 18, 2006, but Roberts testified this was likely a typographic error, as the contract cancellation took place in January 2007.

[T]he owners' trespass on to [sic] the lands of the United States may subject them to damages, both actual and punitive, and costs to remove any structures intruding onto [sic] the land of the United States, and other remedies both equitable and legal. Ex. J, ltr. R. Lloyd to M. Shahid (Jul. 23, 2007).

Shahid corroborated Robert's knowledge of a claim as of July 26, 2007:

Def. counsel: So, as of July 26, 2007, Mr. Roberts was aware of the Navy's continued claim of ownership of the adjacent marshland?

Roberts: Yes. Dep. M. Shahid 75:24-76:3 (Apr. 25, 2012).

The U.S. Attorney's office then wrote Roberts directly on August 8, 2007. Ex. K, ltr. R. Lloyd to K. Roberts (Aug. 8, 2007). In that letter, the DOJ again accused Roberts of trespassing and threatened to seek damages and other relief if Roberts failed to remove the dock. Id. Roberts testified as follows regarding the DOJ's letter:

Def. Counsel: But when you received this letter in August of 2007, you knew that the Navy was asking you to take the dock down and was threatening to try to seek damages against you in the event that you refused to do so, correct?

Roberts: Yes. Dep. K. Roberts 103:21-104:1.

On January 20, 2008, Roberts emailed Randy Drew asking Drew to contact him to discuss the situation: "[H]ow about giving me a call after you receive this. These people just won't go away." Ex. L, email from K. Roberts to R. Drew (Jan. 20, 2008). Roberts testified that the he forwarded Randy Drew threatening letters he received from the Navy with that email. Dep. K. Roberts 106:17-23. During this time, Roberts also sought counsel regarding the Navy's claim from another lawyer, Clay Walker. Id. at 107:5-17. Next, the Navy threatened to file suit against Roberts if he did not remove the dock via an email dated January 30, 2008. Ex. M, email

F. Trapp to C. Walker (Jan. 30, 2008). Trapp copied Roberts on the email, which Roberts received on or about January 30, 2008. Dep. K. Roberts 108:7-10.

On February 6, 2008, the DOJ wrote Randy Drew as Roberts' lawyer regarding the Navy's claim to the marshland adjacent to the Property. Ex. N, ltr. R. Lloyd to R. Drew (Feb. 6, 2008). In pertinent part, the letter states:

[T]he dock constructed from Lot 12 to Yellow House Creek crosses land owned by the United States Government. Please refer to the enclosed survey showing the encroachment of the private dock. By constructing this dock across United States' property, your client has trespassed upon the property of the United States. Additionally, the dock remaining on the property of the United States Government is a continuing trespass. By this letter, the United States is demanding that your client not enter onto the property of the United States Government. This letter further demands that your client not traverse on that portion of the dock that is situated on United States' property. Id.

Roberts testified that he received and reviewed this letter around February 6, 2008. Dep. K. Roberts 108:13-24.

On February 29, 2008, Roberts wrote United States Senator Lindsey Graham regarding the situation. Ex. O, ltr. K. Roberts to L. Graham (Feb. 29, 2008). In the letter, Roberts stated he is being "threatened by the U.S. Attorney," and acknowledged that the government was threatening to seek damages and other recovery against Roberts if he failed to remove the dock. Id. Roberts also stated: "[T]his controversy was going on for years before I bought the property, and even though I was under the impression that it was a 'done deal,' *it has once again reared its ugly head* (emphasis added)." Id. Roberts stated the following regarding the situation in light of his letter to Senator Graham:

Def. Counsel: So is it fair to say that at this time, February 29, 2008, that the situation was a serious issue in your mind?

Roberts: It was an issue and any time you get a letter from the government threatening you the way they threatened me, I would say it's a serious issue... Dep. K. Roberts 112:10-18.

Sometime prior to April 29, 2008, Roberts wrote consultant Wayne Beam, Ph.D., asking for help regarding the issues regarding the Navy's claim and dock permit. *Id.* at 117:17-119:9. Beam wrote Roberts on April 29, 2008, stating in part, "[Y]ou desire me to convince the U.S. Department of Defense and U.S. Department of Justice to cease and desist from their efforts to have your existing private recreational dock disassembled and removed. Ex. P, ltr. H. W. Beam to K. Roberts (Apr. 29, 2008). Roberts was prepared to pay Beam \$80,000 for his services, but ultimately decided not to retain him. Dep. K. Roberts 119:18-23.

In February 2009, the Navy filed a lawsuit in federal court seeking damages and an injunction ordering the dock be removed. The lawsuit included the filing of a *Lis Pendens*, and the bank now owns the Property following a foreclosure. Stan Barnett represents Roberts in that lawsuit, which remains pending as the parties are waiting for Judge Houck to rule on Cross Motions for Summary Judgment, the hearing for which took place over two years ago. Roberts' position in the federal case is that the Navy's claim of ownership of the marshland adjacent to the Property is invalid and that the Navy has no grounds to seek the removal of the dock.

The Plaintiffs filed this legal malpractice action against Randy Drew on May 3, 2011. See Pls.' Compl. (May 3, 2011). According to the Plaintiffs, Mr. Drew improperly advised Roberts to proceed with the closing and that Plaintiffs have suffered damages as a result. Specifically, the Plaintiffs allege that Mr. Drew provided Roberts assurances that the dock permit Stone transferred to Roberts at closing was valid and that the Navy did not have a legitimate

claim of ownership of the marshland adjacent to the Property. The Plaintiffs maintain Drew was negligent to give this advice and that Roberts would not have purchased the Property had Mr. Drew properly advised him. The Plaintiffs allege they have incurred over \$1 million in damages as a result of Mr. Drew's negligence related to lost profits on the contract to sell the Property to Bowen, among other things. Id. at "Summary of the Case" and Pls.' Ans. to Def.'s Int. No. 4 (Jun. 23, 2011). The Plaintiffs also seek other damages related to the foreclosure action and federal lawsuit. Id.

APPLICABLE LAW AND ANALYSIS

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Epstein v. Brown, 363 S.C. 372, 375, 610 S.E.2d 816, 817 (2005) (citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438-439 (2003); Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991)). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Id. Citing Dawkins v. Fields, 354 S.C. 58, 115, 580 S.E.2d 433, 545 (2003). Nevertheless, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hackworth v. Greenville County, 371 S.C. 99, 102, 637 S.E.2d 320, 322 (Ct.App. 2006) (citing Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct.App. 2001)).

ANALYSIS

Any notation or summary of testimony in this section not specifically cited is intended to refer to testimony referenced in the Background Facts section of this Memorandum.

1. The Applicable Statute of Limitations bars Plaintiffs' claims.

S.C. Code Ann. § 15-3-530 provides a three year statute of limitations for the commencement legal malpractice actions. Pursuant to the discovery rule, the period for bringing a malpractice claim begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005) (citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996) and S.C. Code. § 15-3-535). Reasonable diligence requires a party to act with some promptness where the facts and circumstances of the wrong would put a person of common knowledge and experience on notice that his rights had been violated 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." Epstein at 376 citing Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).

In other words, the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party might not comprehend the full extent of the damage is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 363-364, 468 S.E.2d 645, 647 (1996); *see also* Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994). The Plaintiffs had notice of a potential claim against Mr. Drew much earlier than May 3, 2008, three years before the date they filed the Complaint. The statute of limitations clearly bars the Plaintiffs' claims against Randy Drew.

Plaintiffs' Notice of a Claim:

a. August 17, 2005

This is the date of the closing where Roberts purchased the Property from Thomas Stone. Prior to or at closing, Stone reduced the purchase price of the Property by \$50,000 and included language in the contract specifying the transaction was not contingent on the ability to build a dock at the Property. The parties took these measures at Stone's request in efforts to release him from liability to Roberts in the event issues arose with the dock permit and the Navy's claim of ownership of the marshland adjacent to the Property. Roberts' deposition testimony confirms this, and he specifically stated he was aware of issues related to the dock permit based on the Navy's claim of ownership of the marshland at closing. Depo K. Roberts 23:14-18 and 26:11-27:21. At closing, Roberts was aware the Navy had previously claimed an ownership interest in the marshland adjacent to the Property and was cognizant of the impact the Navy's claim could have on the ability to build a dock.

b. November 13, 2006

In late 2006, Roberts signed the contract to sell the Property to Bowen for \$2.2 million. Then on November 13, 2006, Roberts received Chuck Mimm's email indicating that the Navy considered the dock to be a trespass over the adjacent marshland, which the Navy maintained it owned. See Ex. D. According to Roberts' deposition, this was the first indication following the closing that the Navy was pursuing its claim of ownership of the marshland. The email refers to the Navy's claim as a "serious issue" and references the Navy's demand that Roberts remove the dock. Id. and Dep. K. Roberts 72:21-73:18.

According to Roberts, Randy Drew assured him the dock permit was valid and the Navy's ownership claim was not legitimate prior to the closing, and Roberts relied on this information in

consummating the deal. Thus, after learning following the closing that the Navy was still pursuing its claim of the marshland and that claim constituted a "serious issue," a reasonable person in Roberts' position would have been aware of a claim against Mr. Drew related to the advice Drew gave Roberts.

c. November 16, 2006.

On this date, Bowen canceled the contract to buy the Property for \$2.2 million, citing the Navy's claim of ownership of the adjacent marsh and impact on the ability to maintain a dock as a reason. Roberts testified that he believes the sale would have happened had it not been for the issues with the Navy and the dock permit. According to the Plaintiffs' discovery responses, they lost \$425,000 in profits as a result of the deal falling through to sell the Property to Bowen.

So, as of November 16, 2006, Roberts had actual knowledge that Bowen was canceling the contract because of the issues with the Navy and the dock permit (the very issues about which Roberts says Mr. Drew advised him), as well as monetary damages by way of lost profits on the contract. Any reasonable person in Roberts' position would have known of a claim against Randy Drew at that time.

d. November 28, 2006

Roberts may argue that despite Bowen canceling the contract to purchase the Property, the statute did not start to run because Roberts believed Randy Drew when he allegedly told Roberts that the Navy's claims of ownership of the marshland were unfounded and the dock permit was valid. However, Roberts plainly admitted in his deposition that he was aware of the Navy's claim of ownership of the marshland by November 28, 2006. Here, whether the Navy's claim is valid is not the issue for determining when the statute of limitations has run. If it were,

the statute arguably has not started to run yet, as the ownership of the marshland adjacent to the Property is a central issue in the pending federal action. Rather, the knowledge that the Navy was making a claim and the impact the Navy's claim had on the dock permit and ability to sell the Property are the key factors.

According to his own testimony, as of November 28, 2006, Roberts was aware of: a) the Navy's claim of ownership of the marshland; b) the potential impact of the claim on the dock permit; c) the potential and actual impact on the claim to the ability to sell the Property; and d) the impending cancelation of the contract to sell the Property for \$2.2 million directly as a result of the Navy's claim. Any reasonable person in the Plaintiffs' position would have known of a claim against Mr. Drew by this date.

e. December 6, 2006

Roberts retained Mary Shahid to investigate these issues in December 2006, which included paying her at least \$500. So, by December 6, 2006, Roberts recognized a problem significant enough to hire another lawyer. According to the Plaintiffs' logic, had Randy Drew advised Roberts that the Navy's claim of ownership of the marshland was valid and the dock permit might be resolved, the Plaintiffs would not have purchased the Property, incurred construction costs, lost the contract with Bowen, or had to hire separate counsel, all by December 6, 2006. Surely, a reasonable person would have been on notice by this time of a claim against Randy Drew.

f. January 18, 2007 and February 7, 2007

According to Roberts, Bowen formally canceled the contract to purchase the Property because of issues related to the Navy's claim and the dock permit on January 18, 2007. Bowen requested the earnest money back he had put down, which Roberts initially refused to return. However, after hearing from Bowen's lawyer, who cited the Navy's claim and dock permitting issues as a reason for canceling the contract, Roberts returned the earnest money, and recognized the contract as canceled. Considering the Plaintiffs' primary alleged damages are the lost profits on the Bowen contract, it is unclear how Roberts did not have actual, much less constructive, knowledge of a claim against Mr. Drew under these circumstances.

g. March 2007

Sometime in March 2007, Roberts met with Randy Drew and lawyers from the Navy to discuss these issues. Roberts testified that the Navy demanded he remove the dock and claimed it owned the marshland adjacent to the Property. Regardless of any assurances Plaintiffs allege Mr. Drew provided, by this time, Roberts had actual knowledge of the Navy's claim, which had already cost him the contract to sell the Property to Bowen.

h. June 26, 2007 and August 8, 2007

On June 26, 2007, Mary Shahid forwarded Roberts two letters, one from the DOJ and her response to the DOJ. The letters discussed the Navy's claim to the marshland, and the DOJ emphatically demanded that Roberts remove the dock, accusing Roberts of trespassing. The letter, signed by a U.S. Attorney, threatened to pursue damages against Roberts if he refused to remove the dock. Roberts testified that he received that letter and knew at that time that the Navy was demanding the removal of the dock. On August 8, 2007, the DOJ sent Roberts

another letter, this time directly, again accusing him of trespassing, demanding the removal of the dock, and threatening to seek damages.

Again, regardless of anything Mr. Drew said regarding whether the Navy actually owned the marshland, the Navy was accusing Roberts of trespassing and threatening to seek damages against him. Any reasonable person in Roberts position would have been aware of a claim against Randy Drew if he advised Roberts to purchase the Property as Roberts alleges.

i. January 2008

In early 2008, Roberts sought advice from two different lawyers regarding the Navy's claim and its impact on the dock permit. He discussed it with Randy Drew after emailing him stating "these people just don't want to go away." He also discussed the matter with lawyer Clay Walker. On January 30, 2008, the Navy threatened in writing to file suit against Roberts if he refused to remove the dock. Clearly, the Navy was intent on seeing its claim through and forcing the removal of the dock from the Property. Roberts certainly knew or should have known of a claim against Mr. Drew by then.

j. February 2008

The government continued to threaten and harass Roberts regarding removing the dock, reiterating the claim that the dock constituted a trespass over the Navy's land. In light of these threats and after having exhausted other options, Roberts wrote Senator Lindsey Graham asking for help on February 29, 2008. Roberts may claim he relied on assurances Randy Drew provided, but in his letter to Senator Graham, Roberts stated "it has reared its ugly head again" in regards to the Navy's claim. *See Ex. O.* Roberts even described the situation as "serious" by this time. Surely a reasonable person facing "serious" threats by the government, a failed contract,

and mounting costs would be aware of the existence of a claim against the lawyer who allegedly advised him to purchase Property that was the subject of the Navy's claim.

k. April 2008

Finally, in April 2008, Roberts attempted to hire Wayne Beam, a government liaison of sorts, to help deal with these issues. Roberts testified he was prepared to pay Beam \$80,000 if he was able to help him. Roberts' position is that Mr. Drew advised him to buy the Property, that he would not have purchased the Property but for Mr. Drew's advice, and that he has incurred damages as a result of having followed Mr. Drew's advice. No reasonable person could take the position that by this time, Roberts was unaware, constructively or actually, of a claim against Drew related to advice Drew provided regarding purchasing the Property. No legitimate argument exists that Roberts was unaware of a claim against Randy Drew by April 2008, even under the most generous analysis.

Plaintiffs may argue that the statute of limitations did not start to run until the Navy filed the federal lawsuit in February 2009. However, this suit merely formalized the claims and threats the Navy had been making for years. The Navy made its claim of ownership prior to filing suit and only filed suit in an attempt to have that claim recognized by the court. Again though, the claim itself was nothing new, and Roberts had been aware of it since November 13, 2006, according to his testimony. Further, by January 2007, Roberts began incurring damages as a result of the Navy's claim, including lost profits on the contract to sell the Property to Bowen (to the extent Plaintiffs' damages theory is accurate).

The law is well settled that a plaintiff does not need to realize the full extent of his damages in order for the statute of limitations to commence. Dean v. Ruscon Corp., 321 S.C.

360, 363-364, 468 S.E.2d 645, 647 (1996). *See also* Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994). Further, arguing to the contrary would be disingenuous here since the Plaintiffs incurred the majority of their alleged damages when Bowen canceled the contract in early 2007. At that point, the Plaintiffs knew or should have known they had incurred actual damages as a result of following Mr. Drew's advice to purchase the Property.

The law also states "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." Epstein at 376 (citing Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct.App. 1997)). Here, Roberts sought the advice of two lawyers other than Mr. Drew, as well as a U.S. Senator and a third-party consultant by April 2008.

The Plaintiffs may argue that the statute has not started to run because the federal court has not yet ruled on the pending Motions for Summary Judgment. However, if this is the case, then a cause of action has not yet accrued at all against Mr. Drew, and the Plaintiffs' Complaint here is premature.

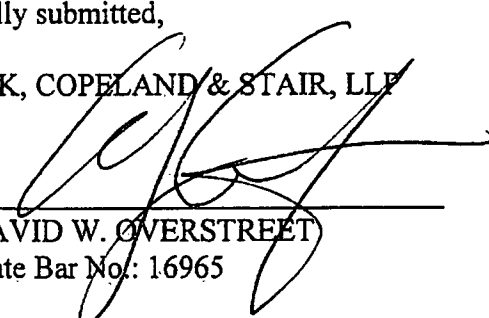
No reasonable argument exists that the Plaintiffs were not actually or constructively aware of claims against Mr. Drew by April 2008 at the very latest. However, the Plaintiffs filed their Complaint on May 5, 2011, which is more than three years after the latest date the statute of limitations could have possibly began to run. The Defendant timely filed an Answer to the Complaint, in which he raised the statute of limitations as an affirmative defense. Therefore, the Plaintiffs' claims fail as a matter of law because they failed to file the Complaint within the applicable three year statute of limitations.

CONCLUSION

The applicable statute of limitations bars the Plaintiffs' claims against Randy Drew in this matter. Therefore, no genuine issue of material fact exists, and the Defendant is entitled to summary judgment.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 

DAVID W. OVERSTREET

State Bar No.: 16965

ANDREW W. COUNTRYMAN

State Bar No.: 72700

Attorneys for Defendant Randall J. Drew

40 Calhoun Street, Suite 400
Charleston, South Carolina
(843) 727-0307

NOTICE OF INTENT TO REVOKE

P/N OCRM-01-300-R

Thomas H. Stone
November 22, 2004

Thomas Stone
503 Ocean Boulevard
Isle of Palms, S. C. 29451

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Dear Mr. Stone:

In accordance with S. C. Code Ann. Section 48-39-220, Regulations 30-2(I) and 30-8, the Department hereby gives you notice of its intent to revoke the above – referenced permit. This permit, for construction of a private dock, was issued in accordance with OCRM Regulation R. 30-12 (A), which governs private dock projects but also in accordance with Regulations 30-1 through 30-11, where applicable. This permit is being revoked on the grounds that the U. S. Government, particularly the U. S. Navy, owns the critical area in question.

As background, on August 9, 2004, DHEC-OCRM staff received a telephone call from a Mr. Jamie Huff, a real estate agent with Read and Read Realtors inquiring about potential marsh ownership by the U. S. Navy. That day he faxed a letter written by Captain R. M. Zalaskus, Commanding Officer with the U. S. Navy regarding Federal ownership of a large area of marsh. Captain Zalaskus states in the letter that use of Federal property for private gain is prohibited. On August 19, 2004, Ms. Leslie Riley, DHEC-OCRM Chief Counsel, wrote the Department of Navy and informed Mr. Mike Mauk, also of the U. S. Navy, of DHEC-OCRM requirements for claiming marsh ownership under S. C. Code Ann. Section 48-39-220. On September 8, 2004, Ms. Riley received a letter from Bruce Joseph, Associate Counsel with the Department of Navy illustrating the Navy's ownership of the marsh tract. With that letter Mr. Joseph provided copies of Civil Action #8795, to which the U. S. Government was a party which proves ownership of the tract as well as two surveys, one from 2004 and one from 1965. Due to the fact that the Navy has demonstrated a judicially declared title to this marsh tract, DHEC-OCRM must revoke your permit.

You have the right to respond, in writing, to the grounds set forth in this letter. Your response is due within 20 days of your receipt of this Notice of Intent to Revoke. Failure to timely respond shall result in issuance of an Administrative Order of Revocation by the Department.

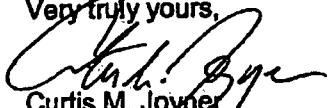


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Mr. Thomas Stone
Notice of Revocation, OCRM-01-300-R
November 22, 2004
Page 2

Pursuant to OCRM Regulation R. 30-8(A)(3), this permit is hereby suspended until further notice. If you have any questions, please do not hesitate to contact me.

Very truly yours,



Curtis M. Joyner
Manager of Critical Area Permitting

cc: Ms. Leslie Riley
Mr. Carl Roberts
Mr. Richard Chinnis
Ms. Tess Rodgers
Mr. Steve Brooks

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

South Carolina Department of
Health and Environmental Control,

Petitioner,

vs.

Thomas Stone,

Respondent.

Docket No. 05-ALJ-07-0003-CC

FINAL ORDER AND DECISION

APPEARANCES: Leslie S. Riley, Esquire, for SC DHEC-OCRM
Mary D. Shahid, Esquire, for Respondent Stone

STATEMENT OF THE CASE

This is a contested case brought by Thomas Stone, contesting an administrative order issued by South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM), revoking Respondent's dock permit, P/N OCRM-01-300-R.¹ The hearing was held before me on April 13, 2005, at the offices of the Administrative Law Court in Columbia, South Carolina. Both parties were present and represented by counsel at the scheduled hearing.

ISSUES

The grounds raised by Respondent Stone are as follows:

1. Whether OCRM complied with the procedural and substantive requirements of 23A S.C. Code Ann. Regs. 30-8 (Supp. 2003).
2. Whether 23A S.C. Code Ann. Regs. 30-2(I) (Supp. 2003) and/or S.C. Code Ann. § 48-39-220 (Supp. 2003) are proper bases for revocation of a permit issued more than three years before OCRM became aware of a private claim of ownership of marsh.

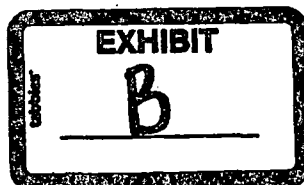
¹ Because this contested case arises from enforcement of an administrative order, OCRM is assigned the burden of proof in accordance with ALC Rule 29(B). The case caption is adjusted for purposes of this Order to reflect the requirements of ALC Rule 29(B).

FILED

JUN 09 2005

SC ADMIN. LAW COURT

Exhibit 12 Page 1



3. Whether the U.S. Department of the Navy knew or should have known of Respondent Stone's 2001 permit application, and failed to properly assert its interests and protect its alleged rights prior to issuance of the permit.
4. Whether OCRM knew or should have known in 2001 of the alleged claim by the U.S. Department of the Navy of private ownership of public tidelands, and failed to act accordingly in its review of Respondent Stone's permit application.
5. Whether Respondent acted in reliance on the U.S. Department of the Navy's failure to respond to the permit application, and on OCRM's failure to take note of the Navy's alleged claim, and suffered a detriment as a consequence of this reliance.
6. Whether the U.S. Department of the Navy had an affirmative duty to provide notice to adjacent upland owners of its claim of ownership of public tidelands.
7. Whether the condemnation action filed on behalf of the U.S. Department of the Navy before the United States District Court could have the force and effect of alienating public trust lands.
8. Whether the general conditions included in all of OCRM's critical area permits support revocation of this permit.
9. Whether Respondent has violated any terms or conditions of the permit that is the subject of this revocation.
10. Whether revocation of Respondent's dock permit, P/N OCRM-01-300-R, is inconsistent with S.C. Code Ann. § 48-39-150(E) (Supp. 2003).

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of evidence:

Background

Respondent Thomas Stone is the owner of a three (3) acre tract located adjacent to Yellow House Creek in Berkeley County, South Carolina, described as Lot 12, Little House Place, Wando. He purchased Lot 12 with the intent of investing in a waterfront lot with access to Yellow House Creek. In fact, Respondent's contract to purchase Lot 12 was expressly

contingent upon receipt of a dock permit and Respondent purposely did not close on the contract for the purchase of Lot 12 until after issuance of this permit. Upon entering into a contract to purchase Lot 12, but prior to closing, Respondent applied for a dock permit for Lot 12. On July 23, 2001, OCRM issued permit P/N OCRM-01-300-R to Respondent, authorizing construction of a dock consisting of a pierhead, floating dock and boatlift on Yellow House Creek. Respondent has not built the dock authorized under this permit.

In August of 2004, over three (3) years after Respondent's permit was issued, the United States Navy, from its offices located at the Naval Weapons Station in Goose Creek, South Carolina, notified OCRM that it claimed ownership of a tract of marsh located between Respondent's property and Yellow House Creek. On August 19, 2004, OCRM requested that the Department of the Navy file an action to establish title to the marsh in accordance with S.C. Code Ann. § 48-39-220 (Supp. 2003) and 23A S.C. Code Ann. Regs. 30-1 (Supp. 2003). The Navy refused and instead provided OCRM with a copy of a Judgment of the United States District Court, Charleston Division, dated December 1, 1969, along with some pleadings and exhibits. The Judgment was issued in the matter entitled United States of America v. 72.50 Acres of Land, More or Less, in the County of Berkeley, State of South Carolina, et al., Civil Action 8795. It is in the form of a Consent Order and arose from a condemnation proceeding filed by the United States of America.

Upon receipt of the Judgment and other documents related to that Civil Action, OCRM then issued a Notice of Intent to Revoke to Mr. Stone, dated November 22, 2004, based on the information provided by the Department of the Navy. On December 14, 2005, OCRM issued a Default Order of Revocation which revoked Respondent's permit based on OCRM's conclusion that "the U.S. Government, particularly the U.S. Navy, owns the critical area marsh in question and substantiated this with DHBC-OCRM on September 8, 2004."²

² In accordance with OCRM's regulations governing enforcement, 23A S.C. Code Ann. Regs. 30-8 (Supp. 2003), Respondent had twenty (20) days from the date of receipt of the Notice of Intent to Revoke to respond. OCRM did not wait twenty (20) days from the date of receipt and instead issued a Default Order of Revocation on December 14, 2004. Accordingly, OCRM's issuance of a Default Order of Revocation was not in compliance with the procedure established for enforcement actions in Regulation 30-8. Nevertheless, to prove the denial of due process, a party must show that it has been substantially prejudiced by the administrative process. Palmsite Alliance, Inc. v. S.C. Public Service Comm'n., 282 S.C. 430, 319 S.E.2d 695 (1984). Moreover, "[a]n adequate de novo review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body." Univisys Corp. v. South Carolina Budget and Control Bd., Div. of General Services Information Technology Management Office, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001). Here, OCRM did consider Respondent Stone's response letter dated December 28, 2004, after it was received. More importantly, this hearing

Notice

The Navy's ownership of the marshland was purportedly established by the 1969 Judgment referenced above. However, Respondent's closing attorney, Robert J. Donaldson, III, performed an extensive title search on Lot 12 based on the fact that Lot 12 was part of a larger parcel of "heirs" property. Mr. Donaldson found no recorded documents in the form of plats, deeds, or mortgages to provide notice of the 1969 Judgment in the Office of the Register of Meane Conveyances for Berkeley County.³ The Department of the Navy simply has taken no steps to provide record notice of its ownership claim. Therefore, Respondent had no knowledge, or reasonable means of obtaining knowledge, of the Navy's purported ownership of the marsh in question.

On the other hand, Public Notice of Respondent's permit application was provided to the Navy. Respondent advertised his permit application, in accordance with OCRM's requirements, in The Post and Courier, a newspaper of general circulation in Berkeley, Charleston and Dorchester Counties. Furthermore, individual notice was given to persons shown on Respondent's application as adjoining property owners, and notification was provided to each individual or entity that appeared on Petitioner's "General Public Notices Mailing List." Various federal agencies were provided notice of this permit application along with the United States Marine Corps.⁴ No entity affiliated with the United States Government commented or objected to Respondent's proposal to construct a dock.

Compliance with Permit

Respondent has, to date, performed no action authorized under the permit. Furthermore, he has not failed or refused to comply with the terms or conditions of his permit. Rather, OCRM revoked Respondent's permit pursuant to 23A S.C. Code Ann. Regs. 30-8 (A) (Supp. 2003) because Respondent failed to list the Navy's Naval Weapons Station as an adjacent property

was held in which Respondent was given a de novo opportunity to challenge the issuance of the Default Order of Revocation. Therefore, I find that Respondent failed to prove a due process violation.

³ Mr. Donaldson performed an additional search in preparation for this contested case hearing, and was only able to locate the Judgment on the judgment rolls for Berkeley County because he was in possession of the case caption. Respondent's predecessors in title are "heirs of Mingo Heyward." This name does not appear in the caption of the Judgment, and the Judgment is not indexed under "heirs of Mingo Heyward."

⁴ The United States Marine Corps is a division of the Department of the Navy. Notification of Respondent's permit application was provided to the Marine Corps commander at Parris Island, Beaufort County, South Carolina.

owner in his permit application and because he provided inaccurate information. Both reasons stem from OCRM's determination that the Navy owned the adjacent marshland property.

In submitting his permit application, Respondent did not provide information to OCRM regarding the Department of the Navy's claim of ownership of marsh located between Lot 12 and Yellow House Creek. However, the Judgment of the United States District Court references 72.50 acres, but the records from the Berkeley County tax assessor's office, obtained in 2004 during OCRM's investigation of the Navy's claim, indicate a parcel between Yellow House Creek and Respondent's high-ground in excess of one hundred (100) acres. Absent any properly proffered evidence from the Navy to clarify or explain this discrepancy, this Court cannot assume or conclude that the Judgment applies to marsh impacted by Respondent's dock permit. Therefore, the Navy's claim of ownership, which is the sole basis for OCRM's revocation, was not properly substantiated before this Court.

Furthermore, the evidence indicates that the parcel of marsh subject to the Navy's claim is not directly adjacent to Respondent's high-ground. The marsh purportedly owned by the Navy is separated from Respondent's high-ground by another parcel of marsh, presumably owned by the State of South Carolina. Therefore, Respondent did not provide materially erroneous information to OCRM when it supplied OCRM with the names and addresses of adjoining property owners.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I conclude the following as a matter of law:

1. The South Carolina Administrative Law Court has subject matter jurisdiction in this action pursuant to S.C. Code Ann. §§ 1-23-310 et seq. (Supp. 2003), and §§ 1-23-500 et seq. (Supp. 2003). Furthermore, S.C. Code Ann. § 48-39-150(D) (Supp. 2003) specifically authorizes the Court to hear contested cases arising under Chapter 39 of Title 48 of the 1976 Code.

2. In civil cases, the burden of proof rests upon the party who asserts the affirmative of an issue. 29 Am.Jur.2d Evidence § 127 (1994); Alex Sanders, et al., South Carolina Trial Handbook § 9:3 Party With Burden, Civil Cases (2000). That burden of proof is carried by a preponderance of the evidence. Natl Health Corp. v. S.C. Department of Health and Environmental Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989).

3. OCRM is charged with carrying out South Carolina's coastal zone policies and issuing permits for docks and piers in the critical areas of the coastal waters and tidelands. S.C. Code Ann. § 48-39-130 (Supp. 2003). Permits for the construction of private docks in the coastal zone are also governed by the South Carolina Coastal Zone Management Act. See 23A S.C. Code Ann. Regs. §§ 30-1 et seq. (Supp. 2003). Those regulations govern the management, development, and protection of the critical areas and coastal zone areas of the State. More specifically, the regulatory policies governing all permit decisions and project standards for docks and piers are found at Regulation 30-12.

4. S.C. Code Ann. § 48-39-50(H) (Supp. 2003) authorizes OCRM to "revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit." Furthermore, Section 48-39-150(E) provides that "[a]ny permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the department." Therefore, a permit may be revoked when the permittee fails to comply with the permit. However, the evidence did not establish that Respondent failed or refused to carry out or comply with the terms and conditions of the permit.

Furthermore, OCRM's critical area permits do not alter or affect the status of title of the State or any person to lands below the mean highwater mark. S.C. Code Ann. § 48-39-190 (Supp. 2003). Moreover, the permit itself sets forth the following general condition:

That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.

Therefore, if Respondent were to build the dock upon land own by the Navy, the permit, even if it could, does not grant Respondent any ownership rights to the land.

The Department relies upon the language of Regulation 30-8(A) to revoke Respondent's permit. Regulation 30-8(A) authorizes revocation when "materially erroneous or fraudulent information has been provided by either the permit applicant, or resource agencies charged with the responsibility of providing background information for the permitting process."⁵ Indeed,

⁵ Whether Regulation 30-8 can extend the provisions of Sections 48-39-50(H) & 48-39-150(E) to revoke a permit based upon "materially erroneous or fraudulent information" provided by the permit applicant is questionable. See *DuRant v. South Carolina Dept. of Health and Environmental Control*, 361 S.C. 416, 604 S.E.2d

notice must be published to the adjoining landowners. Section 48-39-140 (B)(5) provides that an application for a permit must provide "[a] list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable." OCRM relies upon that list to give notice to the adjoining landowners.

Respondent Stone did not list the Navy as an adjoining landowner. However, the evidence did not establish that the Navy is an adjoining landowner.⁶ Here, it appears that Respondent does not share a boundary with the Department of the Navy. More importantly, the 1969 Judgment references a track of land but the evidence did not establish what portion of the condemned property is owned by the Navy. Furthermore, the evidence did not establish that the Navy even owns the disputed land. The 1969 Judgment did not clearly set forth that the property upon which Respondent's dock will lie is the property that was condemned to the United States.

Additionally, the purpose of discovering the identity of adjoining property owners is to provide notification of the permit application. Here, despite Respondent's failure to provide this information, the Department of the Navy received notification of the permit application.⁷ Though the Navy received notification of the permit application, it failed to respond or comment to OCRM in a timely manner. Because the Navy received actual notice, Respondent's omission of this information is not materially erroneous.

704 (Ct. App. 2004), ("Clearly, [OCR], as an office within the state agency of the Department of Health and Environmental Control (DHEC), must act only within the authority granted to it by the legislature."). That issue need not be reached here, however, because the evidence failed to establish that Respondent provided "materially erroneous or fraudulent information."

⁶ In all fairness to OCRM, the Navy initiated this action but failed to appear at the hearing to verify its claim to the marshlands. In accordance with OCRM's regulations governing contested case appeals, 23A S.C. Code Ann. Regs. 30-6(C) (Supp. 2003), the Department of the Navy was provided notification of Respondent's appeal of the Order of Revocation. At no point prior to the scheduled contested case hearing did the Department of the Navy seek intervention in this matter. Furthermore, although it was provided notification of the date and time of the hearing, the Department of the Navy did not send a representative to the hearing or provide a witness to OCRM's Chief Counsel to assist in establishing its claim of ownership of marsh in support of the revocation. Therefore, while OCRM may have had sufficient basis to commence revocation, there is no factual basis to support revocation in the Record before me.

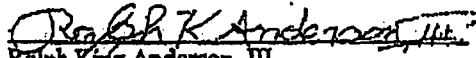
⁷ Upon receiving notice, if an adjoining landowner objects based upon an ownership dispute, the landowner may file an action against the State. See S.C. Code Ann. § 48-39-220(A) (Supp. 2003) ("Any person claiming an interest in the tidelands ... may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State."). If neither written objection is received nor an action instituted pursuant to Section 48-39-220(A), "the permit will be processed pursuant to law." 23A S.C. Code Ann. Regs. 30-2(D)(3) (Supp. 2003).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

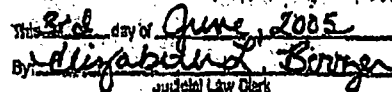
ORDERED that P/N OCRM-01-300-R issued to Thomas Stone authorizing construction of a dock to Yellow House Creek is reinstated.

AND IT IS SO ORDERED.


Ralph King Anderson, III
Administrative Law Judge

June 3, 2005
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or in the Emergency Mail Service addressed to the party(ies) or their attorney(s).

This 3rd day of June, 2005
By: 
Elizabeth A. Berger
Judicial Law Clerk

ASSIGNMENT/TRANSFER FORM

PLEASE ENCLOSE THE FOLLOWING ADMINISTRATIVE FEE. ASSIGNMENT/TRANSFER REQUESTS WILL NOT BE PROCESSED UNTIL THIS FEE IS RECEIVED:

\$25.00 -Minor activities-i.e., private residential dock, general permits, etc.

\$100.00 -Major activities-i.e. Commercial development, marina's, etc.

STATE OF SOUTH CAROLINA

COUNTY OF Berkeley

The undersigned, Thomas H. Stone, does hereby assign unto
(Permit Owner(s))

that certain DHEC-Office of Ocean and Coastal Resource

(New Permit Owner(s))

Management Permit Number OCRM-01-300-2 With an issue date of July 23, 2006
(Permit Number) (Permit Issue Date)

and an expiration date of January 11, 2007 and authorized Dock Construction on the lands of
(Expiration date) (Work authorized by permit)

Lot 17, Yellow House Place in the County of Berkeley,
(Address/location of work) (County)

South Carolina.

By Thomas H. Stone
(Permit Owner(s))

Attested by [Signature]
(Witness to above signature)

Date _____

The undersigned, Keith Roberts, does hereby accept the foregoing
(New Permit Owner)

Assignment/Transfer and does agree to be bound by all of the terms, conditions, and obligations existing
with regards to said permit as were applicable to OCRM-01-300-2 at the date of it's issuance and
(Permit Number)

thereafter until the date of this Assignment/Transfer and hereby agree to discharge the undersigned,

Thomas H. Stone from all such responsibilities and abide by such requirements as are imposed
(Former Permit Owner)
by the aforesaid permit.

By [Signature]
(New Permit Owner(s))

Attested By [Signature]
(Witness to above signature)

Date _____

IMPORTANT: A CURRENT MAILING ADDRESS TO RETURN ASSIGNMENT/TRANSFER CONFIRMATION LETTER MUST BE PROVIDED.

MT. PLEASANT, S.C. 29466



Subj: Fw:
Date: 11/13/2006 4:24:22 P.M. Eastern Standard Time
From: ChuckandEdy@agentowned.com
To: krcarman@aol.com

—Original Message—

From: <SKlavohn@aol.com>
Sent 11/13/2006 8:29:25 AM
To: chuckandedy@agentowned.com
Cc: SKlavohn@aol.com
Subject:

Chuck,

Thank you for the paperwork you gave me today regarding I faxed the elevation certificate on to the insurance company, but they may have a problem with the address being listed as Was this the old name? I haven't seen it listed anywhere previously.

The drawing for the individual sewage treatment and disposal system is very confusing in that it shows a very small looking house to the left of what appears to be the driveway. Was the septic system designed and approved for a 6000 sf house with all the bedrooms and bathrooms that are now there? From the approval letter, this does not appear to be the case, but maybe the seller or builder can clarify this issue.

We have a serious issue regarding the lawsuits with the Navy. Curtis Joyner of DHEC told us to talk to the Navy person who was involved in the lawsuits. I placed a few calls, leaving messages. This morning I received a return phone call from E. R. Nelson, I believe, who told me the dock has to be removed and to call the Navy's attorney, Bruce Joseph, if I have any questions. Although I have left two messages, I have not received a return phone call from Mr. Joseph. If there is any question that the buyer, Robert Bowen, will not be able to keep his boat at the dock or that the dock will have to be removed, then this property will not be suitable since the entire reason for the purchase is to have a place for the buyer's 65' boat. At this time, it would be a good idea if we could get more information or a written opinion from the attorney who represented the seller in this matter. Additionally, the information from DHEC included a letter from The Navy regarding the fact that the dock is located within an "Explosive Safety Quantitative Distance Arc", confirmed by Mr. Nelson this morning. Mr. Nelson explained that this situation is still in effect and will not be changed by The Navy. If there is some danger involved in the location of the property and the dock, then that should have been disclosed to any potential buyers. However, if the information I received this morning is in error, someone needs to clarify the situation.

Due to all the items that need to be examined, the buyer is making a return trip this week and will be at the house on Thursday morning.

Thanks,

Susan Klavohn Bryant, CRS, GRI, CBR
Mentor Group Team Leader
AgentOwned Realty

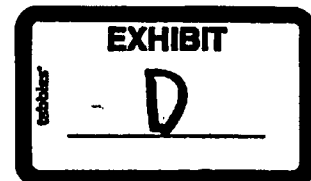
824 Johnnie Dodds Blvd

Mt. Pleasant, SC 29464

843-224-0804

843-725-6530 (direct fax)

Tour Charleston & Search homes Online <http://www.charlestonarearealestate.com/>



Susan Bryant
AgentOwned Realty
824 Johnnie Dodds Blvd
Mt. Pleasant, SC 29464
843-224-0804
Sklavohn@aol.com

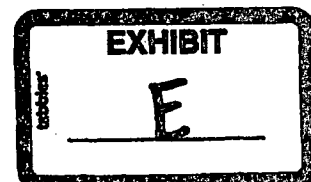
November 16, 2006

Chuck Mimms
AgentOwned Realty

Chuck:

Thank you for meeting with us today at . The buyer, Robert Bowen,
has instructed me to let you know the following information:

1. The property and flood insurance quotes are acceptable.
2. The size of the septic tank has been reported to be 1,500 gallons by the builder and is acceptable.
3. The zoning issue regarding the heavy industrial land to the left of Yellow House Rd. appears to be owned by the Yellow House Property Owners Association, according to the CRS system. If that information is correct, then it is acceptable.
4. The proposed graveyard to the right of the entrance to Blue Crab Lane is acceptable.
5. The access to the 14 acres on the right side of the lot is acceptable, if there is evidence of historical access other than across
6. The rating of the windows as reported by the builder is acceptable, but we need documentation of this rating for insurance purposes.
7. The "Smart House" system details will need to be reviewed by the buyer once the details are provided by the builder.
8. The ownership of the land/marsh that the dock crosses appears to be in dispute with the United States Government Department of the Navy, according to the records of SCDHEC, Berkeley County, phone conversations, and the correspondence from the Navy and others. This is a matter of paramount importance and must be addressed to the satisfaction of the buyer before he will agree to proceed with the purchase of the property. It would be most helpful if the Seller can provide more information, possibly in the form of a written legal opinion from a third party attorney or other documentation, heretofore not in our possession, that is satisfactory to the Buyer. Please review the enclosed survey dated July 25, 2004 by General Engineering & Environmental, LLC that shows TMS No. 267-00-00-059 with the title, "EXHIBIT SHOWING THE ENCROACHMENT OF A PRIVATE DOCK on the lands of Paul K. Ahrens onto



the lands of THE UNITED STATES GOVERNMENT". If there is a new survey of , identified as TMS #267-00-00-012 that includes the new dock, it would also show the new dock as encroaching onto the lands of the United States Government, if the enclosed survey is accurate. The buyer will not be able to continue with the purchase of this property, if this situation is not addressed to his satisfaction.

Sincerely,

Susan Bryant

MCNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

100 CALHOUN STREET, SUITE 400
CHARLESTON, SOUTH CAROLINA 29401

Mary D. Shahid
mshahid@mcnair.net

POST OFFICE BOX 1431
CHARLESTON, SOUTH CAROLINA 29402
TELEPHONE (843) 723-7831
FACSIMILE (843) 722-3227

December 6, 2006

Mr. Keith Roberts

Mt. Pleasant, SC 29466

RE: Lot 12, Yellow House Place, Wando, Berkeley County
In Re: U.S. Navy's Claim of Title to Marshland Adjacent to Yellow House Creek

Dear Mr. Roberts:

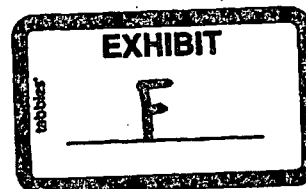
This is to confirm that you have retained our firm to represent you in regard to the above referenced matter.

The fee arrangement for handling this matter is that you will be billed on a monthly basis at the rate of \$275 per hour for me; and \$100 per hour for paralegals. The current rates are reviewed on a yearly basis, and if the regular rates are raised, then the new rate will be charged for the services rendered from that date forward. Our Firm currently charges \$.10 per copy, the costs of long distance telephone calls and the telephone charges incurred for any facsimile transmissions. Any other costs incurred, including court costs and expert witness fees, will also be billed monthly.

My secretary's name is Robin Mobley and she will be able to help you in the event that I am not available. Our Firm Federal Tax ID number is 57-0703244 and will appear on our statements.

We look forward to representing you and working with you in this matter. If all of the above is in keeping with the agreement, please sign the enclosed copy of this letter and return it to me in the envelope provided.

Please let me know if you should have any questions.



ANDERSON • CHARLESTON • CHARLOTTE • COLUMBIA • GEORGETOWN • GREENVILLE • HILTON HEAD ISLAND • MYRTLE BEACH • RALEIGH

CHARLESTON 282624v1

Roberts02147

859

December 6, 2006
Page 2

With kind regards, I am

Very truly yours,



Mary D. Shahid
for McNAIR LAW FIRM, P.A.

MDS/rgm
Enclosure

I, Keith Roberts, acknowledge and agree to the terms and of representations by McNair Law Firm, P.A. as set forth above on the ____ day of _____, 2006.

Keith Roberts

ANDERSON • CHARLESTON • CHARLOTTE • COLUMBIA • GEORGETOWN • GREENVILLE • HILTON HEAD ISLAND • MYRTLE BEACH • RALEIGH

CHARLESTON 282624v1

Roberts02148

860

Susan K. Bryant
AgentOwned Realty, Preferred Group
824 Johnnie Dodds Blvd
Mt. Pleasant, SC 29464
843-224-0804
843-725-6530 (direct fax)
SKlavohn@aol.com

January 18, 2006

Chuck Mimms
AgentOwned Realty
824 Johnnie Dodds Blvd
Mt. Pleasant, SC 29464

RE:
Chuck:

Please make certain the Seller is aware that Bob Bowen will not be closing on the sale of the property at _____ for the following reasons:

1. The Seller will not be able to deliver a marketable title and general warranty deed, free of encumbrances, due to the land owned by the US Government upon which the dock is built.
2. The Seller failed to disclose the material fact that the dock was built on land owned by the US Government. If this information had been provided to the Buyer prior to the Contract, the Buyer would not have entered into the Agreement to purchase the property.
3. The Seller failed to disclose the material fact that the US Government could file a lawsuit against the property owner to have the dock removed. If this information had been provided to the Buyer prior to the Contract, the Buyer would not have entered into the Agreement to purchase the property.
4. The Seller failed to disclose the material fact that the property is located in or near a high explosive arc that may be in an area involving National Security. If this information had been provided to the Buyer prior to the Contract, the Buyer would not have entered into the Agreement to purchase the property.
5. The Seller failed to disclose the material fact that there is an historical easement crossing over the property, potentially allowing access by others. If this information had been provided to the Buyer prior to the Contract, the Buyer would not have entered into the Agreement to purchase the property.



6. The Buyer was not satisfied with the preliminary home inspection. There were certain material items not completed according to the plans supplied by the Seller.
7. The Seller has not provided an inventory list and the property specifications as required by the contract.
8. The Seller has not provided the Builder's Warranty as required by the contract.

At the present time, due to the failure of the Seller to disclose the above-listed material facts, the Buyer has incurred certain substantial expenses that are not normally associated with the purchase of real estate. Therefore, the Buyer is demanding not only the refund of the earnest money, but also the additional expenses that will be presented by separate statement.

Sincerely,

Susan K. Bryant

ATTN: RANDY

HAGOOD & KERR, P.A.

ATTORNEYS & COUNSELORS AT LAW

Ben A. Hagood, Jr.
bhagood@hagoodkerr.com

February 7, 2007

Lot #12 Yellow House LLC
c/o Chuck Mimms
Agent Owned Realty
824 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464

RE: Agreement to Buy and Sell Real Estate, Residential (the "Agreement") dated October 27, 2006 by and between Robert Bowen ("Buyer") and Lot #12 Yellow House LLC ("Seller") for certain real property located in Berkeley County, South Carolina, and generally known as (the "Property")

Dear Mr. Mimms:

This law firm represents the Buyer in the purchase of the Property. Capitalized terms used in this letter without definition have the meaning given them in the Agreement.

The Buyer has previously notified the Seller of the Buyer's election to terminate the Agreement on numerous grounds including, but not limited to, the following:

- DCRM
Licenses
- Section 3 of the Agreement provides in part that the Seller shall deliver marketable title to the Buyer free and clear of encumbrances. It has come to the Buyer's attention that the United States Government owns marshlands abutting the Property. This claim of ownership could result in the Government's demanding that the Seller's dock, which crosses the aforementioned marshlands, be removed. This encumbrance could clearly prohibit the Seller from delivering marketable title to the Property.
 - Addendum A to the Agreement provides, among other things, that the Buyer may terminate the Agreement and receive a full refund of the Earnest Money if the Buyer is not satisfied with the home inspections for any reason. The Buyer was not satisfied with the home inspections for various reasons, including but not limited to, several material deviations from the plans supplied by the Seller.
 - Addendum A to the Agreement further provides that the Agreement is contingent upon the Buyer's approval of certain property specifications and a Builder's Warranty to the Buyer to be provided by the Seller. These were never delivered to the Buyer.

The Buyer elected to terminate the Agreement and demanded that the Earnest Money be refunded in full. If the Seller continues to refuse to authorize the release of the Earnest Money,

Post Office Box 220
Mount Pleasant, South Carolina 29465654 Coleman Blvd.
Mount Pleasant, South Carolina 29464
www.HagoodKerr.comTelephone: 843-972-1000
Facsimile: 843-972-1005Drew 00426
2950-43538

863

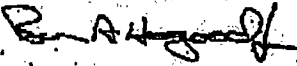
HAGOOD & KERR, PA
ATTORNEYS & COUNSELORS AT LAW
February 7, 2007
Page 2

the Buyer will be forced to take legal action to recover not only the Earnest Money but his considerable legal, travel and other expenses as well.

Notwithstanding the foregoing, nothing in this letter shall be deemed to affect or impair Buyer's rights under the Agreement or applicable law, all of which are hereby reserved.

Please advise of the Seller's intentions within ten days of the date of this letter.

Very truly yours,



Ben A. Hagood, Jr.

cc: Buyer

McNAIR LAW FIRM, P.A.
ATTORNEYS AND COUNSELORS AT LAW

Mary D. Shahid

mshahid@mcnair.net

100 CALHOUN STREET, SUITE 400
CHARLESTON, SOUTH CAROLINA 29401

POST OFFICE BOX 1431
CHARLESTON, SOUTH CAROLINA 29402
TELEPHONE (843) 723-7831
FACSIMILE (843) 722-3227

July 26, 2007

Mr. Keith Roberts

Mt. Pleasant, SC 29466

RE: TMS: 267-00-00-012, Berkeley County
Lot 12, Yellow House Place, Wando, Berkeley County

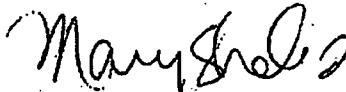
Dear Mr. Roberts:

Please find enclosed a letter I have received from the US Department of Justice. I am also enclosing my response to the same.

Please let me know if you have any questions upon your review of the enclosed.

With kind regards, I am

Very truly yours,

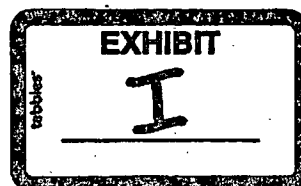


Mary D. Shahid
for McNAIR LAW FIRM, P.A.

MDS/rgm
Enclosure

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CHARLESTON 290424v1



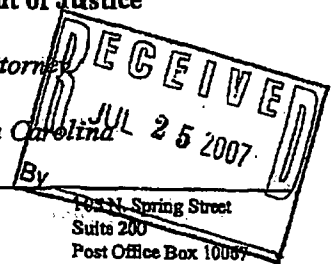
Drew 00234
2950-43538



U.S. Department of Justice

United States Attorney

District of South Carolina



Wachovia Building
Suite 500
1441 Main Street
Columbia, SC 29201
(803) 929-3000
FAX (803) 252-2759

151 Meeting Street
Suite 200
Post Office Box 978
Charleston, SC 29402
(843) 727-4381
FAX (843) 727-4443

John L. McMillan Federal
Building, Room 222
401 W. Evans Street
Post Office Box 1567
Florence, SC 29503
(843) 665-6688
FAX (843) 678-8809

103 N. Spring Street
Suite 200
Post Office Box 10007
Greenville, SC 29603
(864) 282-2100
FAX (864) 233-3158

Reply to: Columbia

July 23, 2007

Ms. Mary D. Shahid
McNair Law Firm, P.A.
100 Calhoun Street
Charleston, South Carolina 29401

Re: TMS: 267-00-00-012, Berkeley County
Lot 12 Yellow House, LLC
Formerly property of Thomas Stone

Dear Ms. Shahid,

I understand that you may represented either Mr. Thomas Stone or Lot 12 Yellow House, LLC regarding the dock on TMS # 267-00-00-012 in Berkeley County, South Carolina. It has come to our attention that the dock is constructed across property owned by the United States. It appears that the owner of TMS# 267-00-00-012 in Berkeley County trespassed and continues to trespass upon the lands of the United States.

The owners' trespass on to the lands of the United States may subject them to damages, both actual and punitive, costs to remove any structures intruding on to the land of the United States, and other remedies both equitable and legal.

I am writing to you as counsel for Lot 12 Yellow House, LLC and Mr. Stone to offer them the opportunity to come forward and give any defenses, plans, or other matters regarding this trespass across the lands of the United States. Please contact me within ten (10) days of the date of this letter so that we may discuss the matter. My direct number is (803) 929-3048. If you are unable to reach me at that number, my cell phone is (803) 413 6500.

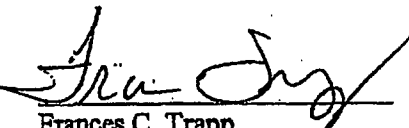


Drew 00238
2950-43538

If you no longer represent Lot 12 Yellow House, LLC and Mr. Stone on this matter, I would appreciate your letting me know so that I can contact them directly. I look forward to hearing from you.

Sincerely,

REGINALD I. LLOYD
United States Attorney

By: 
Frances C. Trapp
Assistant United States Attorney



U.S. Department of Justice

United States Attorney

District of South Carolina

Wachovia Building
Suite 500
1441 Main Street
Columbia, SC 29201
(803) 929-3000
FAX (803) 252-2759

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FAX (843) 727-4443

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Post Office Box 1567
Florence, SC 29503
(843) 665-6688
FAX (843) 678-8809

105 N. Spring Street
Suite 200
Post Office Box 10067
Greenville, SC 29603
(864) 282-2100
FAX (864) 233-3158

Reply to: Columbia

August 8, 2007

Mr. Keith Roberts
and Lot 12 Yellow House LLC

Mt Pleasant, South Carolina 29466

Re: Parcel 2670000012, Berkeley County

Dear Mr. Roberts and Lot 12 Yellow House LLC,

I am writing to you regarding the dock on property shown as TMS #267-00-00-012 in Berkeley County, South Carolina. It has come to our attention that the dock is constructed across property owned by the United States. It appears that the owner of TMS#267-00-00-012 in Berkeley County trespassed and continues to trespass upon the lands of the United States.

The owners' trespass on the lands of the United States may subject them to damages, both actual and punitive, costs to remove any structures intruding on to the land of the United States and other remedies both equitable and legal.

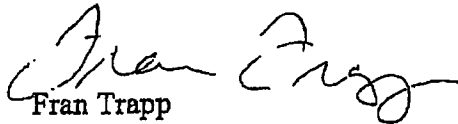
I am writing to you to offer you and Lot 12 Yellow House, LLC the opportunity to come forward and give any defenses, plans, or other matters regarding this trespass across the lands of the United States. Please contact me within (10) days of the date of the letter so that we may discuss the matter. My direct number is (803) 929-3058. If you are unable to reach me at that number, my cell phone is (803) 413-6500.



Drew 00529
2950-43538

Sincerely,

REGINALD I. LLOYD
UNITED STATES ATTORNEY

A handwritten signature in cursive script, appearing to read "Fran Trapp".

Fran Trapp
Assistant United States Attorney
(803) 343-3000

✓ cc: Randall Drew

Randall Drew

From: Krcaman@aol.com

Sent: Wednesday, January 30, 2008 2:37 PM

To: rdrew131@comcast.net

Subject: Fwd: Emailing: Roberts Ltr re Navy Property.wpd, Drew Ltr re Navy Property.wpd

Randy-

How about giving me a call after you receive this please. These people just don't want to go away.

Keith

843-224-4052

Start the year off right. Easy ways to stay in shape in the new year.

5/13/2011



Drew 00240
2950-43538

870

Subj: RE: Emailing: Roberts Ltr re Navy Property.wpd, Drew Ltr re Navy Property.wpd
Date: 1/30/2008 2:29:52 P.M. Eastern Standard Time
From: cwalker@walkerrelbold.net
To: Fran.Trapp@usdoj.gov
CC: Krcarman@aol.com

Fran, please direct any correspondence to randy drew.

Clay

-----Original Message-----

From: Trapp, Fran (USASC) [<mailto:Fran.Trapp@usdoj.gov>]
Sent: Monday, January 28, 2008 2:27 PM
To: Clay Walker
Subject: RE: Emailing: Roberts Ltr re Navy Property.wpd, Drew Ltr re Navy Property.wpd

Hi Clay,

Since this email from you, I have received a telephone call from another lawyer. It is my understanding that neither Mr. Roberts nor Yellow House Lot 14, LLC is not represented at this point.

If you still represent either, please let me know. I am in the process of drafting a letter stating our intent to file suit if a resolution cannot be reached shortly.

Of course, I do not wish to contact a represented party. If I do not hear from you, I will assume that you do not represent any party with reference to the dock across government property adjacent to yellow house creek. Thanks. Fran.

-----Original Message-----

From: Clay Walker [<mailto:cwalker@walkerrelbold.net>]
Sent: Friday, August 31, 2007 3:43 PM
To: Smith, Ed (USASC)
Cc: Trapp, Fran (USASC)
Subject: RE: Emailing: Roberts Ltr re Navy Property.wpd, Drew Ltr re Navy Property.wpd

Thanks. Fran, you indicated that you had letters to and from stone indicating that he had prior actual knowledge that the navy owned this land.

I would be grateful if you would share them with me at your earliest convenience.

I am going to drill into this and try to understand how we got where we are.

I thought that I should make this request now, since you said the next two weeks were full for you. If you feel any other items would help me, feel free to share them.

I hope to get the title information from others, would welcome the opportunity to view it at your office if that could be arranged.

Mr. Roberts is my client.

Clay





U.S. Department of Justice

United States Attorney

District of South Carolina

Wachovia Building
Suite 500
1441 Main Street
Columbia, SC 29201
(803) 929-3000
FAX (803) 254-2943

151 Meeting Street
Suite 200
Post Office Box 978
Charleston, SC 29402
(843) 727-4381
FAX (843) 727-4443

John L. McMillan Federal
Building, Room 222
401 W. Evans Street
Post Office Box 1567
Florence, SC 29503
(843) 668-6688
FAX (843) 678-8809

105 N. Spring Street
Suite 200
Post Office Box 10067
Greenville, SC 29603
(864) 282-2100
FAX (864) 233-3158

Reply to: Columbia

February 6, 2008

Randal J. Drew, Esq.
940 Johnnie Dodds Blvd. Ste. 201
Mt. Pleasant, South Carolina 29464

Re: Lott 12 Yellow House, LLC

Dear Mr. Drew,

I am writing to you concerning the property owned by Lot 12 Yellow House, LLC and known as Lot 12 Yellow House. Clay Walker contacted me sometime ago as a result of a letter that I sent to you and to Mr. Keith Roberts on August 8, 2007. Clay asked that I direct my future correspondence to you. I assume that you represent the partnership as legal counsel. I also noticed that you are the registered agent for the partnership that owns the property.

The dock constructed from Lot 12 to Yellow House Creek crosses land owned by the United States Government. Please refer to the enclosed survey showing the encroachment of the private dock. By constructing this dock across the United States' property, your client has trespassed upon the property of the United States. Additionally, the dock remaining on the property of the United States Government is a continuing trespass. By this letter, the United States is demanding that your client not enter onto the property of the United States Government. This letter further demands that your client not traverse on that portion of the dock that is situated on United States' property.

On August 8, 2007, I wrote to you as Registered Agent of your client and to Mr. Roberts offering Yellow House Partnership, LLC an opportunity meet with me and discuss this matter. As of today, no one representing Yellow House Partnership, LLC has taken advantage of this offer.

We have done considerable research on the location of the United States' property line



Exhibit #
(3 pgs)

Barnett01850

872

and the dock constructed across the property of the United States. You have not come forward with any information showing you have any right to cross the lands of the United States. Moreover, the government land the dock crosses is subject to the Danger Zone and Restricted Area Regulations, 33 C.F.R. 334 et seq.

We are now preparing to file a complaint against Yellow House Partnership, LLC and any individuals who may be liable for the trespass in Federal District Court. In our complaint we will seek actual damages for trespass which will include the cost to remove the portion of the dock which is constructed on government property and the cost to restore the marsh. Additionally, we will seek punitive damages approximating the cost to the government for this litigation. We anticipate hiring several experts, having the property surveyed, hiring an abstractor, taking depositions, and entering into written discovery. Along with damages, we will seek an injunction and protective order prohibiting your client from trespassing on the lands of the United States.

Again, in an effort to avoid the cost of litigation and to effect the orderly removal of the portion of the dock which trespasses on the property of the United States in the most cost effective manner, we offer you the opportunity to meet with us and discuss this matter. If I do not hear from you before February 17, 2008, I will assume you do not wish to discuss the matter and I will proceed accordingly. You can contact me at (803) 929-3058 or you can call my paralegal Ed Smith at (803) 929-3013 and he will be happy to schedule an appointment.

In the interim, the United States demands that your client not enter onto the property of the United States Government and that your client not traverse that portion of the dock which trespasses on the property of the United States.

I look forward to hearing from you soon.

Sincerely,

REGINALD I. LLOYD
UNITED STATES ATTORNEY

By:



Fran C. Trapp
Assistant United States Attorney

cc: Joseph Bruce, NAVFAC SE

Enclosure

KEITH ROBERTS

Mt. Pleasant, South Carolina 29466

February 29, 2008

The Honorable Lindsay Graham
290 Russell Senate Office Building
Washington, D.C. 20510-0505

Re: Lot 12 Yellow House Place

Dear Senator Graham:

I am writing to ask for your assistance in resolving what appears to be misinformation on the part of the US Attorney's Office, the Department of the Navy, and me. I have attached exhibits to help explain my situation.

I bought a piece of property on July 9, 2005, located at Lot 12, Yellow House Place, and fully developed it myself (including a dock), which was completed in November 2006.

All the information I was provided showed that this property, and the permit to build a dock (Exhibit 4), was a "done deal" and I, therefore, obtained it in good faith, with no intention of defrauding the Department of the Navy. An Administrative Law Judge issued a decision in June 2005, so indicating (Exhibit 2).

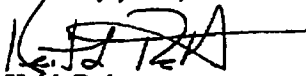
After receiving a letter from the Mary Shahid (previous owner's attorney), which included correspondence from the U.S. Attorney's office (Exhibit 5), I had an extensive title search performed (Exhibit 6), which indicated no claim to the referenced area associated with the dock.

I am now being threatened by the U.S. Attorney, see letter dated February 6, 2008, on behalf of the Department of the Navy, to bring suit for damages, and seek an injunction preventing me from using the dock, etc. (Exhibit 7).

This controversy was going on for years before I bought the property, and even though I was under the impression that it was a "done deal", it has once again reared its ugly head.

I am seeking any assistance you can give me by looking into this matter. Thanking you in advance.

Sincerely yours,


Keith Roberts



Drew 00224
2950-43538

Beam & Associates

PO Box 11863 • Columbia, SC 29211-1863 • 930 Richland Street, Suite 100 • Columbia, SC 29201
(803) 931-0805 • Fax (803) 256-8062

29 Apr 08

Mr. Keith Roberts

Mt. Pleasant, SC 29466

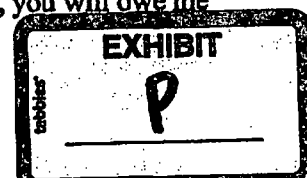
Mr. Patrick Cogan
Yellow House Place
Cainhoy, SC 29492

Gentlemen:

This correspondence will constitute a letter of engagement for my professional services. It is my understanding you own the property at Lot 12, Yellow House Place in Cainhoy, Berkeley County, SC. You desire me to convince the US Department of Defense and the US Department of Justice to cease and desist from their efforts to have your existing private recreational dock disassembled and removed.

Please be advised that I will undertake this assignment under the following conditions:

1. No professional fee or expenses will be due until I deliver the desired results enumerated above. ① - as per PRT COGAW 5/2/08 207
2. A professional fee to include all expenses of \$ 80,000 will be due and payable by you as soon as the desired results enumerated above are achieved. Specifically, I must deliver to you a document which specifies your dock may be left in place. Upon delivery of this document, the fee will be paid to me.
3. In the event I do not deliver the results enumerated above, you will owe me nothing.



GOVERNMENT RELATIONS • ENVIRONMENTAL PERMITTING

Roberts01419

875

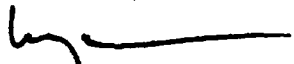
Memorandum to Mr. Roberts and Mr. Cogan

29 Apr 08

Page - 2 -

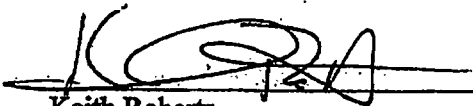
I look forward to working with you on this project.

Very truly,


H. Wayne Beam, Ph. D.
President

If this arrangement is acceptable to you, please sign the document below and return to me. I am prepared to begin work on this assignment immediately.

This letter of engagement accepted this 2nd day of May, 2008.


Keith Roberts


Patrick Cogan

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-10-3241

2011

Keith Roberts and LOT 12 YELLOW
HOUSE, L.L.C.,

Plaintiff,

vs.

Randall J. Drew,

Defendant.

**AFFIDAVIT OF
KEITH W. ROBERTS**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 JUL 23 AM 11:41

FILED

PERSONALLY APPEARED before me Keith W. Roberts who, being duly sworn,
deposes and says that:

I make this affidavit to supplement the testimony given in my deposition that was taken in this case as well as the deposition taken of me by the United States Assistant Attorney in the federal court actions that remain pending, *United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C.*, Civil Action No.: 2:09-cv-0428-CWH and *United States of America v. Keith Roberts and Lot 12 Yellow House, L.L.C.*, Civil Action No.: 2:09-cv-1696-CWH. Neither of the lawyers who took my depositions in this case or in the federal cases asked the proper questions about when I learned that my closing attorney, J. Randall Drew ("Randy"), may have made professional errors in handling my closing that caused damages to me and to LOT 12 YELLOW HOUSE, LLC, my limited liability company that owned the subject property before the bank took it in foreclosure. It was my understanding that during these depositions I was only to answer the questions asked and not to volunteer any extra information, otherwise I would have given the testimony

contained in this affidavit. This affidavit incorporates all of my testimony given in this lawsuit and in the two federal lawsuits.

In addition to Randy, I have retained Mary Shahid and Stanley Barnett to represent me in trying to resolve the Navy's claim of ownership and my right to build a dock. At no point in time did any of these lawyers ever inform me that Randy had made a mistake. At no point in time did any of these lawyers ever even hint that Randy might have made a mistake. I trusted the advice given to me by Randy and the others that they were working in my best interests to resolve the Navy's ownership claims and, it was not until the hearing in which Judge Houck referenced Randy's malpractice insurance that I even began to consider that Randy might have been at fault. This affidavit is my attempt to further explain.

The bottom line is that I trusted Randy to do the things a lawyer is supposed to do to protect a client's interests when the client hires a lawyer to make sure that a piece of property the client is interested in purchasing satisfies all the legal requirements necessary to meet the client's objectives. Randy had represented me in previous real estate transactions and knew and understood my business objectives in purchasing Lot 12 on Blue Crab Lane in Berkeley County, South Carolina. Based on our history as lawyer and client, I trusted Randy to tell me if he had made a mistake in the handling of the closing on my purchase of the subject property, Lot 12. Randy never told me not to purchase Lot 12. Randy never told me that he had made any mistakes as my lawyer on researching the legal issues concerning Lot 12 and the adjacent marsh or on advising me to proceed with the purchase. All along through Randy's extra title searches, communications with the Navy, litigation with the Navy and even in his Navy deposition as well as his deposition in

this case, Randy has never said he made a mistake. And, as far as I can tell, to this day, Randy still claims that he did not commit malpractice.

As a matter of fact, beginning with my conversations with Randy prior to the purchase of Lot 12 on August 17, 2005 continuing all the way through his deposition in the federal cases that was taken in September 2009 and even continuing through his deposition taken in this case in February 2012, Randy has steadfastly maintained that he made no errors whatsoever. In fact, the question of whether Randy properly represented me prior to and during the closing in August 2005 was never raised until April 2010.

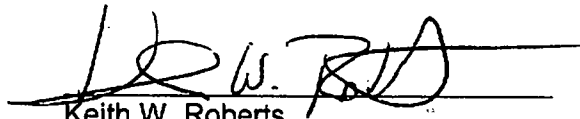
The first time I had any reason to believe that Randy had not given me the proper advice was when the Federal Judge, Judge Houck, made a comment during a hearing in the federal cases that took place in April 2010. During that hearing Judge Houck said something to the effect of "Has anyone put the closing lawyer on notice?" After I heard Judge Houck's comment, I began asking questions and looking for a lawyer who would handle a legal malpractice claim against Randy. It took months to find and retain Mr. Pendarvis and then it took a few more months for Mr. Pendarvis to review and evaluate materials related to this claim and also to find an expert. This lawsuit was filed on May 5, 2011, about one year or so after I first heard that I might have a claim against Randy.

It is my understanding that the defense is claiming that various events should have been sufficient to put me on notice as to possible claims against Randy. However, the defense is taking the events completely out of context and using the benefit of hindsight. The truth is that, taken in context, during each of these events, I was being reassured that the Navy had no claim, could not prove it had a claim and that my lawyers were working in my best interest to prove the Navy had no claim.

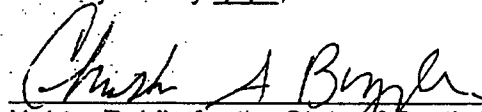
I cannot understand how I was supposed to discover Randy's mistake when he and the other lawyers whom I hired to represent me were telling me that I had a good chance of defeating the Navy's claims of ownership. I had no indication from any of the lawyers representing me, including Randy, that I should be concerned that Randy had not acted in my best interest or not properly informed me of the Navy's ownership of the Marsh. I thought I had hired Randy to search the title to the property, ensure the title was good, ensure that I had a valid dock permit and right to build a dock and to properly handle the real estate closing so that my company and I could build a custom built house with a deep water dock and sell it for a profit. It was not until well into this malpractice litigation that I had ever heard that Randy performed a title search for Lot 12 only and not for the surrounding marshland. I thought Randy had done his job properly and for years, through all of the various issues with the Navy, I was being reassured by Randy and others that the Navy was wrong and that I had a valid right to build the dock. I had no reason to suspect otherwise.

It is absolutely true that I did not discover Randy's malpractice until after Judge Houck's comment in April 2010.

The Affiant further sayeth not.


Keith W. Roberts
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME
this day of July 17, 2012.


Notary Public for the State of South Carolina
My Commission Expires: 06-27-17

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW
HOUSE, L.L.C.,

Plaintiffs,

vs.

Randall J. Drew,

Defendant.

**PLAINTIFFS' MEMORANDUM
IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

TO: DAVID W. OVERSTREET, J.D. AND ANDREW W. COUNTRYMAN, J.D., COUNSEL FOR
DEFENDANT, RANDALL J. DREW:

Plaintiffs, Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C., submit this
Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.

SUMMARY OF THE ARGUMENTS

1. For years Defendant Drew continually assured Plaintiff Roberts that the dock permit allowed the dock to be constructed and the Navy's claims of marsh ownership were not valid, which Roberts believed to be true confirming his reasonable understanding that Defendant's legal advice for Plaintiff Roberts to proceed with the purchase of the subject lot with a dock permit was appropriate and within the standard of care.
2. Material questions of fact are in dispute as to whether it was appropriate for Roberts to rely on Drew's assurances that the dock permit was valid.
3. Material questions of fact are in dispute as to whether a reasonable lay person would have accepted Drew's assurances that the dock permit was valid.

4. Material questions of fact are in dispute as to whether a reasonable lay person would have accepted Drew's assurances that the dock permit was valid when other lawyers retained were essentially confirming the same assurances given by Drew.
5. Material questions of fact are in dispute as to whether under the circumstances prior to May 5, 2008,¹ a reasonable lay person would have known that a claim for legal professional negligence existed against Drew.
6. Drew testified in this case that he told Roberts at the closing that it was possible the Navy could proceed with a claim, which if true, would make the filing of a claim by the Navy consistent with –and not contrary to– Drew's advice at closing, especially when combined with Drew's multiple subsequent assurances the Navy's claims were invalid and that the dock permit was good.
7. Roberts reasonably relied on Drew's legal advice and consistent assurances given between November 13, 2006, the first time after Roberts purchased the property that anyone raised a question about the Navy, and May 5, 2008, which is the date three years before this lawsuit was filed on May 5, 2011.
8. Roberts reasonably and rightfully relied on the legal advice Drew and other lawyers were providing in defending the Navy's claims, none of whom ever suggested to Roberts that Drew did not meet the standard of care in advising Roberts to proceed with the purchase.
9. Roberts did not discover or have any reason to believe Drew's advice to proceed with the purchase was in error until April 2010 when he listened to comments from the bench by Judge Houck in the federal lawsuits.

¹ This lawsuit was commenced on May 5, 2011.

10. Jury is equitably estopped from claiming the statute of limitations defense due to his advice to Roberts and sworn testimony that the Navy's claims were invalid and that Roberts could maintain his dock, all of which confirmed for Roberts that Drew properly handled the closing.
11. Because the Circuit Court judge hearing this motion is a lawyer, it's vast legal experience effectively disqualifies the judge from making the factual determinations of whether a reasonable lay person would have known of Drew's legal errors.

EVIDENCE IN OPPOSITION TO MOTION

1. Deposition of Defendant Drew taken in federal lawsuit, dated September 30, 2009, included as **Exhibit 1**.
2. Deposition of Plaintiff, Keith W. Roberts, taken in federal lawsuit, dated August 25, 2009, included as **Exhibit 2**.
3. Deposition of Defendant Drew, dated February 14, 2012, included as **Exhibit 3**.
4. Deposition of Plaintiff, Keith W. Roberts, dated November 14, 2011, included as **Exhibit 4**.
5. Deposition of Mary Shahid, dated April 25, 2012, included as **Exhibit 5**.
6. Affidavit of Keith W. Roberts, dated July 17, 2012, included as **Exhibit 6**.
7. Deposition of Thomas H. Stone, dated September 16, 2009, included as **Exhibit 7**.
8. Deposition of Thomas H. Stone, dated April 25, 2012, included as **Exhibit 8**.
9. Agreement to Buy and Sell Real Estate, Roberts02015-2019, attached as **Exhibit 9**.
10. Roberts' Memorandum in Opposition to Motion for Summary Judgment filed in the federal case, dated December 20, 2009, (without exhibits) included as **Exhibit 10**.

11. Affidavit of Brian J. Boger, Plaintiff's expert, included as **Exhibit 11**.

FACTS

On July 11, 2005, Plaintiff, Keith W. Roberts (Roberts), as purchaser, and Thomas H. Stone ("Stone"), as seller, entered into an "Agreement to Buy and Sell Real Estate (For General Use and Lots/Acreage)" for the purchase of a parcel of real property on deep water with a dock permit. The property is located at Lot 12 on Yellow House Road in Berkeley County, South Carolina.

In July 2001, the Department of Health and Environmental Control, Office of Coastal Resource Management (OCRM) had granted to Stone a permit to construct a dock appurtenant to Lot 12. Between November 2004 and June 2005, OCRM had attempted to revoke that permit based on claims by the United States Department of the Navy that it owned a portion of the marsh over which the permit allowed a dock to be constructed. See Drew Deposition, February, 14, 2012 at 43:19-24, attached as Exhibit 3. In June 2005, the South Carolina Administrative Law Court issued an Order denying OCRM's revocation and reinstated the dock permit.

Shortly thereafter, Roberts entered into a contact with Stone to purchase Lot 12 and have the dock permit assigned to him. Roberts intended to construct a residential home on the lot and a dock appurtenant to it for resale purposes.

Around July 11, 2005, Defendant, Randall J. Drew (Drew) accepted the representation to provide Roberts with legal advice and counsel as to whether to purchase Lot 12 depending on its compatibility with Roberts' development plans to build a house with a dock on deep water. See Roberts Deposition, November 14, 2011 at 18:16-19:21 and 21:2-17, attached as Exhibit 4; Drew Deposition, February 14, 2012 at 12:22- 13:5,

attached as Exhibit 3. The ability to build and maintain a dock was critical to Roberts' decision to proceed with the purchase of Lot 12, especially in light of OCRM's then-recent attempts to revoke. The contract to purchase included a contingency provision allowing Roberts "to have maximum of 60 days due diligence for suitability of use" providing sufficient time to investigate the legal status of the dock permit. See Roberts02015-2019 at p. 2, l 13, attached as Exhibit 9. In addition, the contract also contained a provision that the "[c]ontract [was] not contingent on dock permit." See Roberts02015-2019 at p.4, K 30, attached as Exhibit 9. In fact, Stone had reduced the \$525,000 purchase price by \$50,000 to remove a contingency proposed by Roberts concerning the dock, making the final purchase price \$475,000. See Stone Deposition, September 16, 2009 at 34:9-16, attached as Exhibit 7; Stone Deposition, April 25, 2012 at 13:3-15, attached as Exhibit 8. Why Stone was willing to make such a price reduction highlights Roberts' need and reliance on Drew's legal advice.

Roberts testified that during the due diligence phase he informed Drew that some of reasons he was interested in purchasing Lot 12 were because it was on deep water, had a dock permit, and appeared to have the characteristics suitable for construction of a residential home and dock with strong potential for sale with a substantial profit. See Roberts Deposition, November 14, 2011 at 36:25-37:5, attached as Exhibit 4. Roberts also testified that during the due diligence phase he discussed with Drew the claim by the Navy that it owned the marsh or a portion of the marsh between the high ground on Lot 12 and the deepwater on Yellow Creek over which the dock permit appeared to allow a dock to be constructed. See Roberts Deposition, November 14, 2011 at 18:16-19:6, 20:8-12, 28:4-10,

43:10-19, 46:5-9, 46:13-18, 50:10-15, 75:17-24, 78:25-79:9, 132:23-133:5, and 138:4-10, attached as Exhibit 4.

Roberts testified that some of the primary reasons he retained Drew were to obtain advice regarding 1) the Navy's marsh ownership claim, 2) whether a dock could be constructed notwithstanding the Navy's claim, and 3) if Drew's legal advice and opinions were either that the Navy's claim was not valid or if it was valid, that a dock could be constructed without a material risk the Navy could or would take actions adverse to Roberts, then Drew was to handle the closing on Roberts' purchase of Lot 12. See Roberts Deposition, November 14, 2011 at 18:16-19:6, 20:8-12, 28:4-10, 43:10-19, 46:5-9, 46:13-18, 50:10-15, 75:17-24, 78:25-79:9, 132:23-133:5, and 138:4-10, attached as Exhibit 4.

With regard to the title search and investigation of the Navy's claims, Drew testified that he was provided with a copy of the Order issued by the Administrative Law Court as well as copies of at least some of the materials filed in the 1960's when the United States condemned property surrounding the Naval Weapons Station, including a portion of the marsh adjacent to the Yellow House creek. "Exhibit B" to these documents is a plat which more fully describes and demonstrates the Navy's ownership claims for the marshland over which the dock appurtenant to Lot 12 travels. Drew claims that these documents did not include a copy of "Exhibit B," however, the documents do reference "Exhibit B" and Drew admits that he did not attempt to locate "Exhibit B." See Drew deposition, September 30, 2009 at 44:14-47:08, attached as Exhibit 1.

Drew testified about his communications with Roberts as follows:

64:24 Q. And based on the decision that Judge
64:25 Anderson made, based on, he says in his footnote, the

65:1 evidence that the Navy provided to the court, which
65:2 did not include witnesses, based on your
65:3 conversations with the Navy people to whom you were
65:4 referred, you advised your client that it was okay to
65:5 build the dock?

65:6 A. Based on the administrative law judge
65:7 order, the conversation with the people over at RDA
65:8 and the Navy, and the conversations I had with Mary
65:9 and her opinions on the permit and the validity now
65:10 of the permit based on the administrative law order
65:11 and the appeal period passing; I discussed all those
65:12 with my client.

Drew Deposition, September 30, 2009; Exhibit 1.

12:22 Q. And, in fact, you told Mr. Roberts that
12:23 if he proceeded with the purchase of the property,
12:24 he would be able to build a dock on that property,
12:25 didn't you?

13:1 A. I told him that -- specifically I told
13:2 him that it was a revokable license, that there was
13:3 a valid permit at the time based on my discussion
13:4 with Mary Shahid and with -- and based on the
13:5 administrative law order.

Drew Deposition, February 14, 2012; Exhibit 3.

13:6 Q. Did you ever discuss with Mr. Roberts
13:7 any issues related to trespass about the Navy
13:8 property or Navy's claimed property?

13:9 A. I specifically discussed with Keith
13:10 when he called me to tell me he wanted the
13:11 assignment of dock permit transferred the day of
13:12 closing and hand-delivered to the OCRM office, I
13:13 told him that the Navy still could make a claim in
13:14 the future and that they have big ships with guns
13:15 on them and I did not want to be in a battle with
13:16 the Navy. And he said, well, I'm going to start it
13:17 right away and get it done.

Drew Deposition, February 14, 2012; Exhibit 3.

92:2 Q. Did you rely on any other
92:3 communications or materials to advise Mr. Roberts
92:4 about whether to proceed with the purchase of this
92:5 lot?

92:6 A. I relied on the title exam I did on the
92:7 lot and I relied for the permit on Mary, who was,
92:8 still is, a -- the guru of docks. She worked for
92:9 OCRM, she knows her way in and out and around them.
92:10 And the administrative law order and the fact that
92:11 there was a valid transfer of that permit to Keith
92:12 so I talked -- and I also had made a phone call to
92:13 the Navy and they had advised me that the permit
92:14 had been litigated.

Drew Deposition, February 14, 2012; Exhibit 3.

145:18 Q. But you testified earlier that you
145:19 never told Mr. Roberts that the Navy owns the marsh
145:20 in front of Blue Crab Lane and you need to be
145:21 careful if you build a dock because the Navy
145:22 definitely owns it.
145:23 MR. COUNTRYMAN: Object to the form.
145:24 THE WITNESS: That's because the Navy
145:25 still hasn't proven that the Navy owns it as far as
146:1 I know.

Drew Deposition, February 14, 2012; Exhibit 3.

167:13 Q. And your testimony is you weren't able
167:14 to find anything conclusive, I think is a fair
167:15 summary, about the United States Navy's claim to
167:16 ownership of the marsh, is that fair?
167:17 A. They hadn't proved it.
167:18 Q. With that lack of being able to
167:19 establish or not and rule out the Navy's claim to
167:20 ownership, did you go back to Mr. Roberts and say
167:21 you might better talk to Mr. Stone again about
167:22 getting some contingency or some assurance, some
167:23 guarantee about this dock before you close?
167:24 A. No.

Drew Deposition, February 14, 2012; Exhibit 3.

Roberts testified that he relied upon Drew for all the information about the Navy's claim of marsh ownership. See e.g., Roberts Deposition, dated November 14, 2011, pp. 20:8-21:1, 22:15-25; Exhibit 4. Roberts also testified that he relied upon Drew's advice to purchase the property and proceed with constructing a dock because of the "legal dock

permit." See e.g., Roberts Deposition, dated November 14, 2011, pp. 28:4-10, 30:22-25; Exhibit 4.

Roberts testified that Drew assured him on numerous occasions prior to closing that if he bought the lot, he would be able to build a dock and not have a problem because of the legal dock permit.

36:25 A My conversations with Mr. Drew were all based
37:1 on one thing and one thing only, that if I bought this
37:2 property, I would be able to put a dock on and across
37:3 the marsh. He assured me not once, he assured me
37:4 numerous times, after whatever research he did, that I
37:5 would not have a problem, I had a legal dock permit.

43:10 Q Well, when you closed, did you know or have
43:11 an understanding as to whether the Navy was still
43:12 claiming that it owned the property, or had the Navy
43:13 said South Carolina owns the property?
43:14 A I don't recall any of that. I know that when
43:15 I closed on the property, that I was advised that I
43:16 would not have an issue with the dock and the
43:17 marshland.
43:18 Q By Mr. Drew?
43:19 A Yes, sir.

Roberts Deposition, dated November 14, 2011, pp. 30:22-25, 43:10-19; Exhibit 4.

In November 2006, some fifteen months after the purchase and after some preliminary communications on behalf of the Navy, Drew again reassured Roberts that the Navy had no valid claims and that Roberts possessed a legal dock permit. Roberts testified as follows:

75:17 A He would have told me that, "There is no
75:18 issue with the Navy. It was litigated or -- with the
75:19 administrative law judge and you've got a legal dock
75:20 permit."
75:21 Q You said he would have told you that. Do you
75:22 remember whether he actually told you that?

75:23 A He has told me that many, many, many times,
75:24 yes, sir.

78:25 Q Do you know what the result of that
79:1 conversation was, or do you know what Mr. Drew told
79:2 you?

79:3 A Randy told me that, you know, we have in our
79:4 hands a legitimate dock permit, legal dock permit, and
79:5 based on the ALJ's decision, that we had a legal dock
79:6 permit.

79:7 Q Did he tell you whether he thought the Navy
79:8 owned the marshland?

79:9 A No.

Roberts Deposition, November 14, 2011 at 75:17-75:24, 79:1-79:9, attached as Exhibit 4.

In November 2006, Roberts sent a letter to former OCRM lawyer, Mary D. Shahid, asking for information about the Navy's claim. Roberts testified that he reviewed Shahid's response letter assuring him that it appeared "unlikely that the Navy would initiate such action." Roberts testified as follows:

80:10 Q Okay. Turn over to page 2, the third
80:11 paragraph under Item 6, it says, "Based on the
80:12 administrative law court's findings and the Navy's
80:13 inaction with regard to the Ahrens dock and this dock,
80:14 and absent a clear threat to national security" --

80:15 A Excuse me, where are we, page 2?

80:16 Q Yeah, page 2, it's the last paragraph.

80:17 A Oh, based on, okay, yes, sir.

80:18 Q It have says, "Based on the ALJ" -- "Based on
80:19 the administrative law court's findings and the Navy's
80:20 inaction with regard to the Ahrens dock and this dock,
80:21 and absent a clear threat to national security, it
80:22 would be very difficult for the Navy to sustain an
80:23 action to obtain removal of this dock. It also appears
80:24 unlikely that the Navy would initiate such action." Do
80:25 you see that?

81:1 A Yes.

Roberts Deposition, dated November 14, 2011, 80:10-81:1, attached is Exhibit 4.

Similarly, in July 2007, after the Navy began writing letters Drew advised Roberts that the Navy did not have a valid claim and that Robert's dock permit was legally valid.

Roberts testified as follows:

101:7 Q And you received this letter in July of 2007,
101:8 correct?
101:9 A Yes.
101:10 Q And at this point, was Miss Shahid
101:11 representing you, or was she just forwarding you a
101:12 letter that she received from the Department of
101:13 Justice?
101:14 A I'm sure she was just forwarding the letter.
101:15 Q What did you do when you received this
101:16 letter, if you can recall?
101:17 A Probably called Randy and sent it to him.
101:18 Q Do you remember doing that?
101:19 A Yes.
101:20 Q What did Mr. Drew say?
101:21 A He said the same thing that he said the
101:22 entire time that we've had this dealing, it's not --
101:23 they're wrong, they're not right.
101:24 Q And you --
101:25 A They have not proven that they own this
102:1 property.

Roberts Deposition, November 14, 2011 at 101:7-102:1, attached as Exhibit 4.

Around February 6, 2008, Drew was continuing to advise Roberts that he possessed a valid dock permit and based this new reassurance on a second title search conducted by an independent title agency. Later in February 2008, Roberts received another letter from the Navy. When asked about this letter, Roberts testified as follows:

112:10 Q So is it fair to say that at this time,
112:11 February 29, 2008, that the situation was a serious
112:12 issue in your mind?
112:13 A It was an issue and any time you get a letter
112:14 from the government threatening you the way they
112:15 threatened me, I would say it's a serious issue, but
112:16 when I'm reassured by my attorney over and over again
112:17 that we have -- we really have no issue, we are right

112:18 in this...

112:19 Q Is it fair to say that at this point, you
112:20 don't know whether you were right in this?

112:21 A Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
113:1 letter, prior letters from the government, he still
113:2 believed that he was right in what he had Edisto Title
113:3 Search do a title search for.

Roberts Deposition, November 14, 2011 at 112:10-113:3, attached as Exhibit 4.

Roberts testified that he had no reason not to believe what Drew told him.

31:1 Q You don't have any reason to believe that
31:2 Mr. Drew wasn't telling the truth when he testified
31:3 that he talked to people from the Navy and they told
31:4 him that the Navy didn't plan on pursuing the claims,
31:5 do you?

31:6 A I've known Randy a long time and I have no
31:7 reason to not believe him.

Roberts Deposition, November 14, 2011 at 31:1-7, attached as Exhibit 4.

Similarly, former OCRM lawyer, Mary D. Shahid, testified that she thought there was a very low risk that the Navy would do anything based on the history with OCRM, the ALC trial and her communications with the Navy. Ms. Shahid testified as follows:

46:22 2005, 2006; when I would assess the risk, I
46:23 thought it was a low risk at that point that the
46:24 Navy was going to do anything. And that was based
46:25 on the whole history with OCRM, the trial, what I
47:1 knew about the Navy's communications with OCRM,
47:2 and my own communications with the Navy.

Shahid Deposition, April 25, 2012, pp. 46:22-47:2.; Exhibit 5.

On April 28, 2010, based on a comment by the presiding judge, Roberts was put on notice for the first time regarding possible claims against Drew.

STANDARD OF REVIEW

Summary judgment is a drastic remedy and should be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is not proper when there are genuine issues as to material facts in dispute on the elements of the claim. See *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 16-17 (Ct. App. 2005); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Under Rule 56(c), SCRCP, the party seeking summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. See *Baughman*, 306 S.C. at 102, 410 S.E.2d at 539.

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. See *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996); *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 389 S.E.2d 300 (Ct. App. 1990) (summary judgment standard of review is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom). “At the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.” *Hill v. York County Sheriff’s Department*, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993), *cert. denied* (1994).

As demonstrated in this memorandum, Roberts' deposition testimony, Roberts' affidavit and other attached exhibits show the existence of genuine issues of material fact prohibiting summary judgment in this case. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Id.*

ARGUMENTS

I. Summary judgment is not available because Roberts relied on Drew's advice and the advice of other lawyers that the dock permit was valid and the Navy's claims were invalid.

A. No evidence exists showing that before May 5, 2008, Drew knew or an objective third party should have known of a claim against Drew for professional negligence.

Summary judgment is not available because there is a genuine issue of material fact regarding when Roberts knew or should have known of Defendant's negligence. "In a negligence action, the statute of limitations accrues at the time of the negligence or when the facts and circumstances would put a person of common knowledge on *notice* that there might be a claim against another party." *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997) *citing Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995); S.C. CODE ANN. §§15-3-530(5) & -535 (Supp. 1996). "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." *Id.*; *see also Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. CODE ANN. § 15-3-535 (Supp. 1996). In other words, in order to prevail in their motion, Drew must submit evidence that even when viewed in the light most favorable to Roberts shows that, prior to May 5, 2008, Roberts had sustained a legally cognizable injury as a

result of an act or omission of professional negligence by his lawyer, Drew, and that the facts and circumstances surrounding such injury would have provided notice to a reasonable lay person that a cause of action existed against Drew to recover damages for the injuries sustained. Drew has not and cannot satisfy those requirements.

The entirety of Drew's Motion for Summary Judgment and its accompanying Memorandum is based on the argument that notice to Roberts of the Navy's claim of ownership equals notice of Drew's malpractice. There simply is no correlation between the two issues. Roberts engaged Drew to obtain advice on whether or not the Navy had valid ownership claims or, that is to say, whether Roberts had a legal right to build a dock appurtenant to Lot 12. Drew researched the issue, conducted a title search and spoke with Navy officials and then advised Roberts that the Navy had not proven its claims, that the ALC proceedings validated the long-term maintenance of the dock permit, and therefore that Roberts should proceed with the purchase of Lot 12. Between November 2006 and the relevant statute of limitations date of May 5, 2008, when issues began surfacing concerning the Navy's claims, Drew conducted a second title search and again confirmed to Roberts that the Navy had not proven its claims and that the dock permit was legally valid. Drew claims he warned Roberts about the Navy's ability to contest the dock. If such advice was actually given it would have made the fact of the Navy's lawsuit come as no surprise to Roberts and would be consistent with Drew's advice.

The Navy's ownership claims simply cannot be the event that gives rise to notice of Drew's malpractice when Drew's failure to discover the Navy's ownership interest is the very root of the malpractice coupled with Drew's own testimony where he allegedly told Roberts that the Navy could object to the dock. Even though the plat identified as Exhibit

B showing the location of the marsh taken by the Navy was specifically referenced in materials available by Drew, Drew failed to conduct the proper inquiry to acquire Exhibit B, which Defendant admits would have showed a clear claim of Naval ownership. Defendant has admitted that had he seen Exhibit B, he would have been able to verify the Navy's ownership claims. Therein lies the malpractice. See Affidavit of Brian J. Boger, attached as Exhibit 10. The Navy's ownership claims cannot be notice of Drew's malpractice when the malpractice is Drew's failure to acquire the information relevant to verifying the claim and then rendering improper advice to Roberts that the Navy's claims were invalid.

Roberts sought Drew's advice on whether he could build a dock on Lot 12 in light of the ALC Order and the Navy's claims of marsh ownership. Drew gave improper advice that a dock could be built on Lot 12 without consequences and that the Navy's claims were invalid. Roberts relied on this advice and proceeded with the purchase and development of Lot 12. See, Robert's Memorandum in Opposition to Motion for Summary Judgment, dated December 20, 2009, filed in the federal lawsuit; Exhibit 11.

B. Drew's assurances to Roberts about the validity of the dock permit and invalidity of the Navy's marsh ownership claims eliminate any "knowledge of an injury" sufficient to trigger the statute of limitations.

Roberts relied on Drew's advice, which was repeated and reasserted by Drew for years, as he assisted Roberts in responding to the Navy's claims prior to the filing of the federal lawsuits. Roberts had every right to rely on the advice of his lawyer in purchasing and developing Lot 12 and in trusting advice from Drew, his lawyer, that the dock permit was legally valid and the Navy's claims were unfounded. See *Smith v. Hastie*, 367 S.C. 410, 419, 626 S.E.2d 13, 18 (Ct. App. 2005) (Client had right to rely on lawyer's

assurances over six years that she would have access to assets, until the lawyer specifically informed the client otherwise) (citing *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997) (“[A]bsent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest.”)).

The Navy's claim of ownership is the very issue on which Roberts sought Drew's advice, it is the very issue that Drew's malpractice hinges upon and cannot now be used to be the fact which placed, or should have placed Roberts on notice of Drew's errors. Notice of the Navy's claim of ownership is not notice of Drew's negligence, especially in light of Drew's own testimony claiming he told Roberts the Navy could take action about the dock.

Further, over the years, Roberts was relying on the continuous reassurances of Drew, his attorney and fiduciary. “A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another.” *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). “One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005) quoting *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). Drew's consistent and long running reassurances

that his legal advice had been accurate and that the Navy's claims were invalid prevented Roberts, or any other reasonable layperson, from believing Drew had committed legal errors.

The evidence in this matter is replete with examples of Drew's advice reassuring Roberts that the Navy had no ownership rights or standing to object to the construction of the deep water dock on Lot 12. Drew not only made efforts before the real estate closing to search title and make phone calls to various Navy officials, but Drew also later conducted a subsequent title search² on which he confirmed to Roberts his earlier advice concerning the dock permit and the Navy's marsh ownership claims. Drew also assisted Roberts in retaining two other lawyers to represent Roberts in resisting the Navy's efforts to remove the dock.

A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel the client dislikes. Instead, absent other facts, the client should be able to follow this advice without fear the attorney is not acting in the client's best interest.

True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997). Under South Carolina law, Roberts absolutely had the right to rely on the advice, assurances, and reassurances of his lawyer and could not have known or should not have known of his lawyer's negligence until hearing statements by the presiding judge in the federal lawsuit as to whether Drew's carrier had been put on notice.

² It was later discovered in September 2009 during Drew's deposition in the federal lawsuit that Drew only searched title to the high ground for Lot 12, not the marsh. This lawsuit was commenced on May 5, 2011, which frames Drew's motion as to what Roberts or an objective third-party knew or should have known before May 5, 2008.

Roberts testified that, as of February 6, 2008, he believed his position about the Navy was correct because of what Drew was telling him and what Drew claimed was confirmed by the recent title work done by the independent title agency. Nothing changed between February 6, 2008 and May 5, 2008, the operative date for statute of limitations purposes.

112:19 Q Is it fair to say that at this point, you
112:20 don't know whether you were right in this?
112:21 A Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
113:1 letter, prior letters from the government, he still
113:2 believed that he was right in what he had Edisto Title
113:3 Search do a title search for.

Roberts deposition, November 14, 2011, attached as Exhibit 4.

It is an issue of fact for the jury to determine when a reasonable lay person in Roberts' position should have -- notwithstanding contrary advice by his lawyer -- discovered the wrongdoing of his or her attorney prior to May 5, 2008. "The jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action." *Maier v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) citing *Garner v. Houck*, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury"); see also *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338–39, 534 S.E.2d 672, 681–82 (2000); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 145, 697 S.E.2d 644, 654 (Ct. App. 2010), *reh'g denied* (Sept. 2, 2010), *cert. denied* (Jan. 11, 2012).

Roberts did not learn of Drew's errors until April 2010 during a hearing over the Navy litigation. See Roberts Affidavit, attached as Exhibit 6. During that hearing, Judge Houck made a comment as to whether Drew's carrier "had been put on notice" with the clearly implied reference to a professional liability claim. At that point in April 2010, Roberts was on actual notice of the existence of a professional negligence claim against Drew concerning Drew's negligence in conducting the title search and providing improper advice to Roberts prior to closing on Lot 12. See *id.* Prior to April 2010, a jury could find that it was reasonable for a person in Roberts' position to rely on his lawyer's advice -- a lawyer with whom he had a long-standing relationship, a lawyer who analyzed two separate title searches, a lawyer who continued to provide on-going advice and counseling reassuring Roberts that his dock permit was good, and a lawyer who worked with his other attorneys to help resist the Navy's ownership claims. See Shahid Deposition, April 25, 2012 at 78:10-23, attached as Exhibit 5 (discussing ALJ's determination that the Navy had not provided information to OCRM to determine proof of ownership). A jury could find that Roberts did not know, or should not have known, that his lawyer had been negligent and therefore, summary judgment is improper.

II. Drew is equitably estopped from claiming a defense based on the statute of limitations.

Drew is and should be estopped from claiming the statute of limitations defense because he acted in such a manner as to induce the Roberts to delay in timely filing a cause of action. See *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 8 (Ct. App. 2009) "This conduct may be either an express representation that the claim will be settled without litigation or actions suggesting that a lawsuit is unnecessary." *Id.* citing *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403. In this matter, Drew

consistently and continuously advised Roberts that the dock permit was valid, the Navy's had not established that it owned the marsh, and worked over the course of years to conceal his wrongdoing and shield Roberts from any knowledge of his failure to properly advise about the Navy's ownership of the marshland adjacent to Lot 12. See Roberts Affidavit, attached as Exhibit 6. For years, Drew advised Roberts that the Navy had no ownership rights over the marshland and even hired an independent title search agency to repeat the title search further delaying Roberts' knowledge of Drew's wrongdoing and then helped Roberts to hire two separate attorneys to determine his rights against the Navy. See *id.* Even as late as his deposition this year, Drew continues to claim that he properly advised Roberts prior to the purchase of Lot 12. See Drew deposition, February 14, 2012 at 79:2-6, 79:21-25, 80:1-3, attached as Exhibit 3.

Drew is and should be equitably estopped from claiming the statute of limitations defense. To claim equitable estoppel, a plaintiff must prove that he (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. See *id.*; see also *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n. 2 (2000). "The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts." *Id.* Here, Roberts lacked knowledge and means of obtaining knowledge of the Navy's ownership interest and relied on their attorney, Drew, to conduct the title searches and provide the legal advice. Also, Drew's actions concealed from Roberts the true facts of the Navy's ownership and the fact that the dock permit was subordinate to the Navy's

marsh ownership. Over the years, Drew continued to reassure Roberts shielding him from the knowledge of Drew's legal errors in the advice given about the purchase of Lot 12.

In his motion and subsequent memorandum, Drew devotes his arguments to various dates and events that Drew claims should have provided Roberts with knowledge as to Drew's wrongdoings. An analysis of many of these events demonstrates Drew's pattern of concealment, which may be nothing more than Drew's refusal to acknowledge his own errors. This pattern of concealment or continuing legal errors should estop Drew from now claiming statute of limitations as a defense in this matter.

For instance, Drew claims that "[a]t closing, Roberts was aware the Navy had previously claimed an ownership interest in the marshland adjacent to the Property and was cognizant of the impact the Navy's claim could have on the ability to build a dock." Demonstrating a prime example of a genuine issue of material facts such that summary judgment is improper, Drew distorts the fact that, while Roberts was aware that the Navy had previously claimed an ownership interest in the marshland and that OCRM had lost its legal challenge to the dock permit, Drew had specifically advised Roberts that the dock permit was valid and the Navy had no proof of ownership in the marsh. As Roberts testified, he believed and trusted Drew regarding his legal work concerning the Lot 12 purchase:

98:23 Q Did you talk about that with Mr. Drew
98:24 following the meeting, about whether he looked in the
98:25 right place?

99:1 A We probably discussed it outside and his
99:2 stance -- everything that Randy had ever done in this
99:3 transaction or any transaction has always been what I
99:4 considered -- you know, I mean, I believed him, trusted
99:5 him and that's why I continued to use him, that the
99:6 research that he did with the titles, the title for the
99:7 property did not show any of -- the government not

99:8 owning any of the land.

Roberts deposition, November 14, 2011, attached as Exhibit 4. Roberts trusted Drew as his lawyer and fiduciary to provide competent legal advice. This trust in his lawyer prevented Roberts from discovering Drew's negligence.

As another example, Drew claims that Roberts should have been aware of a claim against Drew when Roberts received an email indicating that the Navy was maintaining its ownership interest in the marshland. However, Roberts testified that after he got the November 13, 2006 email, he called Drew who told him there was no issue with the Navy because it was litigated, the ALJ had issued an Order, and Roberts had a legal dock permit:

75:17 A He would have told me that, "There is no
75:18 issue with the Navy. It was litigated or -- with the
75:19 administrative law judge and you've got a legal dock
75:20 permit."

75:21 Q You said he would have told you that. Do you
75:22 remember whether he actually told you that?

75:23 A He has told me that many, many, many times,
75:24 yes, sir.

Roberts Deposition, November 14, 2011, attached as Exhibit 4. This phone call and the reassurances of Drew demonstrates why Drew should be estopped from asserting the statute of limitations defense.

As a further example, Drew asserts that the cancellation on the purchase contract for Lot 12 based on concerns over the Navy's ownership claims, should have provided Roberts with notice of his claims against Drew. However, again, Roberts testified that Drew told him the dock permit was legitimate based on the ALJ's Order.

78:25 Q Do you know what the result of that
79:1 conversation was, or do you know what Mr. Drew told
79:2 you?

79:3 A Randy told me that, you know, we have in our
79:4 hands a legitimate dock permit, legal dock permit, and
79:5 based on the ALJ's decision, that we had a legal dock
79:6 permit.

79:7 Q Did he tell you whether he thought the Navy
79:8 owned the marshland?

79:9 A No.

Roberts Deposition, November 14, 2011, attached as Exhibit 4. Again, these reassurances and efforts at concealment demonstrate why Drew should be estopped from claiming statute of limitations as a defense.

Drew puts great emphasis on Roberts' knowledge of the Navy's claim of ownership as a trigger to start the clock on the statute of limitations. However, this demonstrates the fundamental problem with Drew claiming the statute of limitations as a defense. Roberts was aware of the Navy's *claim* of ownership before he bought Lot 12, after he built the dock, and before and after he was sued by the Navy. The knowledge of the Navy's *claim*, however, is not *ipso facto* impute knowledge to Roberts of Drew's errors because Drew had been improperly advising Drew for over a year that the Navy's claims were invalid. This continuing pattern of advice shielded Roberts from the knowledge of Drew's errors and prevented Roberts from gaining access to the truth that would have put him, or any other similarly situated reasonable lay person, on notice of their claims against Drew.

Further, Drew focuses on the Navy's threats against Roberts as proof that Roberts should have known of their claims against him. However, Drew continuously reassured Roberts that the Navy was wrong and in fact had no claims, thus, because Roberts trusted Drew as his lawyer on this and other transactions, and because Roberts is not a lawyer, Roberts was unable to appreciate the Navy's threats and lawsuit as evidence of Drew's wrongdoing. Drew assured Roberts that the Navy's threats were baseless and Roberts

had no reason not to believe or trust his lawyer. Roberts testified that he remembered sending Mary Shahid's July 2007 letter to Drew and Drew continued to tell Roberts that the Navy was wrong about owning the marsh property. As Roberts testified:

101:7 Q And you received this letter in July of 2007,
101:8 correct?
101:9 A Yes.
101:10 Q And at this point, was Miss Shahid
101:11 representing you, or was she just forwarding you a
101:12 letter that she received from the Department of
101:13 Justice?
101:14 A I'm sure she was just forwarding the letter.
101:15 Q What did you do when you received this
101:16 letter, if you can recall?
101:17 A Probably called Randy and sent it to him.
101:18 Q Do you remember doing that?
101:19 A Yes.
101:20 Q What did Mr. Drew say?
101:21 A He said the same thing that he said the
101:22 entire time that we've had this dealing, it's not --
101:23 they're wrong, they're not right.
101:24 Q And you --
101:25 A They have not proven that they own this
102:1 property.

Roberts Deposition, November 14, 2011, attached as Exhibit 4. Due to this pattern of concealing his errors, equitable estoppel prevents and should prevent Drew from asserting the statute of limitations defense.

Another example of Drew's pattern of concealment is Roberts' letter to Senator Graham. This letter demonstrates that Roberts did not believe that the Navy's claims were valid because of Drew's consistent reassurances that the Navy had no proof of its ownership claims. As Roberts testified, as of February 2008, he had no need to find out how much it would cost to remove the dock because based on the information known to Drew and to Roberts there was no convincing evidence establishing the Navy owned the marsh:

109:18 Q Did you start looking into how much it would
109:19 cost to tear the dock down?
109:20 A I did eventually; and at what time, I don't
109:21 know. I've got an estimate, which I'm sure you've got,
109:22 for \$187,000. At that -- I don't know what the time
109:23 frame was when I received that.
109:24 Q I don't recall either. It might be in our
109:25 documents. You don't remember, as we sit here right
110:1 now, whether that was before or after this --
110:2 A Oh, it was not before -- I'm pretty sure it
110:3 was not before this at all. No. I know it wasn't,
110:4 because I had -- still had no real reason to find out
110:5 how much it would cost because I believed that -- as
110:6 well as Randy did, that we were right based on all the
110:7 information that he had gotten.

Roberts Deposition, November 14, 2011, attached as Exhibit 4.

Further, Roberts testified that he was "reassured by my attorney over and over again that we have -- we really have no issue, we are right in this"

112:4 Q And then the next sentence says, "This
112:5 controversy was going on for years before I bought the
112:6 property. Even though I was under the impression that
112:7 it was a done deal, it has once again reared its ugly
112:8 head." Is that what that says?
112:9 A Yes, sir.
112:10 Q So is it fair to say that at this time,
112:11 February 29, 2008, that the situation was a serious
112:12 issue in your mind?
112:13 A It was an issue and any time you get a letter
112:14 from the government threatening you the way they
112:15 threatened me, I would say it's a serious issue, but
112:16 when I'm reassured by my attorney over and over again
112:17 that we have -- we really have no issue, we are right
112:18 in this...

Roberts Deposition, November 14, 2011, attached as Exhibit 4.

In addition, Roberts testified that as of February 6, 2008 he believed his position about the Navy was correct because of what Drew was telling him and what Drew claimed was confirmed by the recent title work done by the independent title agency:

112:19 Q Is it fair to say that at this point, you
112:20 don't know whether you were right in this?
112:21 A Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that
we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
113:1 letter, prior letters from the government, he still
113:2 believed that he was right in what he had Edisto Title
113:3 Search do a title search for.

Roberts deposition, November 14, 2011, attached as Exhibit 4.

Even as late as September 30, 2009, Drew was claiming that he had no prior knowledge of the existence of the plat showing Navy ownership and assuring Roberts that the Navy's ownership claims were invalid because it was unable to present sufficient proof: "any time I've gotten the document (the judgment), it doesn't have the attachment" (i.e., the plat/"Exhibit B"). Drew deposition, September 30, 2009 at 139:13-139:15, attached as Exhibit 1.

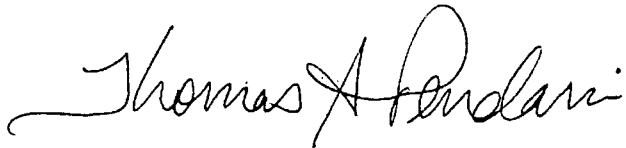
In sum, Drew is equitably estopped from claiming the defense of summary judgment and summary judgment is improper.

CONCLUSION

Based on the foregoing arguments, the affidavits, testimony, and other evidence, Drew's motion for summary judgment must be denied. Genuine issues of material fact are in dispute on each element of Roberts' claims for breach of fiduciary duty and professional malpractice, such that granting Drew's motions for summary judgment would be inappropriate. In addition, Drew is barred by equitable estoppel from claiming the statute of limitations as a defense in this matter.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a large initial "T" and "P".

Thomas A. Pendarvis (SC Bar # 64918)

Catherine B. Kerney (SC Bar # 81429)

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Attorneys for Plaintiffs

Beaufort, South Carolina

July 23, 2012

PENDARVIS LAW OFFICES, PC



July 25, 2012

VIA U.S. MAIL AND E-MAIL

The Honorable W. Jeffrey Young
141 North Main Street
Sumter, SC 29150
wyoungj@sccourts.org
wyounglc@sccourts.org

Re: *Roberts, et al. v. Drew*
Civil Action No. 2011-CP-10-3241

Dear Judge Young:

Thank you for your time and careful attention during hearing on Defendant's Motion for Summary Judgment this past Wednesday, July 23, 2012. We are in the process of preparing a proposed order as you requested and will deliver that to you shortly.

In the interim, there is one material event referenced in Plaintiffs' memorandum in opposition but not emphasized during the hearing that is worthy of specific focus. In November 2007, Mr. Drew engaged an independent title abstractor to perform an additional title search. This happened after the potential purchase fell through in January 2007. Mr. Drew ordered the additional title search, obtained results, and again advised Mr. Roberts that the Navy was wrong because it did not have any ownership interests in the marsh. See Roberts' deposition dated November 14, 2011, 104:4-105:22, an excerpted copy of which is included with this letter.

The November 2007 title search and Mr. Drew's legal advice about that second title search further supports Mr. Roberts' trust and reliance on Mr. Drew's assurances and legal advice given after the closing. And at a minimum this evidence and testimony creates a disputed question of material fact as to whether Mr. Roberts, or a reasonable lay person in a similar situation, should have been aware that Mr. Drew made legal errors in the advice leading to the purchase of the property. Denying the motion for summary judgment is appropriate given the disputed material facts and will not prevent Mr. Drew and his talented counsel from asking the jury to decide whether Mr. Roberts' reliance on Mr. Drew's assurances was reasonable and whether the suit was timely filed. It would not be appropriate for the Court to determine as a matter of law and undisputed fact whether Mr. Roberts' reliance was reasonable.

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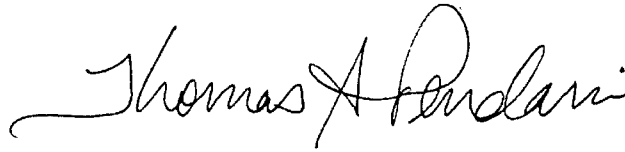
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The Honorable W. Jeffrey Young
Page 2
July 25, 2012

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis

TAP/lat
Enclosure

cc: David W. Overstreet, J.D. (via e-mail and U.S. Mail) (w/ enclosure)
Andrew W. Countryman, J.D. (via e-mail and U.S. Mail) (w/ enclosure)
Keith Roberts (via e-mail) (w/ enclosure)
LOT 12 YELLOW HOUSE, L.L.C. (via e-mail) (w/ enclosure)

THOMAS A. PENDARVIS, J.D.
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STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-3241

KEITH ROBERTS AND LOT 12 YELLOW)
HOUSE, LLC,) CONDENSED
Plaintiffs,)
vs.)
RANDALL J. DREW,)
Defendant.)

* * * * *

DEPOSITION OF: KEITH ROBERTS
DATE TAKEN: Monday, November 14, 2011
TIME: 10:00 a.m.
PLACE: Suite 400, 40 Calhoun Street.
Charleston, SC
REPORTED BY: TERI L. SAMPSON, RPR,
Notary Public and Certified
Live Note Reporter

* * * * *

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784

CAROLINA REPORTING (843) 832-0801
www.carolina-reporting.com

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1 property.
 2 Q Did you discuss with Mr. Drew the Navy's
 3 threat to seek damages against you?
 4 A Probably.
 5 Q That would have been around the time when you
 6 received that letter, July of 2007?
 7 A Yes.
 8 (Defendant's Exhibit 21 marked.)
 9 BY MR. COUNTRYMAN:
 10 Q All right. Exhibit 21 looks to be another
 11 letter from the Department of Justice, but this time
 12 it's a letter addressed to you. Is that right?
 13 A Yes.
 14 Q Look at the third page of Exhibit 21. It's a
 15 letter addressed to Lot 12 Yellow House, LLC, care of
 16 Mr. Drew, from the Department of Justice, is that
 17 correct?
 18 A Yes.
 19 Q Both letters are dated August 8th, 2007?
 20 A Yes.
 21 Q And both letters contain the sentence, "The
 22 owners' trespass on the lands of the United States may
 23 subject them to damages, both actual and punitive,
 24 costs to remove any structures intruding onto the land
 25 of the United States and other remedies both equitable

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1 and legal," correct?
 2 A Yes.
 3 Q And Mr. Drew was your registered -- was the
 4 registered agent for Lot 12 Yellow House, LLC?
 5 A I would imagine, yes. He was my lawyer.
 6 Q Was he ever a member of --
 7 A No.
 8 Q Have there been any other members besides
 9 you?
 10 A No.
 11 Q What did you do when you received this
 12 letter?
 13 A I can't recall. Probably talked to Randy,
 14 but I can't recall.
 15 Q You didn't remove the dock when you received
 16 this letter, did you?
 17 A No, sir.
 18 Q And I may have asked you this before. Is the
 19 dock still there?
 20 A Yes.
 21 Q But when you received this letter in August
 22 of 2007, you knew that the Navy was asking you to take
 23 the dock down and was threatening to try to seek
 24 damages against you in the event that you refused to do
 25 so, correct?

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1 A Yes.
 2 (Defendant's Exhibit 22 marked.)
 3 BY MR. COUNTRYMAN:
 4 Q I've given you Exhibit 22, which looks to me
 5 to be a fax cover sheet from Mr. Drew to Edisto Title
 6 Services and then a letter from Edisto Title Services
 7 back to Mr. Drew and then what looks to be a title
 8 abstract. And I'll tell you that I kind of put these
 9 documents together from what we have, so it's not some
 10 contiguous document. But have you seen -- are these
 11 documents that comprise Exhibit 22 familiar to you?
 12 A Yes.
 13 Q Do you remember -- well, strike that.
 14 To confirm, is the first page of Exhibit 22 a
 15 request from Mr. Drew's office to Edisto Title Services
 16 for a 40-year title search of the Lot 12 property?
 17 A Yes.
 18 Q Do you know why that request was made?
 19 A I would imagine it was to go back as far
 20 as -- 40 years to see if what the Navy was claiming
 21 was -- was true.
 22 Q Did Mr. Drew discuss this title search
 23 request with you when he made it?
 24 A Oh, I'm sure, yes; I'm sure we did together,
 25 we wanted to have another one done.

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1 Q Do you recall whether Mr. Drew performed the
 2 initial title search himself or had an abstractor
 3 perform it?
 4 MR. PENDARVIS: Object to the form. Answer
 5 if you can.
 6 A (Continuing): I don't know. I can find out.
 7 Q I think that he did it himself, but --
 8 And then the second page of Exhibit 22 looks
 9 to be a memo from Edisto Title Services to Mr. Drew
 10 basically saying that Mr. Halish's search didn't find
 11 any issues or anything conveying interest in the
 12 marshlands?
 13 A Yes, sir.
 14 Q Did you discuss the results of the title
 15 search with Mr. Drew?
 16 A Yes.
 17 Q Can you tell me about that discussion?
 18 A It would have probably been they have --
 19 there is no -- there is nothing here that shows the
 20 Navy has any ownership in the land, in the marsh, that
 21 it's what we've been saying, what he has been telling
 22 me all along.
 23 Q Do you know whether you paid for that title
 24 search, or did Mr. Drew pay for it?
 25 A I'm sure I paid for it.

27 (Pages 102 to 105)

FAX COVER SHEET

Randall J. Drew, LLC

Attorney at Law

940 Johnnie Dodds Boulevard, Suite 201

Mount Pleasant, SC 29464

Phone: (843) 971-9790 Fax: (843) 971-9766

rdrew131@comcast.net

If there is a problem with transmission or if all pages are not received, please call 843-971-9790 for retransmission.

TO: Todd
Edisto Title Services

FAX: 552-0884

FROM: Teri Baker
RE: 40 Year Search - Charleston County

DATE: October 16, 2007

This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is **PRIVILEGED, CONFIDENTIAL** and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original to us by mail without making a copy. Thank you.

Hello

I need to order a 40 year title search for Lot 12, Yellow House Place, TMS #: 267-00-00-012. The current owner is Keith Roberts, actually I think he transferred the property into the name of Lot 12 Yellow House, LLC.

Randy needs a copy of all the easements and plats. He also is looking for a copy of a judgment. There is a judgment showing how the Navy got the marsh in front of the above property from the District Court back in 1969. (Give us a call if you have any question about this as I know Randy can probably fill you in).

Thanks a bunch.
Teri



Drew 00451
2950-43538

EDISTO TITLE SERVICES, INC.

MEMORANDUM

To: Randall Drew
From: Todd Balish
Date: November 14, 2007
RE: Lot 12, Yellow House Place (Keith Roberts)
Our File 07-2699

Randy:

We have run the chain of title back as far as we can go and looked for possible deeds which might convey any interest in marshlands and find none.

We have also checked the Berkeley County Clerk of Court's records for any possible suits involving marshland and based on the information given we find none.

We might suggest you look for suits filed in District Court.

Should you have any questions let us know.

Todd



*Exhibit #6
(30 pgs)*

8535 RANDELL COURT, NORTH CHARLESTON, SOUTH CAROLINA 29420
PHONE: 843/813-2354 FACSIMILE: 843/552-0884 edistotitle@knology.net

Drew 00452
2950-43538

Berkeley County
Cynthia B. Forte
Register of Deeds
Moncks Corner 294616120 00050297 Vol: 5393 Pg: 315



Instrument Number: 2008- 00050297

Recorded On: February 27, 2008

As
Deed

Parties: ROBERTS KEITH

To

LOT 12 YELLOW HOUSE LLC

Recorded By: RANDALL J DREW LLC

Num Of Pages: 6

Comment:

** Examined and Charged as Follows: **

Deed	10.00					
Recording Charge:	10.00					
		Consideration				
		Amount	RS#CS#			
Deed Tax	0.00		D 5942		Deed County Tax	0.00
				Deed State Tax	0.00	
EXEMPT						
Tax Charge:	0.00					

RECEIVED

Feb 27, 2008

ASSESSOR
BERKELEY COUNTY SC
JANET B. JORDON
AUDITOR BERKELEY COUNTY SC

** THIS PAGE IS PART OF THE INSTRUMENT **

I hereby certify that the within and foregoing was recorded in the Clerk's Office For: Berkeley County, SC

File Information:

Document Number: 2008- 00050297

Receipt Number: 38235

Recorded Date/Time: February 27, 2008 03:38:17P

Book-Vol/Pg: Bk-R VI-5393 Pg-315

Cashier / Station: R Allen / Cash Station 4

Record and Return To:

RANDALL J DREW LLC

940 JOHNNIE DODDS BLVD

STE 201

MT PLEASANT SC 29464



Cynthia B. Forte

Cynthia B Forte - Register of Deeds

Doc # 00050297

00050297 Vol: 5393 Pr: 316

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, THAT I/WE, ~~WESLEY ROBERTS~~ ("Grantor") in the State aforesaid, for and in consideration of the sum of TEN DOLLARS (\$10.00) to them in hand paid at and before the sealing of these presents by LOT 12 YELLOW HOUSE, LLC, ("Grantee") in the State afore said, the receipt whereof is acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said LOT 12 YELLOW HOUSE, LLC, its heirs and assigns forever, the following described real property:

SEE EXHIBIT A ATTACHED HERETO

SUBJECT to all restrictions, easements and rights-of-way of record.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said LOT 12 YELLOW HOUSE, LLC, its heirs and assigns forever.

AND I/we do hereby bind ourselves and our heirs, executors and administrators, to warrant and forever defend, all and singular, the said Premises unto the said LOT 12 YELLOW HOUSE, LLC, its heirs and assigns, against them and their heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS their Hand(s) and Seal(s) this 27 day of January in the year of our Lord Two Thousand Six and in the Two Hundred and Thirtieth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

[Signature]
First Witness

[Signature]
KEITH ROBERTS

[Signature]
Second Witness

STATE OF SOUTH CAROLINA }

COUNTY OF BERKELEY }

PERSONALLY APPEARED before me the First Witness, and made oath that (s)he saw the within named KEITH ROBERTS sign, seal and as their act and deed, deliver the within Deed, and that (s)he, with the other witness witnessed the execution thereof.

[Signature]
SWORN to before me this

27 day of January, 2006

[Signature] (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: June 12, 2010

EXHIBIT A

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina. The said tract containing approximately three (3) acres, more or less, and is more specifically shown as Tract A on a plat entitled, "PLAT OF LAND "A" AND "B" OWNED BY OR FORMERLY OWNED BY HEIRS OF MINGO HEYWARD, SUBDIVIDED AS SHOWN "A" - DOROTHY H. BROWN AND ROSETTA B. JENKINS AND "B" - ROSA POWELL," prepared by James E. Shuler, RLS, dated December 18, 1976, and which was recorded in the RMC Office for Berkeley County in Book W at page 161; and reference to which is hereby craved.

SUBJECT to any and all restrictions, easements, rights of way, covenants and conditions of record.

BEING the same property conveyed to Keith Roberts by deed of Thomas H. Stone dated August 17, 2005 and recorded in Book 4929 at page 113 in the Berkeley County RMC Office, South Carolina.

TMS# 267-00-00-012

GRANTEE'S ADDRESS:

2670 Egrets Landing CT
MT Pleasant SC 29466

STATE OF SOUTH CAROLINA }
COUNTY OF BERKELEY }

AFFIDAVIT

{Date of Transfer of Title
{ January 27, 2006

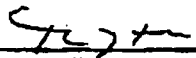
PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property is being transferred BY KEITH ROBERTS TO LOT 12 YELLOW HOUSE, LLC ON January 27, 2006.
3. The DEED is (check one of the following)
 - (a) ___ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) ___ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
 - (c) X EXEMPT from the deed recording fee because (exemption # 12).
(Explanation if required) Quit Claim Deed - No Consideration
(If exempt, please skip items 4-6, and go to item 7 of this affidavit).
4. Check one of the following if either item 3 (a) or item 3 (b) above has been checked.
 - (a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$.
 - (b) ___ The fee is computed on the fair market value of the realty which is \$.
 - (c) ___ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$.
5. Check YES ___ or NO X to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is \$.
6. The DEED Recording Fee is computed as follows:
 - (a) X the amount listed in item 4 above
 - (b) ___ the amount listed in item 5 above (no amount place zero)
 - (c) ___ Subtract Line 6(b) from Line 6(a) and place the result.
7. As required by Code Section '12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney.
8. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.



Randall J. Drew

Sworn to before me on 1-27-06


Notary Public for South Carolina
My Commission Expires: 3-7-15

DEED ABSTRACT

Thomas M Stone

to

Keith Roberts

BOOK: 4929 PAGE: 113

DATED 8-17-05 RECORDED 8-18-05
CONSIDERATION: \$ 475,000.00
SIGNED _____ TWO WITNESSES /
PROBATED PROPERLY: /

"HEIRS AND ASSIGNS": GRANTING /
HABENDUM /
"ALL PERSONS WHOMSOEVER" /

RENUNCIATION OF DOWER

_____/_____/_____
DATE: _____
DATE: _____
DATE: _____
DATE: _____

DOC. RETURNED TO Handall Deen

DESCRIPTION: (SAME AS: 5393-315; SEE ATTACHED _____); OR:

SUBJECT TO:

DERIVATION:

2651-231

EDISTO TITLE SERVICES, INC.

DEED ABSTRACT

re-recorded 3-14-02

Robert Smith, Ruth A. Phillips
also known as Ruth J. Phillips
Michael Scantlebury also known
as Michael E. Scantlebury

to

Thomas H. Stone

re-recorded 2651-231
BOOK: 2588 PAGE: 61

DATED 1-21-02 RECORDED 1-24-02
CONSIDERATION: \$ 135,000.00
SIGNED ☒ TWO WITNESSES ☒
PROBATED PROPERLY: ☒

"HEIRS AND ASSIGNS": GRANTING ☒
HABENDUM ☒
"ALL PERSONS WHOMSOEVER" ☒

RENUNCIATION OF DOWER

DATE: _____

DATE: _____

DATE: _____

DATE: _____

DOC. RETURNED TO Dwight H. Bennett

DESCRIPTION: (SAME AS: _____; SEE ATTACHED ☒); OR:

SUBJECT TO:

DERIVATION:

EDISTO TITLE SERVICES, INC.

EXHIBIT "A"

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina. The said tract containing approximately three (3) acres, more or less, and is more specifically shown as Tract "A" on Plat entitled "Plat of Land" "A" and "B" owned or formerly owned by heirs of Mingo Heyward, subdivided as shown "A" - DOROTHY H. BROWN AND ROSETTA B. JENKINS and "B" - ROSA POWELL, prepared by James E. Shuler, RLS, dated December 18, 1976, and which was recorded in the RMC Office for Berkeley County in Book W at Page 161; and reference to which is hereby craved.

BEING the same property conveyed to Ruth A. Phillips (10%), Mildred Scantlebury (10%), Robert Smith (10%), Manigault Jenkins, Jr. (10%) and Earl Jenkins (10%) by Deed of Distribution of the Estate of Dorothy Heyward Brown, Case 1998-ES-10-0896, dated June 27, 2001 and recorded in the RMC Office for Berkeley County, South Carolina in Book 2330 at Page 138, being further conveyed to Ruth A. Phillips and Mildred Scantlebury by deed of Manigault Jenkins, Jr. and Earl Jenkins dated August 20, 2001 and recorded in the RMC Office aforesaid in Book 2404 at Page 242;

Also conveyed to Earl Alfred Jenkins, Manigault Jenkins, Ruth Phillips and Mildred Scantlebury, by Last Will and Testament of the Estate of Rosetta B. Jenkins, Case 1985-ES-10-01076; being further conveyed to Ruth J. Phillips and Mildred E. Scantlebury by deed of Earl Alfred Jenkins and Manigault Jenkins dated July 27, 1991 and recorded in the RMC Office aforesaid in Book 145 at Page 271.

TMS # 267-00-00-012

DEED ABSTRACT

title Not Examined

Manigault Jenkins Jr
Earl Jenkins

to
Mildred Scamlebury
Ruth A Phillips

BOOK: 2404 PAGE: 242

DATED 8-20-01 RECORDED 9-7-01
CONSIDERATION: \$ 1.00 LHA
SIGNED TWO WITNESSES
PROBATED PROPERLY:

"HEIRS AND ASSIGNS": GRANTING
HABENDUM
"ALL PERSONS WHOMSOEVER"

RENUNCIATION OF DOWER
DATE
DATE
DATE
DATE

DOC. RETURNED TO Steenberg

DESCRIPTION: (SAME AS:); SEE ATTACHED (✓); OR:

SUBJECT TO:

DERIVATION:

EDISTO TITLE SERVICES, INC.

STATE OF SOUTH CAROLINA

TITLE TO REAL ESTATE

COUNTY OF BERKELEY

TITLE NOT EXAMINED BY STEINBERG LAW FIRM

KNOW ALL MEN BY THESE PRESENTS THAT, WE,
 MANIGAULT JENKINS, JR. AND EARL JENKINS in the State aforesaid, for and,
 in consideration of One and 00/100 (\$1.00) Dollar and love and affection for my
 sisters to us in hand paid at and before the reading of these presents by
 MILDRED SCANTLEBURY AND RUTH A. PHILLIPS in the County aforesaid, the
 receipt whereof is hereby acknowledged, have granted, bargained, sold and
 released, and by these presents do grant, bargain, sell and release unto the said
 MILDRED SCANTLEBURY AND RUTH A. PHILLIPS, their heirs and assigns, the
 following described property, to wit:

ALL that certain piece, parcel or tract of land, situate, lying and being near
 Daniel Island, St. Thomas Parish, Berkeley County, South Carolina. The said
 tract containing approximately three (3) acres, more or less, and is more
 specifically shown as Tract "A" and "B" owned or formerly owned by heirs of
 Mingo Heyward, subdivided as shown "A - DOROTHY H. BROWN AND ROSETTA
 B. JENKINS" and "B" - ROSA POWELL, prepared by James E. Shuler, RLS,
 Dated December 18, 1976, and which was to be recorded in the RMC Office for
 Berkeley County; and reference to which is hereby craved.

BEING the same property conveyed to Robert Smith (10%), Ruth A. Phillips
 (10%), Mildred Scantlebury (10%), Manigault Jenkins, Jr., (10%) and Earl Jenkins
 (10%) by deed of distribution from the Estate of Dorothy Heyward Brown dated
 27th day of June, 2001 and recorded in the RMC Office for Berkeley County on
 July 11, 2001 in Book 02830, Page 00138.

The Tax Map Reference Number is 267 00 00 012

RECEIVED

09/07/2001

The Grantees' address is in care of Ruth A. Phillips, 1930 Madison Court, #12-1,
 Columbia, SC 29201.

For \$ 00000000
 FILED, RECORDED, INDEXED
 09/07/2001 10:21:00 AM
 Fee Paid \$1.00 Page(s) 4
 Register of Deeds Berkeley Co. SC
 Cynthia L. Fortin
 Forward to: STEINBERG LAW FIRM

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PROBATE COURT

IN THE MATTER OF DOROTHY HEYWARD BROWN

CASE NUMBER 1998-ES-10-00898

DEED OF DISTRIBUTION

WHEREAS, the decedent died on the 28th day of June, 1995; and

WHEREAS, the estate of the decedent administered in the Probate Court for CHARLESTON County, South Carolina in File # SEE ABOVE; and

WHEREAS, the grantees herein is either a beneficiary or heir at law, as appropriate, of the decedent;

WHEREAS, the undersigned Personal Representative is the duly appointed and qualified fiduciary in this matter; and

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release to:

Name: RONALD BROWN (10%)
RUTH J. PHILLIPS (10%)
MILDRED SCANTLEBURY (10%)
MANIGAULT JENKINS, JR. (10%)
EARL JENKINS (10%)

the following described property:

By: S. W. WALKER, ESQ. DEPT.
FILED, PROBATE COURT
07/11/2001 11:44 AM
For Fee: \$5.00 Clerk: J.
Register of Deeds, Charleston Co., SC
Charles E. Perry
Issued for: STELLINGSMA LAW FIRM

RECEIVED

07/11/2001

PROBATE
CHARLESTON COUNTY SC

SEE ATTACHED FOR FULL LEGAL DESCRIPTION

TAX map number is 257-00-00-066.

The Grantees' address is c/o Ruth Phillips, 1930 Marion Street, Apt. 12-J, Columbia, SC 29201

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the said Ronald Brown, Ruth Phillips, and Mildred E. Scantlebury, Manigault Jenkins, Jr.

(4)

and Earl Jenkins, their heirs and assigns forever.

IN WITNESS WHEREOF, the undersigned, as Personal Representative of the estate of the decedent, has executed this Deed, this 27th day of June, 2001

SIGNED, SEALED AND DELIVERED Estate of: Dorothy Heyward Brown

IN THE PRESENCE OF:

by Signature: Ruth A. Phillips
Ruth A. Phillips
Personal Representative

Witness: [Signature]

Witness: [Signature]

COUNTY OF CHARLESTON
STATE OF SOUTH CAROLINA

PERSONALLY appeared before me the above witness and made oath that he/she saw the within named Personal Representative(s) sign, seal, and as their act and deed, deliver the within written Deed, and that he/she with the other witness witnessed the execution thereof.

SWORN to before me this
27th day of June, 2001

[Signature]
Witness Signature

(SEAL)
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 4/18/08

BELOW, PLEASE SPECIFY THE EXACT NAME AND ADDRESS
OF THE PERSON(S) TO WHOM TAX BILL SHALL BE SENT:

NAME: RUTH PHILLIPS

ADDRESS: 1930 MARION STREET, APT. 124

CITY: COLUMBIA

STATE: SOUTH CAROLINA

ZIP CODE: 29201

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property being transferred by Estate of DOROTHY HEYWARD BROWN TO RONALD BROWN, RUTH PHILLIPS AND MILDRED SCANTLEBURY, MANIGAUT JENKINS, JR. AND EARL JENKINS, dated June 27, 2001
3. Check one of the following: THE DEED IS
 - (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - (c) ☒ EXEMPT from the deed recording fee because this is a deed of distribution.
4. CHECK ONE OF THE FOLLOWING IF EITHER ITEM 3(a) OR ITEM 3(b) ABOVE HAS BEEN CHECKED.
 - (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$.00
 - (b) ☐ The fee is computed on the fair market value of the realty which is \$ _____
 - (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____
5. CHECK YES ☐ OR NO ☐ to the following: A lien or encumbrances existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is approximately \$ _____
6. THE DEED RECORDING FEE IS COMPUTED AS FOLLOWS:
 - (a) ☐ .00 the amount listed in Item 4
 - (b) ☐ .00 the amount listed in Item 5 above
 - (c) ☐ .00 Subtract line 6(b) from Line 6(a) and place the result
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as the closing attorney.
8. Deed of Distribution - Attorneys Affidavit: Estate of Dorothy Brown Hayward deceased CASE NUMBER 09-ES-10-00895. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina, that (s)he has prepared the Deed of Distribution for the Personal Representative in the Estate of Dorothy Brown Hayward deceased and that the grantee(s) therein are correct and conform to the estate file for the above named decedent.
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

[Signature]
Grantor, Grantee, or Legal Representative
Connected with the Transaction.

SWORN to before me this
27th day of June, 2001

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 4/16/08

PROPERTY DESCRIPTION

ALL that certain piece, parcel or lot of land, situate, lying and being in the Township of Calhoun, St. Thomas and St. Dennis Parish, Berkeley County, South Carolina, measuring and containing 2.50 acres and being delineated as LOT ONE (1), on a plat of Clearwood E. Droze, RLS, dated January 20, 1988, entitled "Plat of Land-Subdivision as shown-owned by CALEB BROWN ESTATE", and being of record in Cabinet H, page 87, RMC Office for Berkeley County, the said tract having such location, measurements, shape, dimensions, buttings and boundings as are shown on said plat by reference thereto.

BEING the property conveyed to Dorothy Heyward Brown and Rosetta Jenkins by deed of Joseph Heyward, et al., recorded February 2, 1977, in Book A-332, page 167, RMC Office for Berkeley County. Thereafter, Dorothy Heyward Brown died testate in Charleston County seized and possessed of an undivided 50% interest in said property, and under the provisions of her Last Will and Testament she devised her interests in the property to Earl Jenkins, Mildred E. Scastlebury, Ruth A. Phillips, Manigault Jenkins, Jr. and Ronald Brown.

THE tax map number is 271-00-01-050.

THE Grantees' address is c/o Ruth A. Phillips, 1930 Marion Street, Apt. 12-1, Columbia, SC 29201.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PROBATE COURT

IN THE MATTER OF DOROTHY HEYWARD BROWN

CASE NUMBER 1988-ES-10-00896

DEED OF DISTRIBUTION

WHEREAS, the decedent died on the 29th day of June, 1988; and

WHEREAS, the estate of the decedent administered in the Probate Court for CHARLESTON County, South Carolina in File # SEE ABOVE; and

WHEREAS, the grantee herein is either a beneficiary or heir at law, as appropriate, of the decedent;

WHEREAS, the undersigned Personal Representative is the duly appointed and qualified fiduciary in this matter; and

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release to:

Name: ROBERT SMITH (10%)
RUTH A. PHILLIPS (10%)
MILDRED SCANTLEBURY (10%)
MANIGAULT JENKINS, JR. (10%)
EARL JENKINS (10%)

for 00041362 DEPT
FILED RECORDED INDEXED
07/11/2001 11:20:00AM
for Fee \$15.00 Page 4
Register of Deeds Berkeley Co. SC
Cynthia A. Farris
Issued for: 00041362 LAW FIRM

the following described property:

ALL that certain piece, parcel or tract of land, situate, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, South Carolina; The said tract containing approximately three (3) acres, more or less and is more specifically shown as Tract "A" and "B" owned or formerly owned by heirs of Mingo Heyward, sub-divided as shown "A- DOROTHY H. BROWN and ROSETTA B. JENKINS-"B"- ROSA POWELL", prepared by James E. Studer, RLS, dated December 18, 1976, and which was to be recorded in the RMO Office for Berkeley County; and reference to which is hereby craved.

BEING the same property conveyed to Dorothy Heyward Brown and Rosetta Jenkins by deed of Joseph Heyward, et al. recorded February 2, 1977, in Book A-332, page 167, RMO Office for Berkeley County. Thereafter Dorothy Heyward Brown died testate seized and possessed of an undivided 50% interest in said property, and under the provisions of her Last Will and Testament she devised the described property to Robert Smith (10%) and the remaining interests to Ruth A. Phillips, Mildred E. Scantlebury, Earl A. Jenkins, and Manigault Jenkins,

RECEIVED

07/11/2001

RECORDED
BERKELEY COUNTY SC

(4)

The Grantees' address is c/o Ruth Phillips, 1830 Marion Street, Apt. 12-I,
Columbia, SC 29201

TOGETHER with all and singular, the Rights, Members, Hereditaments and
Appurtenances to the said Premises/Property belonging, or in anywise incident or
appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the
said Robert Smith, Ruth Phillips, and Mildred E. Scaletbury, Manigault Jenkins, Jr.
and Earl Jenkins, their heirs and assigns forever.

IN WITNESS WHEREOF, the undersigned, as Personal Representative of the
estate of the decedent, has executed this Deed, this 27th day of June, 2001

SIGNED, SEALED AND DELIVERED Estate of Dorothy Hayward Brown

IN THE PRESENCE OF:

by Signature: Ruth Phillips
Ruth A. Phillips
Personal Representative

Witness: C. M.

Witness: Luan M. Scafe

COUNTY OF CHARLESTON
STATE OF SOUTH CAROLINA

PERSONALLY appeared before me the above witness and made oath that
he/she saw the within named Personal Representative(s) sign, seal, and as their act
and deed, deliver the within written Deed, and that he/she with the other witness
witnessed the execution thereof.

SWORN to before me this
27th day of June, 2001

Luan M. Scafe
Witness Signature

(SEAL)
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires: 4/16/03

BELOW, PLEASE SPECIFY THE EXACT NAME AND ADDRESS
OF THE PERSON(S) TO WHOM TAX BILL SHALL BE SENT:

NAME: RUTH PHILLIPS

ADDRESS: 1830 MARION STREET APT. 12-J

CITY: COLUMBIA

STATE: SOUTH CAROLINA

ZIP CODE: 29201

000041862 BK:02330 Pg:00141

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property being transferred by Estate of DOROTHY HEYWARD BROWN TO ROBERT SMITH, RUTH PHILLIPS AND MILDRED SCANTLEBURY, MANIGAULT JENKINS, JR. AND EARL JENKINS, dated June 27, 2001
3. Check one of the following: THE DEED IS
 - (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - (c) ☒ EXEMPT from the deed recording fee because this is a deed of distribution.
4. CHECK ONE OF THE FOLLOWING IF EITHER ITEM 3(a) OR ITEM 3(b) ABOVE HAS BEEN CHECKED:
 - (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$.00
 - (b) ☐ The fee is computed on the fair market value of the realty which is \$ _____
 - (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is \$ _____
5. CHECK YES ☐ OR NO ☐ to the following: A lien or encumbrances existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is approximately \$ _____
6. THE DEED RECORDING FEE IS COMPUTED AS FOLLOWS:
 - (a) ☐ .00 the amount listed in Item 4
 - (b) ☐ .00 the amount listed in Item 5 above
 - (c) ☐ .00 Subtract line 6(b) from line 6(a) and place the result
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as the closing attorney.
8. Deed of Distribution - Attorneys Affidavit: Estate of Dorothy Brown Heyward deceased CASE NUMBER 06-EB-10-00898. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina, that (s)he has prepared the Deed of Distribution for the Personal Representative in the Estate of Dorothy Brown Heyward deceased and that the grantee(s) therein are correct and conform to the estate file for the above named decedent.
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.


Grantor, Grantee, or Legal Representative
Connected with the Transaction.

SWORN to before me this
27th day of June, 2001


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 4/16/08

(23)

RECORDED 10:00 A. GROWN
NOTED BY _____
STATE OF SOUTH CAROLINA
COUNTY STAMPS _____
WEEKLY COUNTY

145 MAR 27 1985

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) TITLE TO REAL ESTATE

WHEREAS, ROSETTA B. JENKINS, late of the County of Charleston, State of South Carolina, died intestate on the 19th day of January, 1985, while claiming and owning an interest in the herein described parcel of Real Estate, and leaving in full force and effect, her last Will and Testament, bearing date of February 23, 1984, which was admitted to Probate in Common form in the Probate Court of Charleston County and is now on file therein, bearing Case No: 85ED10-01076; and

WHEREAS, the late ROSETTA B. JENKINS, in item II of her last Will and Testament provided as follows "I give, devise and bequeath all of my property, real, personal and/or mixed and wheresoever the same may be situated, unto my four children to wit: EARL ALFRED JENKINS, MANIGAULT JENKINS, RUTH J. PHILLIPS and MILDRED SCANTLEBURY, share and share alike, absolutely and forever" and

WHEREAS, the within named Grantors, EARL ALFRED JENKINS and MANIGAULT JENKINS acquired an interest in the subject property as tenants in common with the within named Grantees, RUTH J. PHILLIPS AND MILDRED E. SCANTLEBURY. As such, they are now mindful of conveying all of their undivided right, title and interest so acquired therein to their co-tenants, RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY; now therefore

KNOW ALL MEN BY THESE PRESENCE THAT

WE, EARL ALFRED JENKINS and MANIGAULT JENKINS, in the State

Grantor's Address:
100 East 93rd Street, Apt 4C-407
Brooklyn, New York 11212

aforesaid, and for and in consideration of love and affection for our sisters and co-tenants, and the sum of one (\$10.00) Dollars to us in hand paid, at and before the sealing of these presence by RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, 100 East 93rd Street, Apartment 9C-407, Brooklyn, New York 11212, in the State aforesaid, and the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presence, do grant, bargain, sell and release unto the said RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, all of our undivided right, title and interest in and to the herein described parcel of Real Estate, to wit:

ALL THAT CERTAIN PIECE, PARCEL OR TRACT OF LAND, situated, lying and being near Daniel Island, St. Thomas Parish, Berkeley County, State of South Carolina; Measuring and Containing Three (3) acres, more or less; more specifically shown as Tract "A" on Plat entitled "Plat of Land" "A" and "B" owned by heirs of MINGO HEYWARD, sub-divided as shown "A-DOROTHY M. BROWN and ROSETTA B. JENKINS - "B"- ROSA POWELL", prepared by JAMES E. SEULER, R. L. S., dated December 18, 1976, to be recorded herewith in the Office of the Clerk of Court for Berkeley County in Plat Book _____, at Page _____, and reference to which is hereby craved; Butting and Bounding on the aforesaid Plat as follows, to wit:

NORTH along Marshland, a distance of 191.6 feet, more or less; Northeast along lands of the Heirs of TONY BENNETT, a distance of 1001 feet; Southeast along other land of the Heirs of MINGO HEYWARD, a distance of

129.8 feet; Southwest along Tract "B" on aforesaid map, a distance of 1141.5 feet.

BEING the same premises conveyed to DOROTHY M. BROWN and ROSETTA B. JENKINS, by Deed of JOE REYNARD, et. al., dated January __, 1977, and recorded February 2, 1977, in Book A-332, at Page 167, in the R. M. C. Office for Berkeley County.

TMS # 267-00-00-012

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said premises belonging to in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, their heirs and assigns forever.

AND WE DO HEREBY bind ourselves, our Heirs, and our executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said RUTH J. PHILLIPS and MILDRED E. SCANTLEBURY, their heirs and assigns, against us and our Heirs, and all persons whosoever lawfully claiming, or to claim the same or any part thereof.

WITNESS our hands and seal, this 22 day of July, in the year of Our Lord One Thousand Nine Hundred and Ninety One and in the Two Hundred and Fifteenth year of the Sovereignty and Independence of the United States of America.

BOOK 145 PAGE 274

SIGNED, SEALED, AND DELIVERED
IN THE PRESENCE OF:

Herman Moore
EARL ALFRED JENKINS

Lance Brown Manigault Jenkins
MANIGAULT JENKINS

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PERSONALLY appeared before me, the undersigned witness and made oath, that he/she saw the within named EARL ALFRED JENKINS and MANIGAULT JENKINS, sign, seal, and as their act and deed, deliver the within written deed, and that he/she with the other witness whose signature appears above, witnessed the execution thereof.

Herman Moore

SWORN to before me
this 10th day of July, 1991.

Lance Brown
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7-1-2000

FILED-RECORDED
JUL 23 11 58 AM '92
CLERK OF COURT
SOUTH CAROLINA
CHARLESTON COUNTY, SC

RECORDED THIS 30th DAY
OF August, 1992
IN BOOK 145 PAGE 274
OFFICE OF THE CLERK OF COURT
SOUTH CAROLINA
CHARLESTON COUNTY, SC

RECORDED THIS 30th DAY
OF Aug, 1992
IN BOOK 145 PAGE 274
OFFICE OF THE CLERK OF COURT
SOUTH CAROLINA
CHARLESTON COUNTY, SC

2777 5.75
05

State of South Carolina.

County of Berkeley

Deed of Mortgage

Witnessed

Witnessed by J. M. Brown +
R. M. B. Brown

TITLE TO REAL ESTATE

Filed 2 day

at February A.D. 1977

at 8:50 P.M.

and recorded in Book 8323

Page 167 Fee \$

Witnessed by J. M. Brown

H. M. B. in Clerk Court C.P. & C.S.

Berkley County, S.C.

Recorded this 2 day

at February 1977

in Book 1 Page 167

Fee \$

Witnessed by J. M. Brown

Attest Berkley County, S.C.

State of South Carolina,

COUNTY OF BERKELEY,

WE, THE SOLE SURVIVING HEIRS OF MINGO HEYWARD,

KNOW ALL MEN BY THESE PRESENTS, THAT
We, Joe Heyward, Agnes Heyward, Lillian Dingle, Clara White, Anne Williams,
Ethel Brown, Frances Williams, Lillie Simmons, Rosa Powell, Eddie Heyward,
Rosetta Dingle, Joseph Shaw, Earnestine Shaw, Charles Shaw, Isaac Heyward,
Rebecca Washington, George Shaw, and Clarence Shaw,

in the State aforesaid for and in consideration of the sum of
One Dollar (\$1.00) DOLLARS,

to us hand paid at and before the writing of these presents by DOROTHY H. BROWN and
ROSETTA B. JENKINS, 30 Carolina Street, Charleston, S. C.

in the State aforesaid County aforesaid the receipt whereof is hereby

acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and
release unto the said Dorothy H. Brown and Rosetta B. Jenkins, their Heirs and

Assigns, the following described Real Property, to-wit:
ALL that certain piece, parcel or tract of land, situate, lying and being
near Daniel Island, St. Thomas Parish, Berkeley County, State of South
Carolina; MEASURING AND CONTAINING Three (3) acres, more or less; more
specifically shown as Tract "A" on plat entitled "Plat of Land "A" & "B"
Owned by Heirs of Mingo Heyward Sub-divided as shown "A - Dorothy H. Brown
& Rosetta B. Jenkins - "B" - Rosa Powell", prepared by James E. Shuler,
R.L.S., dated December 18, 1978, to be recorded herewith in the Office of
the Clerk of Court for Berkeley County in Plat Book _____, at page _____,
and reference to which is hereby craved; BUTTING AND BOUNDING on the afore-
said plat as follows, to-wit: North along marsh land a distance of 191.6
feet, more or less; northeast along lands of the Heirs of Tony Dennett a
distance of 1001 feet; Southeast along other lands of the Heirs of Mingo
Heyward a distance of 129.8 feet; Southwest along Tract "B" on aforesaid
map a distance of 1141.6 feet.

SAME being a portion of land conveyed to Mingo Heyward by Susan B. Heyward
by deed of record in the R.M.C. Office in Charleston County in Deed Book
Y-18, at page 294.

Deed Drawn - Title Not Examined
Noel N. Newell
Attorney at Law
Moncks Corner, S. C.

.....

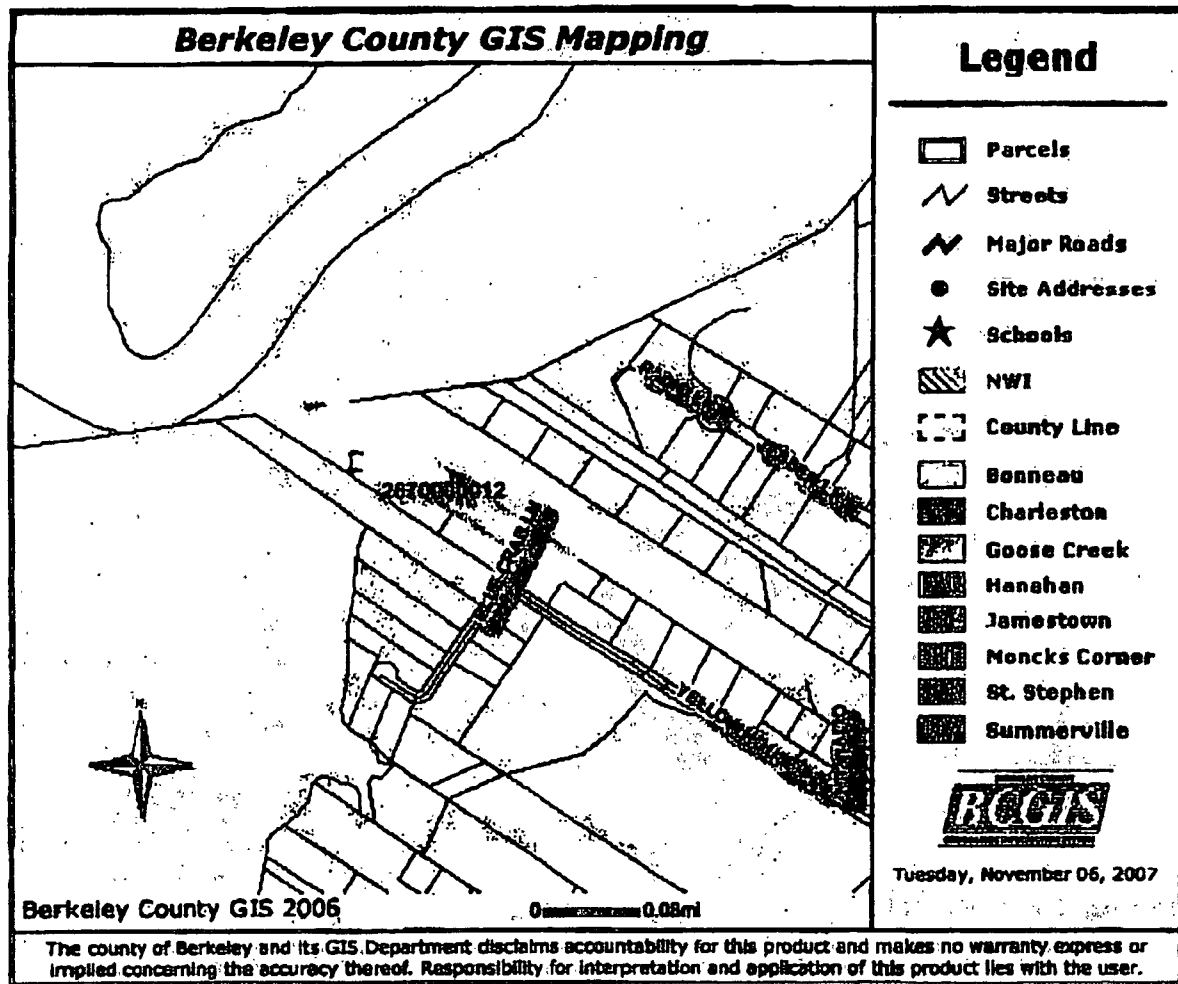
TOGETHER with all and singular, the Rights, Advantages, Honorifics and Appurtenances to the said
Premises belonging, or in anywise incident or appertaining.

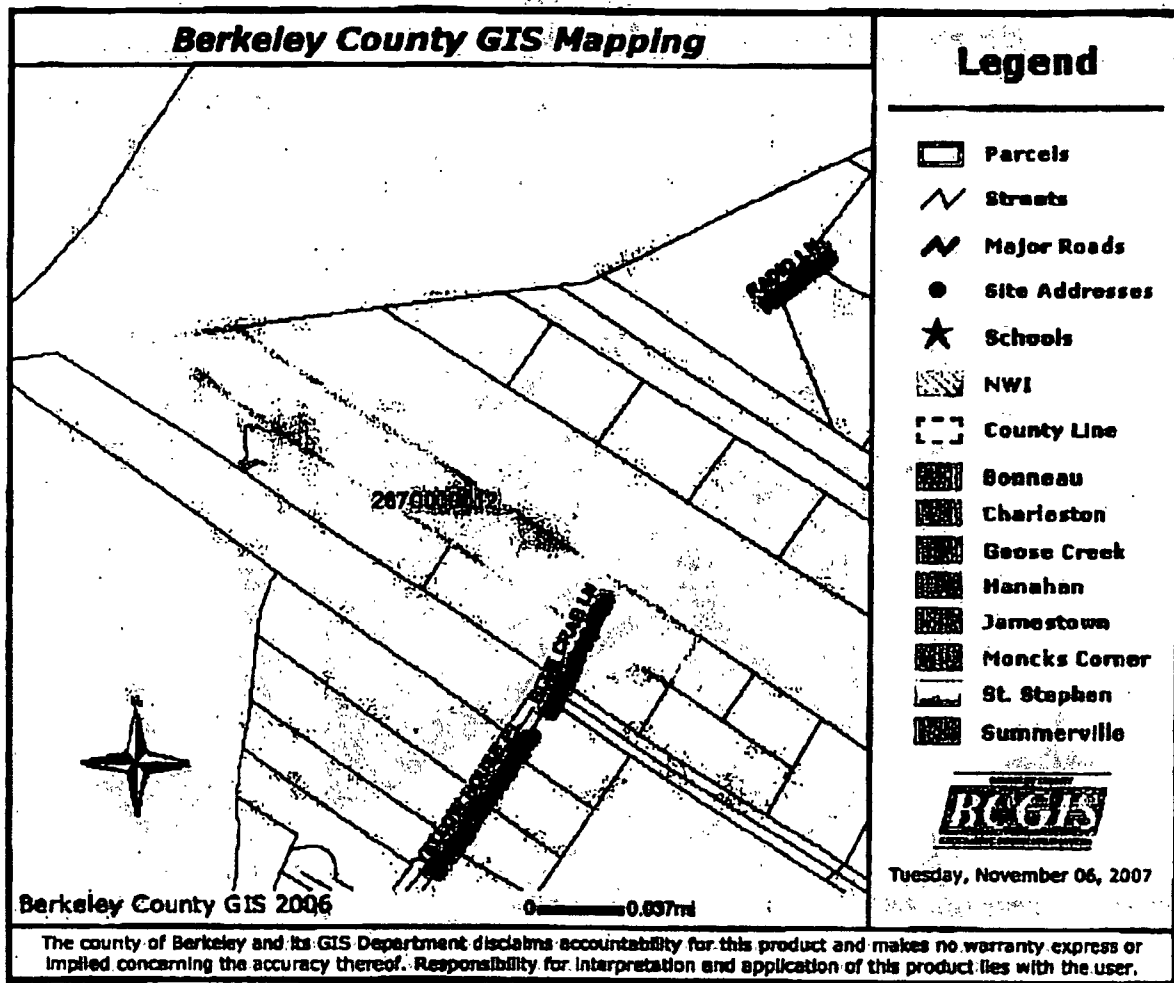
TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said
Dorothy M. Brown and Rosetta S. Jenkins, their Heirs and Assigns forever.

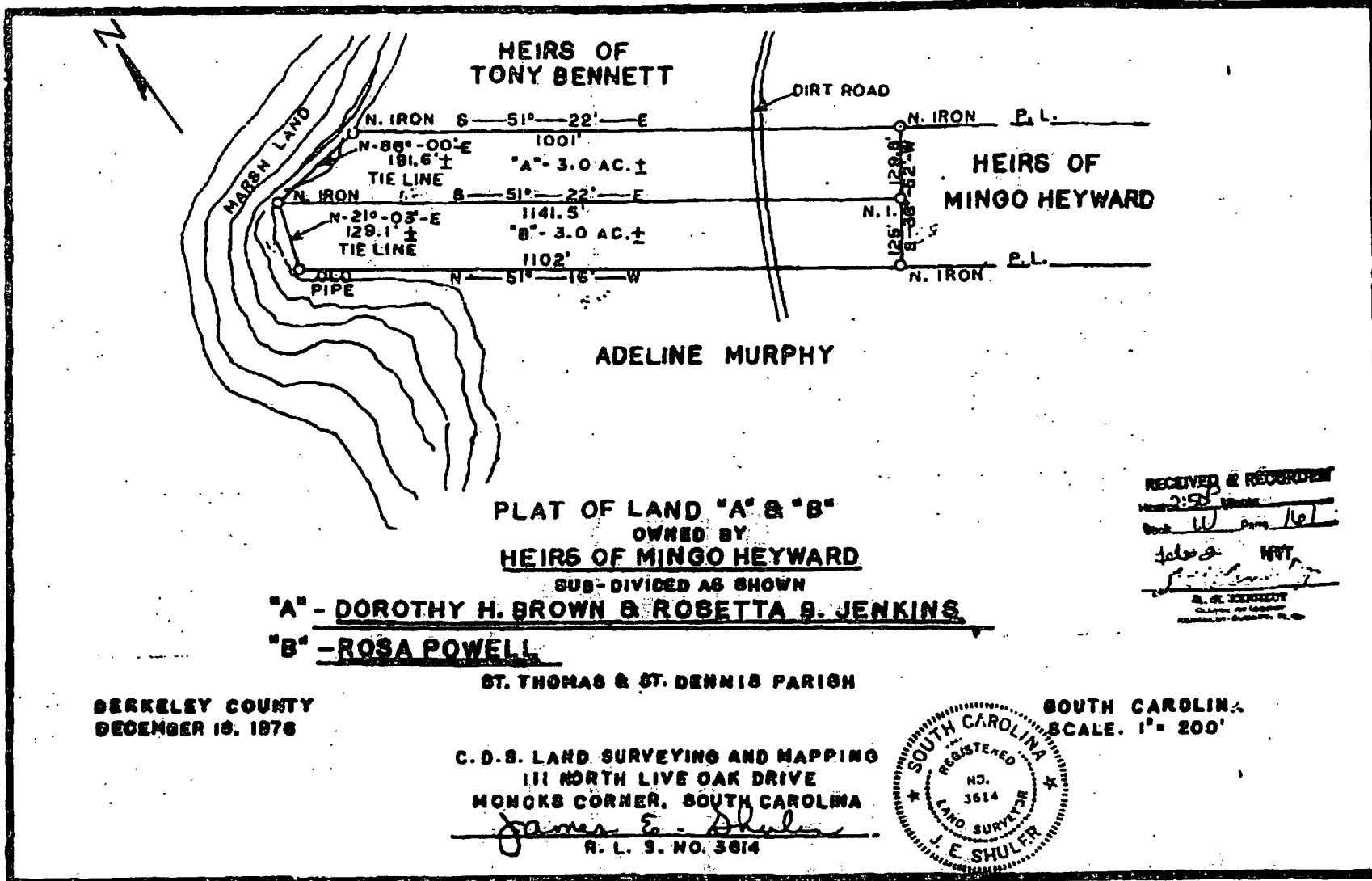
A323

116'

940







STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW
HOUSE, L.L.C.,

Plaintiffs,

vs.

Randall J. Drew,

Defendant.

**PLAINTIFFS' MOTION TO ALTER OR
AMEND ORDER GRANTING SUMMARY
JUDGMENT TO DEFENDANT**

TO: DAVID W. OVERSTREET, J.D. AND ANDREW W. COUNTRYMAN, J.D., COUNSEL FOR
DEFENDANT;

NOTICE

PLEASE TAKE NOTICE THAT Plaintiffs, Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C., through their undersigned counsel, will move ten days after service of this motion or as soon thereafter as counsel can be heard at the Charleston County Judicial Center, Charleston, South Carolina, for an Order pursuant to Rule 52(a) and Rule 59(e), SCRCP, altering or amending the Order ("the Order") issued by the Honorable W. Jeffrey Young, dated October 19, 2012, filed with the clerk on October 24, 2012, and received by counsel for the Plaintiff via e-mail¹ on October 24, 2012, granting Defendants' Motion for Summary Judgment.

MOTION

The motion filed on behalf of Plaintiffs, Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C., seeking an Order altering or amending the Order pursuant to Rule 52(a) and Rule

¹ Plaintiffs have not been served with a copy of the Order per Rule 5, SCRCP, by counsel for Defendants.

59(e), SCRCF, is based on mistakes and omissions identified in the factual findings and errors and omissions contained in the conclusions of law set forth in the Order. A copy of the Order is attached and incorporated herein by reference as **Exhibit 1**.

SUMMARY OF THE ARGUMENTS

There are findings of fact and conclusions of law that are inconsistent with the Court's ruling that the statute of limitations bars Plaintiffs' claims. The record is devoid of any evidence supporting a finding that as a matter of undisputed fact a reasonable person in Roberts' position 1) would have known that a legal malpractice claim existed against Drew and 2) would not have been entitled to rely on Drew's assurances that the Navy would not prevail on its claim that Roberts could not maintain a dock. The statute of limitations had not run by May 2011 when this lawsuit was commenced and the Order should be amended accordingly.

A. The Order incorrectly concludes Roberts should have known three years before May 2011 that Drew committed malpractice when he advised the Navy's claims would not impact the ability to maintain a dock because no court has ruled the dock cannot be maintained.

Throughout the Order, the Court finds as a matter of undisputed fact and concludes as a matter of law that Drew gave legal advice to Roberts "that the Navy's claim of ownership of the adjacent marshland was invalid and should not impact the ability to maintain a dock at the Property." (Order at p. 2, ¶ 2; p. 7, ¶ 1; p. 7, ¶ 2; p. 8, ¶ 2; p. 9, ¶ 2) (emphasis added). The record before the Court, however, shows that as a matter of undisputed fact the dock is still being maintained at the Property, notwithstanding the Navy's pending lawsuit seeking to have a federal court order Plaintiffs to remove the dock. One of the problems with the Order is that it concludes that "no later than April 2008"

"Roberts was aware that Drew's advice regarding the Navy's claim and *its impact on the ability to maintain a dock at the Property was incorrect*, as the Navy vigorously pursued its claim and demanded removal of the dock beginning in 2006." (Order at p. 9, ¶ 1) (underlining in original, other emphasis added). This conclusion is simply incorrect for several reasons.

First, because the federal lawsuit remains pending without any finding that the dock cannot be "maintained," there is no evidence before the Court that Roberts knew or should have known that Drew's advice concerning the "ability to maintain a dock" was incorrect; Roberts may prevail in the federal lawsuit. Next, because the Navy's lawsuit was not filed until February 2009, a little more than two years before this malpractice lawsuit was filed, the conclusion in the Order that "the Navy vigorously pursued its claim" is not consistent with the facts in the record and certainly was not construed in the light most favorable to Roberts.

In the event Roberts does prevail in the federal lawsuit, he will (or should if the Court amends its Order to deny Drew's motion for summary judgment) still be able to maintain a claim against Drew based on the opinions from Plaintiffs' expert that Drew should have told Roberts not to purchase the Property and that to advise him to proceed with the purchase was below the standard of care. See Affidavit of Brian Boger, dated June 6, 2011, at p. 19 ("Drew's representation was below the standard of care because he did not advise Roberts not to purchase Lot 12 when it was clear that Lot 12 was not suitable for Roberts' development purposes.")

- B. Because the dock is still being maintained, neither Roberts or an objective third party would have known a claim existed against Drew a) based on Drew's contrary assurances and b) until gave Roberts actual notice of the existence of the claim.**

South Carolina law on when a statute of limitations begins to run can be summarized as beginning when a party a) sustains damages and b) has knowledge a claim exists based on wrongful conduct. This lawsuit was filed a little more than a year after Roberts heard a federal judge make comments from the bench suggesting – for the first time to Roberts – that there may be malpractice claims against Roberts' closing lawyer, Drew. Given that by April 2010, Roberts had incurred expenses by way of legal fees in defending the Navy's lawsuit, such that cognizable damages existed, and heard a federal judge make reference to malpractice claims against Drew, such that he then had knowledge of his lawyer's negligence, the statute of limitations began running at that time per our Supreme Court's holdings in *Epstein v. Brown*, 363 S.C. 372, 380-81, 610 S.E.2d 816, 820-21 (2005).

- C. The Order incorrectly concludes that Drew's assurances eliminated Roberts' knowledge of an injury" but should instead conclude those assurances eliminated Roberts' "knowledge of a claim."**

Another significant error in the Order is the conclusion concerning Plaintiffs' arguments that "Roberts had a right to rely on Drew's assurances, which eliminated any 'knowledge of an injury' sufficient to trigger the statute of limitations." Order at p. 8, ¶ 2. This conclusion is incorrect and needs to be amended. The true effect of Drew's assurances to Roberts that the "dock permit was valid and the Navy's claim of ownership of the adjacent marsh was invalid" was to eliminate Roberts' "knowledge of a claim" against Drew for malpractice, which again was not revealed until Roberts heard it from the federal judge.

Considering that in November 2007, Drew hired a title abstractor to conduct a title search more than two years after the closing Drew gave Roberts new advice again advising that the recent title work showed that the dock permit was valid and that Roberts could maintain a dock. The new advice in 2007 made it imminently reasonable for Roberts to believe that Drew's advice in 2005 was correct. A jury could conclude that it was reasonable for Roberts to believe Drew had not committed malpractice when he relied on Drew's advice between November 2007 and the time when the federal judge made his statements in April 2010 concerning Drew's professional negligence. Such a belief was consistent with the absence of any statements from any of the other lawyers representing Roberts, including Ms. Shahid and Mr. Barnett. Drew was unable to point to any evidence showing that Drew himself, Ms. Shahid, or Mr. Barnett ever suggested to Roberts that he might have a claim against Drew because none of them ever did.

The Order should be amended to show that Roberts' reliance on Drew's assurances eliminated Roberts' "knowledge of a claim" against Drew for malpractice instead of 'knowledge of an injury' sufficient to trigger the statute of limitations."

D. The Order fails to address Plaintiffs' equitable estoppel arguments.

Drew should be estopped from claiming the statute of limitations defense because he acted in such a manner as to induce the Plaintiffs to delay in timely filing a cause of action. See *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 682 S.E.2d 1, 8 (Ct. App. 2009) "This conduct may be either an express representation that the claim will be settled without litigation or actions suggesting that a lawsuit is unnecessary." *Id.* citing *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403. In this matter, Drew consistently and continuously worked over the course of years to conceal his errors and shield Roberts from

any knowledge of his failure to properly advise them regarding the Navy's ownership of the marshland adjacent to Lot 12. See Roberts Affidavit. For years, Drew advised Roberts that the Navy had no ownership rights over the marshland and even hired an independent title search agency to repeat the title search further delaying Roberts' knowledge of Drew's errors and then helped Plaintiff to hire two separate attorneys to determine his rights against the Navy. See *id.* Even as of his deposition this year, Drew continued to conceal his errors and denied any evidence that he failed to properly advise Roberts prior to the purchase of Lot 12. See Drew deposition, February 14, 2012 at 79:2-6, 79:21-25, 80:1-3.

The Order makes no reference to Roberts assertions that Drew should be equitably estopped from claiming the statute of limitations defense. To claim equitable estoppel, a Plaintiff must prove that he (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. See *id.*; see also *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n. 2 (2000). "The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts." *Id.*

Here, Roberts lacked the legal skills and knowledge and means of obtaining knowledge of whether the Navy actually had an ownership interest sufficient to defeat his attempt to maintain a dock, as Drew advised he could do. Roberts, therefore, relied on Drew to conduct the title searches and provide the legal advice. Also, Drew's actions concealed the true facts of the Navy ownership, demonstrated his intentional desires to shield his errors from the Roberts and shows that he possessed both constructive and

actual notice of the true facts. Over the years, Drew continued to shield Roberts from the knowledge of his errors in part because if Roberts were successful in their litigation with the Navy, then Roberts would possibly never have discovered Drew's negligence.

The Order makes reference to various dates and events that Drew claims should have provided Roberts with knowledge as to Drew's errors. An analysis of many of these events demonstrates Drew's pattern of concealment as both a lawyer and a friend to Roberts. This pattern of concealment should estop Drew from now claiming statute of limitations as a defense in this matter.

For instance, Drew claims that "[a]t closing, Roberts was aware the Navy had previously claimed an ownership interest in the marshland adjacent to the Property and was cognizant of the impact the Navy's claim could have on the ability to build a dock." Demonstrating a prime example of a genuine issue of material facts such that summary judgment is improper, Drew distorts the fact that, while Roberts was aware that the Navy had previously claimed an ownership interest in the marshland, Drew had specifically advised Roberts that the Navy had no proof of ownership in the marsh. As Roberts testified, he believed and trusted Drew regarding his legal work concerning the Lot 12 purchase:

98:23 Q Did you talk about that with Mr. Drew
98:24 following the meeting, about whether he looked in the
98:25 right place?

99:1 A We probably discussed it outside and his
99:2 stance -- everything that Randy had ever done in this
99:3 transaction or any transaction has always been what I
99:4 considered -- you know, I mean, I believed him, trusted
99:5 him and that's why I continued to use him, that the
99:6 research that he did with the titles, the title for the
99:7 property did not show any of -- the government not
99:8 owning any of the land.

Roberts deposition, November 14, 2011. Roberts trusted Drew as his lawyer and fiduciary to provide competent legal advice. This trust in his lawyer in combination with Drew's fault advice reassuring Roberts that he would be able to maintain the dock, prevented Roberts from discovering the knowledge of the existence of a claim against Drew.

As another example, Drew claims that Roberts should have been aware of a claim against Drew when Roberts received an email indicating that the Navy was maintaining its ownership interest in the marshland. However, Roberts testified that after he got the November 13, 2006 email, he called Drew who told him there was no issue with the Navy because it was litigated, the ALJ had issued an Order, and Roberts had a legal dock permit:

75:17 A He would have told me that, "There is no
75:18 issue with the Navy. It was litigated or -- with the
75:19 administrative law judge and you've got a legal dock
75:20 permit."

75:21 Q You said he would have told you that. Do you
75:22 remember whether he actually told you that?

75:23 A He has told me that many, many, many times,
75:24 yes, sir.

Roberts Deposition, November 14, 2011. This phone call and the reassurances of Drew demonstrates why Drew should be estopped from asserting the statute of limitations defense.

As a further example, the Order makes reference to the cancellation on the purchase contract for Lot 12 based on concerns over the Navy's ownership claims, should have provided Roberts with notice of his claims against Drew. However, again, Roberts testified that Drew told him the dock permit was legitimate based on the ALJ's Order.

78:25 Q Do you know what the result of that
79:1 conversation was, or do you know what Mr. Drew told
79:2 you?

79:3 A Randy told me that, you know, we have in our
79:4 hands a legitimate dock permit, legal dock permit, and
79:5 based on the ALJ's decision, that we had a legal dock
79:6 permit.

79:7 Q Did he tell you whether he thought the Navy
79:8 owned the marshland?

79:9 A No.

Roberts Deposition, November 14, 2011. Again, these reassurances and efforts at concealment demonstrate why Drew should be estopped from claiming statute of limitations as a defense.

The Order puts great emphasis on Roberts' knowledge of the Navy's claim of ownership as a trigger to start the clock on the statute of limitations. However, this demonstrates the fundamental problem with Drew claiming the statute of limitations as a defense. Roberts knew of the Navy's claim of ownership since he first became involved with the Property, however, this did not lead to knowledge of Drew's errors because Drew had been improperly advising Drew for over a year that the Navy's claims were invalid. This pattern of advice shielded Roberts from the knowledge of Drew's errors and prevented Roberts from gaining access to the truth that would have put them, or any other similarly situated reasonable person, on notice of their claims against Drew.

Further, the Order focuses on the Navy's threats against Roberts as proof that Roberts should have known of their claims against Drew. However, Drew continuously reassured Roberts that the Navy was wrong and in fact had no claims, thus, because Roberts trusted Drew as his lawyer on this and other transactions, Roberts was unable to recognize the Navy's threats as evidence of Drew's errors. Drew assured Roberts that the Navy's threats were baseless and Roberts had no reason not to believe or trust his lawyer. Roberts testified that he remembered sending Mary Shahid's July 2007 letter to Drew and

Drew continued to tell Roberts that the Navy was wrong about owning the marsh property.

As Roberts testified:

101:7 Q And you received this letter in July of 2007,
101:8 correct?
101:9 A Yes.
101:10 Q And at this point, was Miss Shahid
101:11 representing you, or was she just forwarding you a
101:12 letter that she received from the Department of
101:13 Justice?
101:14 A I'm sure she was just forwarding the letter.
101:15 Q What did you do when you received this
101:16 letter, if you can recall?
101:17 A Probably called Randy and sent it to him.
101:18 Q Do you remember doing that?
101:19 A Yes.
101:20 Q What did Mr. Drew say?
101:21 A He said the same thing that he said the
101:22 entire time that we've had this dealing, it's not --
101:23 they're wrong, they're not right.
101:24 Q And you --
101:25 A They have not proven that they own this
102:1 property.

Roberts Deposition, November 14, 2011. Due to this pattern of concealing his errors, equitable estoppel prevents Drew from claiming the statute of limitations defense and the Order should be amended to address these estoppel issues.

Another example of an error in the Order concerning Drew's pattern of concealment is the reference to Roberts' letter to Senator Graham. This letter demonstrates that Roberts did not believe that the Navy's claims were valid because of Drew's consistent reassurances that the Navy had no proof of its ownership claims. As Roberts testified, as of February 2008, he had no need to find out how much it would cost to remove the dock because based on the information known to Drew and to Roberts there was no convincing evidence establishing the Navy owned the marsh:

109:18 Q Did you start looking into how much it would

109:19 cost to tear the dock down?
109:20 A I did eventually, and at what time, I don't
109:21 know. I've got an estimate, which I'm sure you've got,
109:22 for \$187,000. At that -- I don't know what the time
109:23 frame was when I received that.
109:24 Q I don't recall either. It might be in our
109:25 documents. You don't remember, as we sit here right
110:1 now, whether that was before or after this --
110:2 A Oh, it was not before -- I'm pretty sure it
110:3 was not before this at all. No. I know it wasn't,
110:4 because I had -- still had no real reason to find out
110:5 how much it would cost because I believed that -- as
110:6 well as Randy did, that we were right based on all the
110:7 information that he had gotten.

Roberts Deposition, November 14, 2011.

Further, Roberts testified that he was "reassured by my attorney over and over again that we have -- we really have no issue, we are right in this . . ."

112:4 Q And then the next sentence says, "This
112:5 controversy was going on for years before I bought the
112:6 property. Even though I was under the impression that
112:7 it was a done deal, it has once again reared its ugly
112:8 head." Is that what that says?
112:9 A Yes, sir.
112:10 Q So is it fair to say that at this time,
112:11 February 29, 2008, that the situation was a serious
112:12 issue in your mind?
112:13 A It was an issue and any time you get a letter
112:14 from the government threatening you the way they
112:15 threatened me, I would say it's a serious issue, but
112:16 when I'm reassured by my attorney over and over again
112:17 that we have -- we really have no issue, we are right
112:18 in this...

Roberts Deposition, November 14, 2011.

In addition, Roberts testified that as of February 6, 2008 he believed his position about the Navy was correct because of what Drew was telling him and what Drew claimed was confirmed by the recent title work done by the independent title agency:

112:19 Q Is it fair to say that at this point, you

112:20 don't know whether you were right in this?
112:21 A Oh, no. Trust me, I believed that I was --
112:22 that we were right, based on Randy telling me that
we
112:23 were right, I had -- you got to remember, you know,
112:24 this is my attorney, this is a guy that's done a lot of
112:25 closings for me, and I trusted him. And to this
113:1 letter, prior letters from the government, he still
113:2 believed that he was right in what he had Edisto Title
113:3 Search do a title search for.

Roberts deposition, November 14, 2011.

Even as late as September 30, 2009, Drew was claiming that he had no prior knowledge of the existence of the plat showing Navy ownership and assuring Roberts that the Navy's ownership claims were invalid because it was unable to present sufficient proof: "any time I've gotten the document (the judgment), it doesn't have the attachment" (i.e., the plat/"Exhibit B"). Drew deposition, September 30, 2009 at 139:13-139:15.

In sum, the Order should be amended to reflect that Drew is equitably estopped from claiming a statute of limitations as the basis for his motion for summary judgment and therefore summary judgment on those grounds is improper.

E. Other miscellaneous errors in the Order.

1. The Order finds as an undisputed fact that "Drew oversaw the 2005 closing."
 - a. While Plaintiff doubts this is a serious point of contention, the Order should conclude that Drew was the lawyer representing Roberts with regard to the closing on the property and that a client-lawyer relationship existed between Drew and Roberts such that Drew owed duties to Roberts with regard to the closing. Simply stating that "Drew oversaw the 2005 closing" does not acknowledge any duties Drew owed to Roberts.

2. The Order omits any references in the Findings of Fact to Drew's frequent and continual assurances to Roberts between November 2007 and May 2008 that the Navy's claims were invalid and should not impact the ability to maintain a dock at the Property. Given the number of references in the record to Drew's legal advice to Roberts assuring him of the accuracy and correctness of his legal advice, the Order should reflect those communications to put the remainder of the Findings of Fact and Conclusions of Law in context.
3. The Order states on page 2 that "Roberts later transferred title to the Property Plaintiff Lot 12 Yellow House, LLC, a company Roberts had recently formed." The Order omits the fact that Drew was the lawyer who actually formed LOT 12 YELLOW HOUSE, LLC on behalf of Roberts. Such a finding adds additional context to Roberts' reliance on Drew's advice throughout the relevant time periods.
4. The Order on pages 3-5 summarizes many of the events relevant to Roberts' knowledge and involvement with the claims by the Navy, but specifically omits reference to the facts showing that Roberts was calling in contacting Drew during the events summarized during which Drew continued to assure Roberts that the dock permit was valid and that the Navy could not prevent the maintenance of the dock.
5. The Order fails to make any reference to Drew's actual and active involvement in assisting Roberts in contesting the Navy's demands as referenced on page 8 paragraph 1 of the Order. Again, Drew was actively involved in contesting the Navy's claims and demands and continually assured Roberts that he would be able to maintain a dock on the Property.

6. The Order concludes on page 8, paragraph 1 that “[a] reasonable person under the circumstances would have known of a possible claim against drew by April 2008 at the very latest”, but does not explain why a reasonable person would have known of a claim against Drew at a time when no court or other authority had concluded that a dock could not be maintained.
7. The Order concludes at the top of page 9 that “[a]dopting a ‘right to rely’ argument would mean a cause of action against Drew has not yet accrued, as it remains unclear whether his advice regarding the validity of the Navy’s claim was correct.” This conclusion cannot be reconciled with the advice of Plaintiffs’ expert that Drew should have advised Roberts not to purchase the property.
8. The Order should be altered or amend to recognize factual allegations creating disputed issues of material fact that would defeat the motion for summary judgment.
9. The Order should be altered or amend to recognize that material facts are in dispute as to whether Defendant’s legal advice and statements to Plaintiffs concerning the legal viability of the dock permit and the legal status of the Navy’s claims of marsh ownership were sufficient for Plaintiff to believe he had no claim for professional negligence against Defendant based on the legal advice given to purchase the subject property.
10. The Order should be altered or amend to recognize that material questions of fact are in dispute as to whether it was appropriate for Plaintiffs to rely on Defendant’s assurances that the dock permit was valid and the Navy’s claims were not, including the legal advice Defendant’s gave to Plaintiffs more than 2 years after the closing on the subject property following the Defendant ordering a second title search in

November 2007 – *and after January 2007 when the prospective purchaser withdrew from the contract to buy the property.*

11. The Order should be altered or amend to recognize that material questions of fact are in dispute as to whether a reasonable lay person would have accepted Defendant's assurances that the dock permit was valid, again including Defendant's statements to Plaintiffs more than 2 years after the closing on the subject property that were made following Defendant ordering a second title search in light of the Navy's claims.
12. The Order should be altered or amend to recognize that material questions of fact are in dispute as to whether a reasonable lay person would have accepted the assurances and legal advice of their lawyer, Defendant Drew, given years after the closing that the dock permit was valid when other lawyers involved were essentially confirming the same assurances and legal advice given by Defendant.
13. The Order should be altered or amend to recognize that material questions of fact are in dispute as to whether under the circumstances prior to May 5, 2008,² a reasonable lay person would have known that a claim for legal professional negligence existed against Defendant.
14. The Order should be altered or amend to recognize that material facts are in dispute as to whether Plaintiffs reasonably relied on the legal advice Defendant and other lawyers were providing in defending the Navy's claims, none of whom ever suggested to Plaintiffs that Defendant did not meet the standard of care in advising Plaintiffs to proceed with the purchase of the subject property.

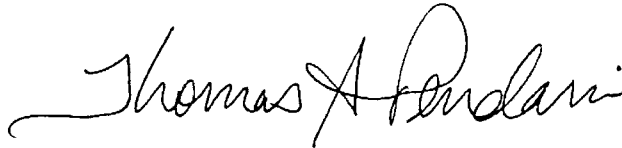
² This lawsuit was commenced on May 5, 2011.

CONCLUSION

Based on the foregoing arguments, the affidavits, deposition testimony, exhibits, and other evidence all viewed in the light most favorable to Plaintiffs, the Order should be altered or amend to show that Defendant's motion for summary judgment is denied. Genuine issues of material fact are in dispute on each element of Roberts' claims for breach of fiduciary duty and professional malpractice, such that granting Drew's motion for summary judgment would be inappropriate. Whether under the facts and circumstances Roberts should have known at some point on or before May 5, 2008, of the legal malpractice claims against Drew is for the jury to determine at the trial of this case. In addition, Drew should be estopped from raising a statute of limitations defense based on his conduct in failing to disclose his errors or at least disclose that there was a potential claim, as the federal judge later recognized. As a matter of public policy, lawyers should not be allowed to continually reassure their clients for years that everything is alright about the legal matter they handled – even though problems are surfacing – and then assert a statute of limitations defense when the client finally learns they had a claim.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

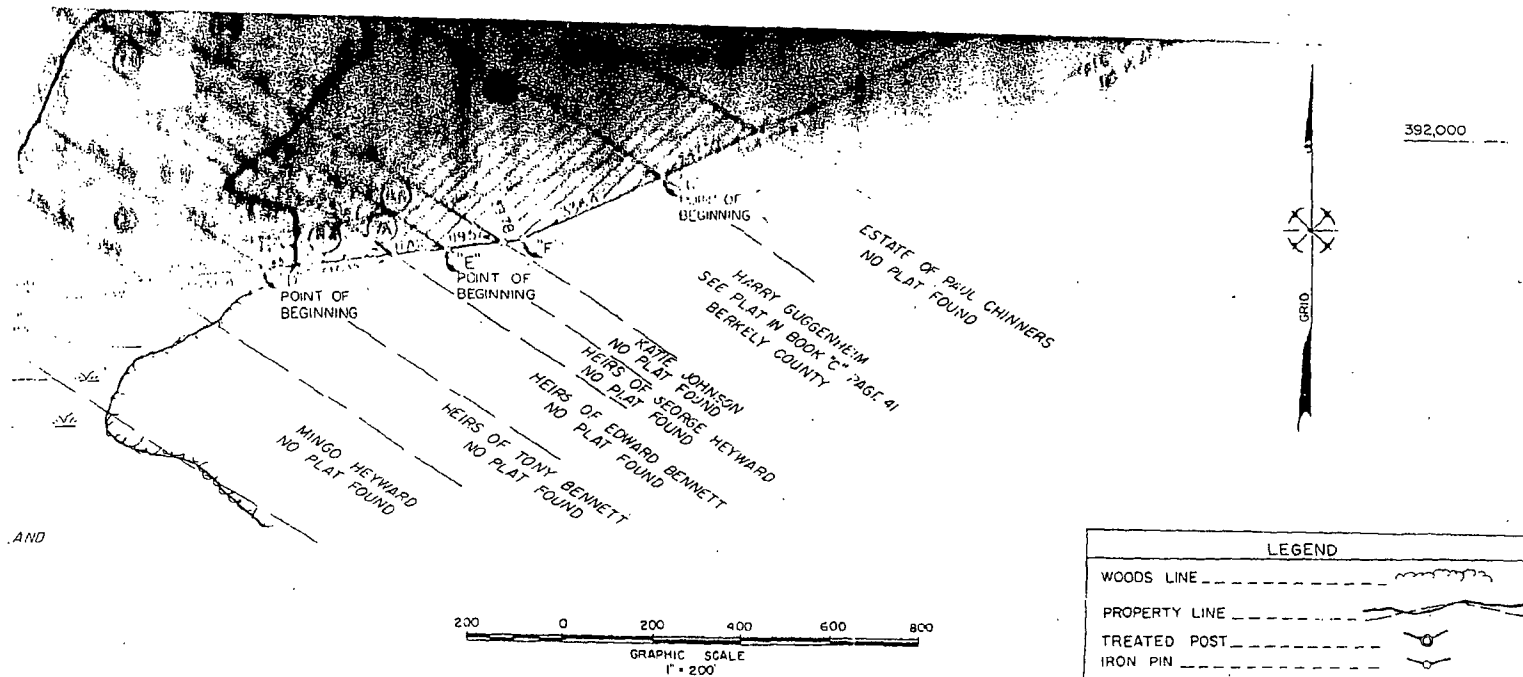
A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

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Lawyers for Plaintiffs

Beaufort, South Carolina

November 2, 2012



PROPOSED FEE ACQUISITION
PROPOSED LEASE AREA

NOTES AND BOUNDS OF MARSH AREAS ADDED TO
Y&D DRAWING NO. 1022237, 04-06-64

LEGEND	
WOODS LINE	---
PROPERTY LINE	---
TREATED POST	---
IRON PIN	---
MARSH	---

J.N. PEASE ASSOCIATES P.O. BOX 10336 - CHARLOTTE, N.C. ARCHITECTS - ENGINEERS		DEPARTMENT OF THE NAVY SOUTHEAST DIVISION - BUREAU OF YARDS AND DOCKS U.S. NAVAL BASE CHARLESTON, S.C.	
DES.	DR.	CH. ENGR. WALKINTON, M.	
SUPV.	DATE 1 APR 64		
PREPARED BY: PALMER & MALDINE CIVIL ENGINEERS H.M. PARKER		LAND ACQUISITION MAP FOR FBI REPLENISHMENT FACILITIES US NAVAL BASE CHARLESTON, S.C.	
APPROVED:	DATE	CODE IDENT NO.	SHEET
8-665-73-226	DATE	80091	F
JOB ORDER NUMBER	DATE	SCALE	Y&D DRAWING NO. 1022237
	DATE	1" = 200'	1 OF 2
	DATE	NOV. 58731	

EXHIBIT "B"

ALL RIGHTS IN - see original

Carlock-Shahid00219

2950-43538
Shahid.00219



AGREEMENT TO BUY AND SELL REAL ESTATE RESIDENTIAL

1. **PARTIES:** This legally binding Agreement entered into on October 27, 2006 between, Buyer(s), Robert Bowen, (hereinafter called "BUYER"), and Seller(s), LOF #12 Yellow House LLC, (hereinafter called "SELLER"). The property shall be deeded in the name(s) of Buyer's Choice

THE ☐ BUYER ☐ SELLER IS LICENSED UNDER THE LAWS OF SOUTH CAROLINA AS A REAL ESTATE LICENSEE

2. **PROPERTY TO BE SOLD:** Subject to terms and conditions herein, Seller agrees to sell and Buyer agrees to buy the following described property with improvements and fixtures thereon:

Lot 12 Block _____ Section _____ Subdivision _____

Address _____

Tax Map # 267-00-00-012 City Charleston Zip 29492

County of Berkley, State of South Carolina.

Seller represents that the property is connected to ☐ public sewer system or to ☒ septic tank or to ☐ public water or to ☒ well system or to ☐ other _____

No personal property will convey as a part of this sale, except as described: Inventory list to be provided by seller and approved by buyer

3. **CONVEYANCE SHALL BE MADE:** Conveyance shall be made subject to all easements as well as covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations. Seller agrees to convey by marketable title and deliver a proper general warranty deed, if applicable, free of encumbrances, except as herein stated. Seller agrees to pay all statutory deed recording fees. The deed shall be delivered at the stipulated place of closing, and transaction closed on or before January 8, 2007, not later than 8:00 p.m. Time is of the essence. Seller and Buyer authorize their respective attorneys and the settlement agent to furnish to Listing Broker and Selling Broker copies of the final HUD-1 settlement statement for the transaction for their review prior to closing.

4. **POSSESSION:** Possession of said property will be given to Buyer at the time of closing. Seller agrees to deliver property free of debris and in a clean condition. The property, including but not limited to, landscaping and lawn, shall be maintained in the same condition from the effective date of this agreement until possession is delivered, ordinary wear and tear excepted. Possession by Buyer before closing or by Seller after closing shall be subject to the terms and conditions of a separate agreement to be executed prior to closing or occupancy.

5. **PURCHASE PRICE** shall be \$ 2,200,000.00
Two Million Two Hundred Thousand dollars.

6. **METHOD OF PAYMENT:** Purchase price shall be paid as follows: ☒ Cash; or ☐ Subject to Financing. Financing to be obtained by ☐ Conventional ☐ Seller ☐ VA ☐ FHA ☐ Other terms: _____

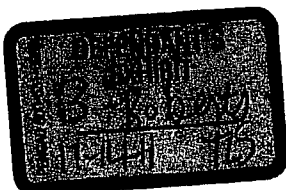
7. **EARNEST MONEY:** This offer is accompanied by an earnest money deposit of \$ 10,000.00. Buyer and Seller authorize Agent Owned Realty, as Escrow Agent, to hold and disburse earnest money according to the terms of this agreement. Earnest money paid by ☐ Cash, ☒ Check, or ☐ Other. Broker does not guarantee payment of a check or checks accepted as earnest money. All escrow money received shall be deposited as required by South Carolina law and South Carolina Real Estate Commission Rules and Regulations. At the consummation of this sale, the earnest money deposit shall be credited to the Buyer.

11/3 BUYER ☐ BUYER ☐ SELLER ☐ SELLER HAVE READ THIS PAGE

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Agent Owned Realty, Professional Group, Inc. 824 Lakeside Dodge Blvd., Mt. Pleasant SC 29564
Agent: Robert Bowen

Phone: 843.234.0394 Fax: 843.234.0765
Produced with 21stForm™ by R.E. Formulator, LLC 18025 Pittman Mills Road, Clinton Township, Michigan 48035 www.21stform.com



10/29/2006 04:17PM

THE PARTIES UNDERSTAND THAT, UNDER ALL CIRCUMSTANCES, INCLUDING DEFAULT, THE ESCROW AGENT HOLDING THE EARNEST MONEY DEPOSIT WILL NOT DISBURSE IT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT.

8. **LOAN PROCESSING AND APPLICATION:** Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum _____ % loan (loan-to-value ratio) within _____ consecutive days from the execution of this Agreement and shall provide Seller with written satisfactory loan approval within _____ consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. Time is of the essence. Should the Buyer fail to make loan application or receive approval within said period, and to diligently pursue the application, the Seller shall have the option to terminate this Agreement, with written notice. Buyer also agrees to provide all documents or information requested by the lending company in a prompt and timely manner. Buyer will take any action that is needed or requested by Lender to process the loan application. Buyer further hereby gives permission to Lender to disclose pertinent information concerning the Buyer's credit-worthiness or any other information needed for the loan processing to the listing or cooperating broker(s) or agent(s). If Buyer fails to comply with these above contingencies, Buyer shall be in default of this agreement subject to the terms of paragraph 16.
FHA Mortgage Insurance ☐ will ☐ will not be added to the mortgage. VA funding fee ☐ will ☐ will not be added to the mortgage.

9. **CLOSING COSTS:** Unless otherwise agreed, closing costs, including all loan charges and prepaid recurring items, shall be paid as follows:

(a) SELLER shall provide or pay for preparation of deed, any recording charge based on value of property, and all costs necessary to deliver a marketable title, including recording of satisfactions and property taxes to the day of closing.

(b) BUYER shall pay, unless otherwise agreed herein, the cost of the Buyer's credit report, property insurance, appraisal, survey, cost of obtaining loan, discount points, title examination, escrow deposits, and prepaid expenses. The Buyer shall also pay, if applicable, interim interest and mortgage insurance premium or VA funding fee. Buyer's hazard insurance policy shall provide coverage as required by lender. Other terms: _____

10. **HOME PROTECTION PLAN COVERAGE:** Both parties understand that a third party home warranty Plan ☐ will ☒ will not be issued at closing. If applicable, the warranty premium will be paid at closing by the ☐ Buyer or ☐ Seller not to exceed \$ _____.

11. **EXPIRATION OF OFFER:** The offer from Buyer shall be withdrawn at _____ 10:00 _____ o'clock _____ P. M. on October 30, 2006 unless accepted or countered by Seller in written form prior to such time. Time is of the essence. Nov 1, 2006 10:00/06

12. **EXTENSION AGREEMENT:** If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date. Time is of the essence.

13. **ADJUSTMENTS:** Taxes, water, all sewer assessments, sewer charges, fuel oil, rents as when collected, insurance premiums, if applicable, and other assessments, including homeowner's association fees, shall be adjusted as of the date of closing. Tax prorations pursuant to this Agreement are to be based on the tax information available on the date of closing, and are to be prorated on that basis. **BUYER TO BE RESPONSIBLE FOR APPLYING FOR ANY APPLICABLE TAX EXEMPTIONS.** The ☐ Buyer or the ☒ Seller shall pay for the cost of any Certificate of Assessment, or other similar document, made available, if applicable. Property taxes and rent, as well as other expenses and income of the property, if applicable, shall be apportioned to the date of closing. Annual expenses or income shall be apportioned using 365 days. Monthly property expenses or income shall be apportioned by the number of days in month of closing. Prorations at closing shall be final.

14. **NON-RESIDENT TAX:** Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.

15. **RISK OF LOSS OR DAMAGE:** In case the property herein referred to is destroyed wholly or partially by fire or other casualty prior to delivery of deed, Buyer or Seller shall have the option for ten (10) days thereafter of proceeding hereunder, or of terminating this Agreement.

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remedy such deficiencies, subject to section (E) below, and shall furnish Buyer with a report of a qualified inspector that property is free from infestation or damage herein mentioned or that infestation or damage has been treated and/or repaired as appropriate in a workmanlike manner on or before closing.

If the property to be sold has not been previously occupied, Seller shall certify that the dwelling has been treated by soil poisoning for the prevention of termites and other wood destroying organisms and shall provide the Buyer, at closing, a written certification from a licensed pest control operator.

(E) **Repairs:** The cost of all repairs to heating system, air conditioning, plumbing, and electrical system to be conveyed, and to make the roof free of leaks, to address environmental concerns and to make the dwelling structurally sound and provide wood infestation treatment, if any, required by section (B) and (D) above, to be paid by Seller. If the Seller refuses to make these repairs and treatment, the Buyer shall have the option to (1) accept the property in its present condition, (2) negotiate with the Seller for the payment of these repairs and treatment, or (3) terminate this Agreement, subject to paragraph 7. The repairs to any other items are the sole responsibility of Buyer. The obligations of Seller under paragraph 19 terminate on the day of closing or on the day possession is given, whichever occurs first.

(F) **Residential Dwellings Built before 1978:** (check one of the following)

☐ This contract is contingent upon a risk assessment or inspection of the property for the presence of lead-based paint and/or lead-based paint hazards which shall be done, at the Buyer's expense, by midnight on the tenth day after ratification of this contract or by midnight on _____, (Intact lead-based paint that is in good condition is not necessarily a hazard. See EPA pamphlet "Protect Your Family From Lead in Your Home" for more information). This contingency will terminate at the above predetermined deadline unless the Buyer (or Buyer's agent) delivers to the Seller (or Seller's agent) a written contract addendum listing the specific existing deficiencies and corrections needed, together with a copy of the inspection and/or risk assessment report. The Seller may, at the Seller's option, within _____ days after Delivery of the addendum, elect in writing whether to correct the condition(s) prior to settlement. If the Seller will correct the condition, the Seller shall furnish the Buyer with certification from a risk assessor or inspector demonstrating that the condition has been remedied before the date of the settlement. If the Seller does not elect to make the repairs or if the Seller makes a counter-offer, the Buyer shall have _____ days to respond to the counter-offer or remove this contingency and take the property in "as-is" condition or this contract shall become void. Upon such termination, the earnest money deposit of Buyer shall be returned to Buyer and neither party shall have any further rights hereunder. The Buyer may remove this contingency at any time without cause; or

☐ Buyer waives the opportunity to conduct a risk assessment or inspection for lead-based paint and/or lead-based paint hazards.

(G) **Megan's Law:** The Buyer and Seller agree that the Listing and Selling Broker and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Buyer and Seller agree that no course of action may be brought against the Listing and Selling Broker and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Buyer and Seller agree that the Buyer and Seller have the sole responsibility to obtain any such information. The Buyer and Seller understand that Sex Offender Registry information may be obtained from the local sheriff's department or other appropriate law enforcement officials.

(H) **Disclaimer:** The Buyer acknowledges the Seller, except as provided in subparagraphs (B), (C), (D), and (E) of this section, gives no guarantee or warranty of any kind, expressed or implied, as to the physical condition of the property or to the conditions of or existence of improvements, services, appliances or system thereto, or as to merchantability or fitness for a particular purpose as to the property or improvements thereof, and any implied warranty is hereby disclaimed by the Seller.

Neither Buyer nor Seller will hold Cooperating or Listing Broker responsible for any act of negligence or intent by any inspection or repair company employed by Seller or Buyer for the purposes of this agreement. The Seller is not required to make any repairs under any circumstances until Purchaser's financing has been approved.

20. **APPRAISED VALUE:** (check one)

☐ This agreement is not contingent on the lot or parcel with building and improvements thereon, if any, appraising, according to the lender's appraisal or other appraisal as agreed, for the selling price.

☒ This agreement is contingent on the lot or parcel with building and improvements thereon, if any, appraising, according to the lender's appraisal or other appraisal as agreed, for the selling price or more; if the lot or parcel with building and improvements thereon appraises for less than the selling price, the seller may elect to sell for the appraised value. In such case, the Buyer agrees to proceed with the consummation of this sale at the reduced price. However, if Seller does not agree to sell at the appraised value, the Buyer shall have the option of

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proceeding with the consummation of the Agreement without regard to the amount of the appraised valuation, or terminate the agreement without penalty.

- 21. DISCLAIMER BY BROKERS AND AGENTS:** The parties acknowledge that the Listing and Cooperating Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the property or as to condition of or existence of improvement services or systems, thereto, included but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage, electric systems, and to the structure; (2) Give no warranty, express or implied, as to the merchantability or fitness for a particular purpose as to the property or such improvements thereto and any implied warranty hereby disclaimed; (3) Give no warranty as to title; (4) Give no guaranty or warranty concerning (a) any certification or inspection concerning the condition of the property, (b) any matters which would be reflected by current survey of the property, and (c) the accuracy of the published square footage of the property; (5) Buyer acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Buyer regarding (a) projected income or economic benefit for Buyer from rentals; (b) rental arrangements except that Buyer may rent the unit if Buyer so desires or (c) other economic benefits to the Buyer.
- 22. COASTAL TIDELANDS & WETLANDS ACT:** In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures at ☐ Buyer's ☒ Seller's expense.
- 23. MEDIATION CLAUSE.** Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this Agreement pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding.
- This mediation clause shall survive for a period of 120 days after the date of the closing. The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; (e) the filing of a interpleader action to resolve earnest money disputes. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.
- 24. SURVIVAL:** If any provision herein contained which by its nature and effect is required to be observed, kept or performed after the closing, it shall survive the closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed.
- 25. ENTIRE BINDING AGREEMENT:** This written instrument, including the additional terms and conditions set forth on any documents intended by the parties to be included, expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Seller. It can be changed only by a subsequently written instrument signed by both parties. Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein. The benefits and obligations shall inure to and bind the parties hereto and their heirs, assigns, successors, executors, or administrators. Whenever used, singular includes plural, and use of any gender shall include all.
- 26. FACSIMILE AND OTHER ELECTRONIC MEANS:** The parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.
- 27. TRUST ACCOUNT INTEREST/CHARITABLE CONTRIBUTION:** According to the rules and regulations of the South Carolina Real Estate Commission and the Code of Laws of South Carolina, 1976, as amended, any interest earned on Buyer's earnest money deposit would belong to Buyer until the closing of the transaction referenced in this agreement. It is understood that Broker ☐ may ☒ may not place deposited earnest monies into an interest bearing trust account. If Buyer's earnest money deposit is deposited into an interest bearing trust account, Broker will retain all interest earned in said account.

 BUYER ☐ BUYER ☐ SELLER ☐ SELLER HAVE READ THIS PAGE

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28. **NON-RELIANCE CLAUSE:** Both Buyer and Seller hereby acknowledge that they have not received or relied nor could have relied upon any statements or representations or promises or agreements or inducements by either Broker or their agents which are not expressly stipulated herein. If not contained herein, such statements, representations, promises, or agreements shall be of no force or effect. This general non-reliance clause shall not prevent recovery in tort for fraud or negligent misrepresentation or intentional misrepresentation unless specific non-reliance language is included in this agreement. This is a non-reliance clause and is neither a merger clause nor an extension of a merger clause. The parties execute this agreement freely and voluntarily without reliance upon any statements or representations by parties or agents except as set forth herein. Parties have fully read and understand this Agreement and the meaning of its provisions. Parties are legally competent to enter into this agreement and to fully accept responsibility. Parties have been advised to consult with counsel before entering into this agreement and have had the opportunity to do so.

28. **CONTINGENCIES:** These stipulations shall preempt printed matter herein (attach and reference addendum if necessary) ADDENDUMS A AND B ARE INTEGRAL PARTS OF THIS AGREEMENT

THIS IS A LEGALLY BINDING AGREEMENT. BOTH BUYER AND SELLER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT. BOTH BUYER AND SELLER ACKNOWLEDGE RECEIVING, READING, AND UNDERSTANDING THE SOUTH CAROLINA REAL ESTATE COMMISSION'S AGENCY DISCLOSURE FORM.

ALL TERMS AND CONDITIONS OF THIS AGREEMENT DO NOT SURVIVE CLOSING UNLESS OTHERWISE SPECIFIED.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: Robert Bowen Date 10/29/06 Time 3:35 PM

WITNESS: _____ Date _____ Time _____

BUYER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

SELLER: LOT #12 Yellow House LLC Date _____ Time _____

WITNESS: _____ Date _____ Time _____

SELLER: _____ Date _____ Time _____

WITNESS: _____ Date _____ Time _____

LISTING AGENT AND COMPANY Chuck Mims Agent Owned Realty

SELLING AGENT AND COMPANY Susan Bryant Agent Owned Realty

SELLING AGENT IS PRESENTING THIS OFFER AS A ☒ BUYER'S AGENT OR ☐ SUBAGENT OF THE SELLER

ESCROW AGENT ACKNOWLEDGMENT Agent Owned Realty

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**ADDENDUM A
TO CONTRACT OF SALE**

Dated 10/27/06 Between

Robert Bowen and Lot #12 Yellow House LLC

for the purchase of

The following marked items shall be considered an integral part of the contract referenced above and to which it is attached and where conflicting shall be considered in effect:

[] **HOME FOR SALE CONTINGENCY:** this offer is contingent upon the sale & conveyance of the Buyer's present home located at _____ on or before _____. Buyer shall within _____ days list their present property with a Realtor and provide the Seller with a copy of the listing agreement. It is understood that the subject property shall remain as an active listing and shall be actively marketed. Should another acceptable contract be received by the Seller, the Buyer shall be given _____ consecutive hours after notification to remove this contingency in writing or this contract shall be considered null & void and the earnest monies shall be refunded to Buyer in full. Notification shall be deemed to have been received by the Buyer upon the fixing of such notice to the Buyer's agent.

[x] **DEED RESTRICTIONS AND RESTRICTED COVENANTS:** Seller to provide copy of any deed restrictions (including zoning ordinances, condemnation documents, i.e. master deed, bylaws, or financial information) and a copy of all restrictions and covenants for said property upon acceptance of this offer within _____ consecutive days and this contract is contingent upon Buyer's approval of same by or within 5 consecutive days from the time Seller delivers same to Buyer.

[] **SELLER'S PROPERTY DISCLOSURE:** Seller shall complete, sign and return to Buyer the attached Seller's Disclosure Statement before Seller's acceptance of this offer. If the Seller's Disclosure Statement discloses any material information about the property which is not acceptable to Buyer, Buyer may terminate this contract with written notice to Seller within 3 consecutive days of receipt of Seller's Disclosure Statement, and receive a return of all deposits. However, Buyer's failure to object to the Seller's Disclosure Statement shall not limit or modify Buyer's right of inspection or Seller's obligations to perform any repairs and maintenance specified within the Agreement to Buy and Sell.

[x] **EXISTING TERMITE BOND:** If there is a transferable bond on the property, () buyer (x) seller to pay cost of transferring bond. Cost not to exceed \$ _____ 200. Seller to complete the following: there () is () is not a termite bond existing on the property. The bond is () a repair bond () no-term bond. It () is () is not transferable to new buyer. The name of company holding the bond is - Seller to provide buyer with a soil treatment letter and termite bond.

[x] **TITLE INSURANCE:** Seller to provide a copy of a current or past title insurance policy for the subject property.

[x] **SURVEY & ELEVATION CERTIFICATE:** Seller to provide buyer with prior survey and elevation certificate.

[] **"AS IS" CLAUSE:** Each undersigned Buyer hereby expressly acknowledges and accepts that they are buying this property strictly "as is" with no warranties implied, expressed or written. This includes personal and real property included as a part of this sale. Buyers should require expert inspections before obligating themselves to purchase, since there may be concealed defects not evident by a casual inspection.

[] **APPROVAL OF ANOTHER PERSON (Relative, Accountant, Attorney, etc):** This contract is contingent on (Name) _____ approving this purchase. Said approval will be made in writing, removing this contingency by (date/time) _____. **TIME BEING OF THE ESSENCE** or this contract is null and void at the Seller's option alone.

[] **BACK-UP CLAUSE:** This offer, if accepted by all parties, will be considered a back-up contract (non-primary). It is contingent upon all presently pending contracts not closing since if any presently pending contracts do close, this contract will become null and void. If this contract does not become the primary pending contract by _____, regardless of the status of other pending contracts, this contract will become null and void with no further actions necessary by either party. If this contract becomes null and void, the Buyer's earnest money will be refunded immediately in full. Any back-up contract will become a primary contract when its earliest date of fully negotiated terms is the earliest date of all pending contracts and all previously dated contracts have become null and void, unenforceable and/or released. If this offer becomes primary, Buyer has _____ consecutive days to complete the transaction.

(1/6/07) Buyer [] Buyer [] Seller [] Seller [] have read this page.

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☒ **SURVEY:** Within 30 consecutive days after acceptance of this offer, the property shall be surveyed by a licensed surveyor at the expense of the Buyer. The surveyor shall set and flag all property pins, showing encroachments and easements. Property must be a x or having at least acres. The survey is to be approved in writing by Buyer prior to close of escrow. The purchase price is based upon \$ per (acre, sq. ft., front ft., or) and shall be adjusted in accordance with the area set forth in such a survey, if applicable. Seller shall provide copies of all prior surveys, dock permit documents, elevation certificate, and any other applicable documents for the approval of the Buyer.

☒ **SOIL & WATER TEST:** Upon acceptance of this agreement, Buyer shall have the right to go upon the property to conduct soil and water tests, including percolation tests, to ascertain whether the property is suitable for the improvements which Buyer proposes to make. All expenses of such tests shall be borne by the Buyer and Buyer shall be responsible for the repair and restoration of any damage to the property which may be caused by such tests. If in the opinion of the engineer, employed by Buyer, the property is not suitable for the proposed improvements, this agreement at the option of the Buyer, may be terminated and all deposits shall be refunded. Buyer shall be deemed to have waived this condition unless written notice to the contrary is delivered to Seller or Seller's agent within consecutive days of acceptance.

☐ **PERMIT CONTINGENCIES:** Contingent upon Buyer receiving all necessary permits from proper governmental authorities for intended use (building, dock), zoning, soil and water evaluations (including any evaluations necessary by DHEC, Corps of Engineers, South Carolina Coastal Council or other environmental groups), surveys, utility approvals and land clearing approvals (to permit view of ...) to construct a single family dwelling (or other) to Buyer's satisfaction. This must be completed by or this contract becomes null and void.

☐ **F.I.R.P.T.A. (Foreign Investment and Real Property Tax Act):** The Foreign Investment and Real Property Tax Act requires a buyer purchasing real property from a foreign person to withhold tax from the sale proceeds unless an exemption applies. Owner agrees to provide Buyer with a certification establishing that no federal income tax is required to be withheld under the act, or to establish that the transaction is exempt and the Buyer intends to use the property as personal residence due to existing laws at time of closing.

☐ **COMMISSION DISCLOSURE:** Buyer is a licensed South Carolina Real estate licensee representing himself/herself or is a relative of the Buyer and () does / () does not anticipate receiving commission.

☒ **HOME INSPECTION APPROVAL AT SOLE DISCRETION OF BUYER:** This Agreement is contingent upon Buyer's approval of the home inspections referenced in paragraph 19 of said Agreement which is referenced above. If Buyer(s) is not satisfied in any way with said inspection(s), Buyer(s) shall have the option of voiding this Agreement with written notice, and all earnest monies be returned to Buyer(s) with no further documentation required by either party.

☒ **HOME INSPECTION:** Seller shall have 15 consecutive days, **TIME IS OF THE ESSENCE**, to respond to buyer's repair request or Buyer(s) shall have the option of voiding this Agreement with written notice, and all earnest monies to be returned to Buyer(s) with no further documentation required by either party. Seller agrees that any repairs agreed to by seller will be made by a S.C. licensed contractor in a workmanlike manner and shall be completed by the date of closing .
(date)

☐ **MORTGAGE:** In addition to paragraph 8 of attached contract, this contract is contingent upon the buyer being able to obtain an interest rate of no more than %. Should such an interest rate not be obtained, buyer shall have the option of voiding this Agreement with written notice and all earnest monies to be returned to Buyer(s) with no further documentation required by either party.

☐ **SELLER TO PAY CLOSING COSTS:**
Seller(s) to pay either \$ or % of sales price, towards buyer(s) closing costs to include pre-pays and home inspection if allowed by lender. (not to exceed 3% if loan is 90% LTV or higher, & not to exceed 6% if 90% LTV).

☒ **ITEMS TO REMAIN WITH PROPERTY:** Buyer requests that all personal items and appliances, etc. listed in the current MLS agreement convey at closing. Both parties agree that these are included in the sales price and no additional monies will be due. Other items to convey at closing at no additional costs are: As per inventory list, plans, and specifications as provided by the Seller and approved by the Buyer.

☒ **WALK-THROUGH INSPECTION:** Prior to Closing, Buyer shall have the privilege of a walk-through inspection to verify that the property is in the same (or better) condition as at the signing of this Agreement.

☒ **RISK OR LOSS OF DAMAGE:** In the event of damage to the property by fire or other casualty requiring restoration of any part of the premises, Buyer shall have the right to terminate this Agreement, with written notice, and the earnest monies will be returned to Buyer(s) with no further documentation required by either party.

1/16) Buyer |) Buyer |) Seller |) Seller have read this page

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☐ **SELLER FINANCING:** If the Seller is to receive all or a portion of the sales price of the property in the form of deferred payments, then the Buyer shall pay \$_____ to the Seller under the terms of a promissory note and real estate mortgage with the said sum payable with interest at _____% ANNUAL PERCENTAGE RATE in consecutive installments of \$_____ for a term of _____. The Seller reserves the right to specify the promissory note and real estate mortgage forms to be used by the Buyer and approved by Buyer's attorney. These note and mortgage forms will be similar to those used by commercial banks and savings and loan institutions providing similar term financing in South Carolina and shall include among other provisions the requirement for the maintenance of adequate hazard insurance at the expense of the Buyer sufficient to pay in full all mortgage liens on the subject property with the Seller named as an insured mortgagee, a provision for a "due-on-sale" clause, the requirement for a reasonable late charge, the right of prepayment in whole or in part without penalty, appropriate provisions regarding acceleration of the loan balance and foreclosure in the event of a default by the Buyer, and a "right to cure" clause similar to that provided in your area. Buyer to furnish Seller evidence of paid real estate property taxes at end of each year. The Buyer shall personally guarantee the promissory note and real estate mortgage. The Seller reserves the right to request and approve a financial statement from the Buyer. The Seller also reserves the right to secure any personal property conveyed by the transaction through the filing of the proper UCC statements in situations where the Buyer is to occupy the premises before closing.

☒ **COASTAL TIDELANDS & WETLANDS ACT:** This property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et. seq., South Carolina Code of Laws), and the critical area line and marsh area is shown on the plat of subdivision at Book _____ at Page _____ or survey by _____ dated _____. If a dock permit has been issued, then the property is subject to any restrictions contained in such permit and the Seller agrees to execute an assignment of any such dock permit to the Buyer and all documents for Buyer's approval.

☒ **HAZARDOUS MATERIAL:** Various materials utilized in the construction of any improvements to the Property may contain materials that have been or may in the future be determined to be toxic, hazardous, or undesirable and may need to be specially treated, specially handled and/or removed from the Property. For example, some electrical transformers and other electrical components can contain PCBs, and asbestos has been used in a wide variety of building components such as fire-proofing, air duct insulation, acoustical tiles, spray-on acoustical materials, linoleum, floor tiles and plaster. Due to current or prior uses, the Property or improvements may contain materials such metals, minerals, chemicals, hydrocarbons, biological or radioactive materials, and other substances which are considered, or in the future may be determined to be, toxic wastes, hazardous materials or undesirable substances. Such substances may be in above and below ground containers on the Property or may be present on or in soils, water, building components, or other portions of the Property in areas that may or may not be accessible or noticeable. Current and future federal, state, and local laws and regulations may require the clean-up of such toxic, hazardous, or undesirable materials at the expense of those persons who in the past, present, or future have had any interest in the Property including, but not limited to, current, past and future owners and users of the Property. Sellers and Buyers are advised to consult with independent legal counsel of their choice to determine their potential liability with respect to toxic, hazardous, or undesirable materials they may wish to include in purchase and sales agreements, leases, options, and other legal documentation related to transactions they contemplate entering into with respect to the Property. The real estate salespersons and brokers in this transaction have no expertise with respect to toxic wastes, hazardous materials, or undesirable substances. Property inspections of the Property by qualified experts are an absolute necessity to determine whether or not there are any current or potential toxic wastes, hazardous materials, or undesirable substances in or on the Property. The real estate salespersons and brokers in this transaction have not made, nor will make representations, either express or implied, regarding the existence or non-existence of toxic wastes, hazardous materials, or undesirable substances in or on the Property. Problems involving toxic wastes, hazardous materials, or undesirable substances can be extremely costly to correct. It is the responsibility of Sellers and Buyers to retain qualified experts to deal with the detection and correction of such matters.

☒ **BACK FLOW PREVENTER:** If the property has a irrigation system, the seller agrees that a back flow preventer has been installed according to the requirement of DEHEC or ☒ a) seller agrees to install such prior to closing (IF REQUIRED BY DEHEC) or ☐ b) buyer assumes responsibility for installing after closing.

☒ **HOMEOWNERS INSURANCE:** This offer is contingent upon the Buyer(s) ability to secure affordable homeowners insurance within 15 consecutive days after contract ratification. Time is of the Essence.
 [Signature] Buyer [] Buyer [] Seller [] Seller have read this page.

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[] **HOMESOWNERS ASSOCIATION:** Buyer(s) acknowledge that there will be a mandatory Homeowner's Association and further acknowledge that homeowner's assessments of \$ _____ shall be payable to _____ () monthly () quarterly () annually, and otherwise agrees to abide by the covenants and provisions contained in the subdivision documents. The contact person/company for the HOA is _____ phone # _____

[X] **CLOSING ATTORNEY:** The closing attorney shall be _____ Buyer's Choice _____

[] **BUYER** is a customer of the selling agent and is not being represented.

[X] **CONFIDENTIALITY:** All financial data and other proprietary information with regard to the terms of the offer to purchase or other sales agreement concerning the above referenced property shall be treated as confidential by Buyer and Seller and shall be disseminated to third parties on a "need to know" basis only. Upon the termination or completion of this agreement, Broker shall keep confidential all information received during the course of this agreement, which was made confidential by written request or instructions from the client, except as provided for under South Carolina law.

[X] **OTHER STIPULATIONS:** This contract is contingent upon the following: Buyer's approval of the plans and specifications ^{to the lot line add 14/16/06} regarding this property. Seller shall complete all items not yet completed. The handrails on both sides of the dock as well as the water and power to the deck shall be completed. The driveway and road to the property shall not be paved by the seller, but will be completed as required by any applicable city or county zoning or ordinance. The driveway and parking areas shall be graded and finished with gravel or other material to the satisfaction of the Buyer. The Seller warrants that no further paving requirements will be required on the part of the Buyer to meet any zoning, building code, or subdivision regulations, unless desired by the Buyer at a future time. Seller to provide Buyer with a copy of any applicable Builder's Warranty for Buyer's approval.

The earnest money shall be mailed by overnight mail within 24 business hours after contract ratification.

NOTICE

TAXES: The parties acknowledge that taxes may increase significantly if the county in which the property is located undergoes property tax reassessment. Furthermore, the parties acknowledge that the county in which the property is located may have a 15% tax cap ordinance as allowed by South Carolina Code 12/37-223A(A), which may cause an additional, and substantial, increase in property taxes for the tax year following closing.
(Buyer's Initials Here)

SQUARE FOOTAGE: The square footage listed in any materials or marketing information provided by Seller, Listing or Selling Agents is deemed to be reliable, however, Seller, Listing and Selling Agents make no representation as to the accuracy of the square footage. It is the Buyer's responsibility to verify any square footage measurements to their satisfaction. Buyer is not purchasing the property based upon any representation of Seller, Listing and Selling Brokers. Buyer hereby indemnifies and holds harmless all Sellers, Brokers and Agents due to any discrepancies arising out of measurements. Buyer realizes that as a Buyer, he/she has the **ULTIMATE RESPONSIBILITY** of accepting or rejecting such figures.
(Buyer's Initials Here)

Buyer:	<u>[Signature]</u>	Date:	<u>10/29/06</u>	Time:	<u>3:35 PM</u>
Witness:	_____	Date:	_____	Time:	_____
Buyer:	_____	Date:	_____	Time:	_____
Witness:	_____	Date:	_____	Time:	_____
Seller:	_____	Date:	_____	Time:	_____
Witness:	_____	Date:	_____	Time:	_____
Seller:	_____	Date:	_____	Time:	_____
Witness:	_____	Date:	_____	Time:	_____

The Agent Owned Realty Co.

LISTING AGENT AND COMPANY:

Agent owned Realty Co.

SELLING AGENT AND COMPANY:

Agent owned Realty Co. Susan K. Bryant



ADDENDUM B

In reference to ☒ AGREEMENT TO BUY AND SELL REAL ESTATE, ☒ RESIDENTIAL RENTAL AGREEMENT,
☐ COUNTER OFFER, ☐ OTHER _____ covering the ☒ real property,
☐ business, ☐ premises — commonly known as:

Lot 12 Block _____ Section _____ Subdivision _____

Address _____

Tax Map # 267-00-00-012 City Charleston Zip 29402

County of Berkley, State of South Carolina.

The undersigned Parties hereby agree as follows:

This contract is contingent upon the Buyer's satisfaction with the information obtained from the city or county planning and zoning departments & OCRM regarding this property as well as other properties in the same general area by 11/10/06. The home inspection shall be held upon completion of the construction with at least 10 days prior notice from the builder. Closing will occur on or before January 8, 2007 or within 15 days of completion satisfactory to the Buyer, whichever is later. Buyer and Seller agree to extend the closing date, if necessary for completion.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: Robert Bowen

Date 10/29/06

Time 3:35 PM

WITNESS: _____

Date _____

Time _____

BUYER: _____

Date _____

Time _____

WITNESS: _____

Date _____

Time _____

SELLER: _____

Date _____

Time _____

Lot #12 Yellow House LLC

WITNESS: _____

Date _____

Time _____

SELLER: _____

Date _____

Time _____

WITNESS: _____

Date _____

Time _____

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 Phone: 843.224.0804 Fax: 843.884.7995 Susan Kharosh Bryant

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ADDENDUM



In reference to ☒ AGREEMENT TO BUY AND SELL REAL ESTATE, ☒ RESIDENTIAL RENTAL AGREEMENT,
☐ COUNTER OFFER, ☐ OTHER _____ covering the ☐ real property,
☐ business, ☐ premises — commonly known as: _____

Lot 12 Block _____ Section _____ Subdivision _____

Address _____

Tax Map # 267-00-00-012 City Charleston Zip 29492

County of Berkeley, State of South Carolina.

The undersigned Parties hereby agree as follows:

Buyer and Seller agree that Buyer shall have 5 business days after receiving all required documents from DHEC, OCEM, Berkeley County Planning and Zoning, the prior survey, elevation certificate, new survey, insurance and flood insurance quotes, and any other documents and information pertaining to the property to either approve or disapprove said documents as contingencies to the contract.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

BUYER: Robert Bowen

Date 11/09/06

Time 8:40 AM

WITNESS: _____

Date _____

Time _____

BUYER: _____

Date _____

Time _____

WITNESS: _____

Date _____

Time _____

SELLER: Lot #12 Yellow House LLC

Date 11/16/06

Time _____

WITNESS: _____

Date _____

Time _____

SELLER: _____

Date _____

Time _____

WITNESS: _____

Date _____

Time _____

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Addendum C.zfx

11/09/2006 08:41AM

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,	)	Civil Action No.: 2:09cv428-CWH
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
KEITH ROBERTS, PATRICK COGAN,	)	
and LOT 12 YELLOW HOUSE, LLC,	)	
	)	
Defendant.	)	
_____	)	

UNITED STATES OF AMERICA,	)	Civil Action No.: 2:09cv01696-CWH
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
KEITH ROBERTS and LOT 12 YELLOW	)	
HOUSE, LLC,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

In the above consolidated cases, the United States (hereinafter "the government") has moved for summary judgment on its twin causes of action for abatement of a trespass and for violation of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Contrary to the government's claim, there are genuine issues of material fact as to its entitlement to the remedy it seeks under both claims – the complete removal of a dock constructed by the defendant, Lot 12 Yellow House, LLC.

INTRODUCTION

The government commenced this action alleging only that the defendants constructed a dock across a narrow strip of land owned by the United States. The strip of land in question is located about half way from the jumping off point of the dock on highland and the pier head of the dock in Yellow House Creek. All of this narrow strip was well below the mean high water mark and thus part of the navigable waters of the United States and was always subject to the dominant navigation servitude held by the United States. The government claims that this land was acquired in condemnation in 1965 for the purpose of creating a safety arc, also called an "explosive arc", around certain piers used by the Navy at its Charleston Weapons Station to load and unload explosives. As the dock constitutes what the government asserts is a trespass, the government seeks an injunction to abate the trespass by removal of the part of the dock which crosses the land it claims to own.

Defendants do not contest the validity of the acquisition of the bare technical title to the land the government says the dock crosses. Nor do defendants dispute the government's claim that it is free of the requirement imposed on all other land owners to properly record its title and accompanying plat in the land records of the county where it is located – in this case, Berkeley County. As noted below, the government did not record its title in the land records of Berkeley County and did not record its plat anywhere, apparently. While the government may not be required to record these fundamental records of its ownership, Defendants contend that there are consequences for this refusal to do what common sense, if not the law, requires.

Especially in light of the other facts of this case, Defendants contend that even if the government secured the bare technical title to the submerged land under their dock, an injunction is not warranted in this case. The equities, as explained below, weigh heavily against requiring its removal. In addition, there are other far less destructive remedies which would satisfy the interests identified to date by the government. At a minimum, there are genuine issues of material fact concerning the balance of equities as to the alleged trespass, or whether construction of the dock was a trespass at all.

The government filed the second of these cases alleging that the dock constructed by Defendants violates the Rivers and Harbors Act of 1899 because the U.S. Army Corps of Engineers ("the Corps") did not issue a permit for the dock pursuant to Section 10 of that statute, 33 U.S.C. § 403. Defendants dispute this assertion and believe that a general permit issued by the Corps authorized the dock. There are genuine issues of material fact as to whether the dock was authorized by the general permit. Moreover, even if the dock is found not to have been authorized by the general permit, Defendants submit that the question of whether an injunction should be issued requires a balancing of the equities and that the equities do not favor ordering its removal.

STANDARD FOR SUMMARY JUDGMENT

Defendants adopt the statement by the government in its Memorandum concerning the proper standard for evaluating a motion for summary judgment.

FACTUAL SUMMARY

The United States undertook in 1965 to secure fee title to an area in Berkeley County along Yellow House Creek that included the bed of navigable waters of the United States as well as land above the mean high water mark. The Declaration of

Taking states that the "public use to which said lands are to be put is in connection with the Naval Ammunition Depot, Charleston," now known as the Naval Weapons Station.

Exh. 1. Neither the Navy nor any other agency of the United States has occupied the land in any fashion or erected any structure on any part of the land, but it secured title to the land for sole purpose of creating a safety arc, specifically related to the explosive handling activities at Pier Charlie. Pier Charlie is no longer used for handling ammunition and is slated to be torn down in the near future with no plans for its replacement. Exh. 2, Deposition of Mike Mauk. The sole use identified by the government for the property is as a safety arc for explosive handling activities at this soon to be demolished pier. Exh. 10, Answers to Interrogatories

The United States did not record its title in the public records of Berkeley County. The Auditor of that county, however, has subsequently prepared tax maps which show title to the property in the United States as Tax Map No. 267-00-00-059. There is a substantial conflict in the acreage shown on the tax maps and that alleged by the United States in this action. The tax maps show in excess of 100 acres as opposed to the 72.50 acres claimed by the United States. Entry Number 26-9 to Government Memorandum, Order of the S.C. Administrative Law Court by Judge Ralph King Anderson, III. Tax maps are also not relied upon for delineation of ownership or boundaries of tracts of land. Exh. 8, Drew Deposition.

While the government did record the Declaration of Condemnation in the Berkeley County judgment rolls, it was not properly indexed. Furthermore, and more importantly for any examination of title, it did not record its plat all. Without the plat, the

description of the property at issue – Tract 4 in the Declaration – is meaningless. Exh. 8, Drew Deposition, pp. 45-49; Exh. 1, Declaration of Leslie Riley.

Thomas H. Stone took title to Lot 12, Yellow House for a purchase price of \$135,000.00 prior to June 2001. This lot is adjacent to the marsh of Yellow House Creek. A portion of the property condemned by the United States in 1965 approximately two hundred feet wide stretches between the edge of Lot 12 and Yellow House Creek. All of the property the United States claims to own in front of Lot 12 is below the mean high water mark. On August 18, 2005, Stone sold the property to Defendant Keith Roberts for \$475,000.00.

While Stone owned the property, he applied for a permit to construct a dock. Stone's application was filed with the Ocean and Coastal Resources Management Division of the S.C. Department of Health and Environmental Control ("OCRM"). A permit was required from that agency pursuant to the S.C. Coastal Zone Management Act, S.C. Code §48-39-10, et seq. as the marsh area and all areas below the mean high water mark where the dock was to be erected are classified as "critical area" in accord with Section 130 of the Act.

A permit was also required for the dock from the United States pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The dock was required to be built over and within areas below the mean high water mark of Yellow House Creek. All waters which ebb and flow with the tide are deemed "navigable waters" under federal law and, therefore, subject to the requirement of Section 10 that any alteration of the course, condition or capacity of such waters be done only pursuant to

an authorization under the Act. These authorizations are issued by the United States in the form of a permit from the Corps.¹

The Corps has the authority to issue general permits covering specific categories of similar structures. The rules governing general permits are set forth in the Corps' regulations at 33 C.F.R. Part 325.5. For many years, the Corps has issued general permits for private, recreational non-commercial docks in specified areas of federal navigable waters. Typically, these permits provide that the general public has authorization to construct docks complying with the limitations set out in the permit so long as the individual building the dock secures authorization from the appropriate state agency.

At the time Stone applied for a permit for a dock from Lot 12 to Yellow House Creek, the Corps had issued General Permit No. 2000-14-001 which authorized private non-commercial docks and associated structures in the waters such as those in which Stone sought to build a dock which were "critical areas" subject to the permitting jurisdiction of OCRM. Prior to issuing this permit, the Corps solicited comments from many agencies, organizations and individuals.

In June 2004, the Commanding Officer of the Naval Weapons Station, Charleston received an inquiry from a potential purchaser of Lot 12 inquiring about problems with respect to the Navy concerning construction of the dock for which Stone had been issued

¹ Originally, Congress delegated to the Corps of Engineers the authority to permit any alteration or construction in navigable waters. Since 1899, however, the Congress has broken off some specific types of work and delegated authority to permit these to other agencies. The Coast Guard was given the authority to permit bridges and the power to permit power dams was delegated to the Federal Power Commission (now renamed the Federal Energy Regulatory Commission). All other alterations or structures in navigable waters must be permitted by the Corps.

a permit. The Commanding Officer, Capt. Zalaskus, notified the potential purchaser that the Navy would not grant permission to build the dock. This individual, a Mr. Leopold, had no connection to either Stone or the Defendants. In July 2004, Capt. Zalaskus also wrote to OCRM asking the agency to revoke the permit it issued Stone arguing that the United States had title to part of the area crossed by the dock. On November 22, 2004, OCRM revoked Stone's permit and Stone appealed pursuant to the S.C. Administrative Procedures Act, S.C. Code § 1-23-310 to the S.C. Administrative Law Court.

The Navy was specifically asked to provide evidence concerning its claim to title to the bed of the part of the navigable waters to be crossed by the dock. Leslie Riley was at that time the attorney for OCRM and responsible for defending its decision to revoke the permit. As she explains in the attached Declaration, she had a number of conversations with Bruce Joseph, an attorney for the Navy's Facilities Engineering Command (NAVFAC), the command which handles real estate and environmental and navigable waters permitting for all Naval installations. Mr. Joseph provided Ms Riley a copy of a December 1, 1969 judgment from the U.S. District Court and some pleadings and exhibits. Despite a plea she made in person several months before trial of the case, Mr. Joseph refused to supply any more documents or any witnesses. Ms Riley explains that she was concerned that without witnesses or authenticated documents, she would not be able to submit proof of the Navy's claim to government ownership of the submerged land to the Court. His response was that the Navy was unconcerned what happened at the Administrative Law Court as the Navy had adequate authority to remove the dock with its own resources if a dock was constructed. Exh. 1, Riley Declaration.

As Ms Riley predicted, Judge Anderson, who tried the case at the ALC, did not permit the introduction of unauthenticated documents. In his decision dated June 3, 2005, he ruled in favor of Stone and reinstated the dock permit. Specifically, Judge Anderson found that:

“However, the Judgment of the United States District Court references 72.50 acres, but the records from the Berkeley County tax assessor’s office, obtained in 2004 during OCRM’s investigation of the Navy’s claim, indicate a parcel between Yellow House Creek and Respondent’s (Stone) high-ground in excess of one hundred (100) acres. Absent any properly proffered evidence from the Navy to clarify or explain this discrepancy, this Court cannot assume or conclude that the Judgment applies to marsh impacted by Respondent’s dock permit. Therefore, the Navy’s claim of ownership, which is the sole basis for OCRM’s revocation, was not properly substantiated before this Court....the evidence did not establish that the Navy even owns the disputed land. The 1969 Judgment did not clearly set forth that the property upon which Respondent’s dock will lie is the property that was condemned to the United States.” (A copy of the full ALC decision in *S.C.D.H.E.C. v. Stone* is attached to the government memorandum in support of the motion). Judge Anderson noted the inexplicable absence of any witnesses from the Navy. Order, p. 7, footnote 6.

The government articulated what it contends are numerous errors by Judge Anderson in its answers to interrogatories. Exh. 10. Defendants dispute that Judge Anderson was in error in any way in his Order. It is undisputed that no one from the United States government provided any competent evidence for Judge Anderson to

consider in evaluating the Navy's claim of ownership of the submerged land. Exh. 1, Riley Declaration.

Stone did not construct the dock but placed the property up for sale. Part of the disclosures made by Stone and his realtor was the dispute over the permit initiated by the Navy's claim that the government owned part of the submerged land over which the dock was to be constructed. A copy of the ALC Order by Judge Anderson was supplied to prospective purchasers. Exh. 3, Roberts Deposition.

Immediately to the south of Stone's lot is property owned by Paul Ahrens. Visible from the Stone property is a dock constructed by Mr. Ahrens and his father from March 1993 until September 1994. Exh. 7, Ahrens Deposition and Exhibit 7 thereto. This dock was constructed by the two men by hand and consists of poured concrete piers. It is undisputed that the Ahrens dock also crosses part of the submerged land the government says it owns. Mr Ahrens has been a federal employee, a fireman, for some 17 years at Hunter Army Airfield in Savannah, Georgia. For 15 years, he was a Naval Reservist assigned to the Charleston Naval Weapons Station Security team. He routinely performed reserve duty at the Weapons Station including conducting boat patrols along Yellow House Creek where his dock was constructed. During the construction of the dock and thereafter, Mr. Ahrens held social gatherings at his property and on the dock at which various co-workers from the Naval Weapons Station security force were guests. Exh. 7.

The government first complained to Mr. Ahrens about his dock in July 2007 shortly after he returned from a one year deployment to the Persian Gulf where he patrolled the waters between Iraq and Iran. No suit has been filed against him to date, but

he has been advised that the government will seek to force him to remove his dock, just as it seeks to force Defendants to remove theirs. Exh. 7.

Defendant, Keith Roberts, learned that Stone was proposing to sell his property and formed a partnership with Patrick Cogan to purchase the property, construct a house and dock and eventually sell the property. Key to their decision regarding the purchase of the Stone lot was the ability to construct a dock from the lot to Yellow House Creek. Exh. 3, Roberts Deposition; Exh. 4, Cogan Deposition; Exh. 11, Roberts Declaration; and Exh. 12, Cogan Declaration. As part of their decision on the purchase, they reviewed the ALC decision by Judge Anderson and retained Randy Drew, a Mount Pleasant real estate attorney to perform a title search and otherwise advise them regarding the purchase.

Drew performed a title search after reading the ALC Order by Judge Anderson. Like Judge Anderson, he was not able to determine what property below the mean high water mark, if any, the government had condemned in 1965. He has testified that without the plat to which the Declaration of Taking legal descriptions refer, it is not possible to identify the property. Aware that the Navy had attempted to have Stone's permit revoked, however, he contacted the Navy to inquire as to whether the Navy was continuing to object to the construction of the dock. Not familiar with the Navy, he began by calling the Naval Base Redevelopment Authority, a state agency managing the property of the former Naval Station in Charleston. He was referred to an office with the Navy and ultimately to the office of Raymond Nelson, Director of the Naval Facilities Engineering Command's Real Estate. He does not recall whom he spoke to in Mr. Nelson's office, whether it was Nelson himself or someone else, but he testified that he was told that the Navy now considered the matter of the Stone dock "litigated" and

closed and that it intended to take no further action with respect to the dock permit. Despite the fact that Drew had called to ask if the Navy objected to the dock being built, he was not told that the Navy objected or warned that it should not be built. On that basis, Drew advised Roberts and Cogan that the Stone dock permit would remain valid and that construction of the dock was permissible. Exh. 8, Drew Deposition, pp 63-64.

Based on Drew's research of the title, the ALC Order by Judge Anderson and the Navy's disavowal to Drew of any objection to the dock, Roberts purchased the property from Stone and was transferred Stone's dock permit. Roberts paid some \$475,000 for the property with his personal funds. He titled the property in the name of Lot 12 Yellow House Creek, LLC, of which he is the sole proprietor. Roberts formed a partnership with Cogan whereby Cogan, a builder, would construct a house on the lot at cost. The agreement between Roberts and Cogan is that they will share equally in the profits of losses from the venture. Roberts contracted for and paid for construction of the dock at a cost of \$82,890. The dock was completed in November 2005. Exh. 11, Roberts Declaration. The house is furnished throughout and Cogan lives there much of time, but also maintains a residence in Mount Pleasant. Exh. 3, Roberts Deposition, pp. 12-13; and Exh. 4, Cogan Deposition, p. 9.

Defendants do not charge for use of the dock and allow a friend to keep his boat tied to the dock currently. They do not rent the house out for any purpose. It is the only property in which they share an interest. Exh. 3; and Exh. 4.

Photographs of the dock as constructed from the air and on the ground are in the record. Exh. 9, McMullen Deposition, Exhibits 2 and 3 thereto; and Exh. 5, Hadden Deposition, Exhibit 1 thereto. (The Defendants' dock is the one showing a large pier

head at the end). It is undisputed that the dock does not pose any interference with navigation or otherwise pose any concern with docks typically evaluated by the Corps, as testified to by the Corps' Chief of its Regulatory Functions Division, Tina Hadden. Exh. 5, pp. 12-13.

The current situation regarding the Defendants' dock can be summarized as follows:

The dock was individually permitted by OCRM. The dock is an appurtenance to a single family residential lot on which a house is constructed and in which Cogan lives part time. The property is for sale. Roberts has invested the purchase price of \$475,000 and the dock construction cost of \$82,890 and has borrowed approximately \$1.2 million dollars to advance the project. The dock does not interfere with navigation, riparian rights or any federal navigation channel interests. It does not pose any environmental problems.

The government first complained to Defendants about the dock in a letter from an Assistant U.S. Attorney to Randy Drew on August 8, 2007, nearly two years after the dock had been constructed. Exh. 13. The only estimate to remove the dock as the government seeks to have this Court order is one by the same man who oversaw its construction – \$187,000. Exh. 11; and Exh. 9, McMullen Deposition. Removal of the dock will, therefore, result in a total cost to Defendants of some \$269,890. Roberts is currently not able to make the payments due on the mortgage on the Yellow House property, has missed the last two payments and is due to meet with the lender in January to discuss their options. Cogan has no further capacity to borrow and lacks any income other than rent on property he owns in Mount Pleasant. Payment of the cost to remove

the dock by Defendants, even with their combined assets, is not possible. Exh. 11; Exh. 12.

The sole reason the government – at the behest of the Navy – says that it seeks to have the dock removed is that it sits in part on a strip of submerged land acquired by the Navy as a safety arc to prevent structures being built in the area where people would be at risk of harm if an explosion accidentally occurred during explosive handling operations at Pier Charlie, a facility no longer in use and which will soon be demolished and not replaced. Explosive arcs are currently in place at the Weapons Station which encompass much of the golf course, parts of North Rhett, Remount Road, part of a facility owned by the Berkeley County Water and Sewer Commission, and possibly at least one of the officers quarters located on the bank of the Cooper River. Exh. 2, Mauk Deposition including Exhs. 7 and 9 thereto.

ARGUMENT

A.

Trespass

To establish trespass, the government's burden is no different than it would be for a private landowner. Camfield v. U.S., 167 U.S. 518, 524, 17 S.Ct. 864 (1897), ("the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers.") The elements of trespass are ownership by the plaintiff of the subject land and the intentional use of the property by the defendant without authorization and without privilege. U.S. v. Imperial Irrigation District, 799 F.Supp. 1052 (S.D. Cal. 1992), citing Prosser and Keaton on the Law of Torts § 13 at 70 (5th ed. 1984).

In this case, a respected South Carolina judge, Ralph King Anderson, III, found that on the records recorded in Berkeley County, it was not possible to tell what the Navy owned. Other federal agencies such as the Corps and the Forest Service have overcome the temptation to cling to their special status and have properly recorded the instruments documenting the precise boundaries of property under their control. Exh. 8, Drew Deposition. One would have thought that the Navy would have also wanted to make the fullest public disclosure of the safety arc the government acquired for it by doing likewise with the records of the 1965 condemnation. Instead, the Navy's actions in effect kept its ownership a secret so that the boundaries of the 1965 condemnation, including the submerged land at issue here, were not discoverable. At the time Defendants built the dock, therefore, in light of the record title and the Order by Judge Anderson and the Navy's response to Randy Drew's questions concerning the dock permit, it was reasonable for the Defendants to conclude the Navy did not own any part of the land across which the OCRM permit authorized them to construct the dock.

Even if Defendants could somehow be presumed to know of the Navy's ownership of the strip of submerged land in question, the response by the Navy's NAVFAC Real Estate official to Drew's questions conveyed the clear message that the Navy did not object to the permit any longer, and, therefore, to the dock.

There are genuine questions of material fact as to whether Defendants were aware of the government's ownership of the land at the time they constructed the dock and as to whether the Navy gave its consent to construction of the dock. Defendants submit that these questions make summary judgment inappropriate.

B.

Removal of the Dock as a Remedy for Trespass

If the Court concludes that the dock, in fact, constitutes a trespass to lands owned by the government, Defendants submit that an injunction requiring its removal is not a proper remedy. The general law of trespass is that such an injunction should be ordered only after a balancing of the equities of the case. Specifically, "factors to be considered in determining whether to grant a mandatory injunction requiring a trespassing defendant to remove an encroachment from the plaintiff's land are whether the owner (of the structure) acted in good faith or intentionally built on the adjacent land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the encroachment." Williams v. South & South Rentals, Inc., 346 S.E.2d 665 (N.C. App. 1986), cited in 75 Am Jur. 2d, Trespass § 113-116, which lists the following as considerations for injunctive relief:

- Nature of the interests to be protected;
- Relative adequacy of injunctive and other remedies available to the plaintiff;
- Any unreasonable delay of the plaintiff in initiating the action;
- Any relative misconduct on the part of the plaintiff;
- Relative hardship to the parties if the injunction is granted or denied;
- Interests of the third persons and the public;
- Practicality of framing and enforcing an injunction.

This principal has long been established as the governing rule for a mandatory injunction requiring removal of a trespassing structure. The rule has generally been summarized this way: When the encroachment is minimal and the cost of removing the encroachment is most likely substantial, balancing of hardships and equities is necessary,

employing the above factors. Dundalk Holding Co. v. Easter, 137 A.2d 667 (Md. 1958); Heinrich v. Hinson, 600 S.W.2d 636 (Mo. App. 1980); Lawrence v. Mullen, 338 N.Y.S.2d 15 (NY App. 1972); Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980); McDowell v. U.S., 870 P.2d 656 (Colo App. 1994); Ostrem v. Alyeska Pipeline Service Co., 648 P.2d 986 (Alaska 1982); Gaffny v. Reid, 628 A.2d 155 (Me. 1993).

This test is consistent with the rules applied in the federal courts governing permanent injunctions, including cases seeking an injunction to prohibit trespass. Ebay, Inc. v. Mercexchange, LLC, 547 U.S. 388, 126 S.Ct. 1837 (2006); Christopher Phelps Asso. Inc. v. Galloway, 492 F.3d 532 (4th Cir. 2007); and Crown Orchard Co., Inc. v. Dennis, 229 F. 652 (4th Cir. 1913).

As to the government's conduct, the record reflects vague and dilatory behavior, not careful protection of its rights. It did not properly record its title or take any other steps to inform the public, including purchasers of land adjacent to the marshes of Yellow House Creek that it owned any part of the submerged area along the creek. When at the Navy's behest, OCRM revoked Stone's permit and when OCRM's attorney asked for the Navy's help in pursuing the case it had instigated, the Navy inexplicably refused, stating that it had no interest the outcome of the case. While the government has repeatedly claimed that it made it clear to Defendants that it opposed construction of the dock, there is no evidence in the record that it communicated this in any fashion to Defendants or their attorney. The only thing the Navy has ever done was to send a letter to another landowner unaffiliated with Defendants prior to the ALC's rejection of the Navy's claim of ownership and consequent reinstatement of Stone's dock permit. But they never wrote to Stone after the permit was reinstated. Worse, when Defendants' lawyer, Randy Drew,

asked the Navy if it still objected to the dock, the official responsible for managing the Navy's real estate responded that the Navy did not and intended to take no further action as to the dock, considering the matter closed. Exh. 8.

The Navy could have provided competent proof of the government's title in the action in the ALC which its actions triggered. The government could have filed an action against Stone to enjoin construction of the dock after Judge Anderson reinstated the dock permit. The Navy could have requested the Corps to prevent construction of the dock. It could have posted a sign in the marsh where the government says it took title prohibiting its use for dock construction. In fact, the government did nothing at all. The Defendants' dock was constructed in broad daylight and was visible to boat patrols by the Naval Weapons Station security force, who waved to the builders of the dock during its construction. Exh. 9, McMullen Deposition. Only after the dock had been built for two years did the government even contact Defendants.

As to the balance of hardships, the record reflects that the government has absolutely no present use for the submerged land at issue and no need to have the dock removed. The only safety arc which encompasses any part of the dock is one related to Pier Charlie, no longer used by the Navy and which will soon be demolished, not to be replaced. The Navy has no plans to make physical use of the property, which is, after all marsh below the mean high water mark. On the other hand, removal of the dock will waste the cost of its construction, \$82,890, and cost another \$187,000, a total of \$269,890, money the Defendants do not have and can not raise. The contrast in relative benefits and hardships could not be more stark. In this case, the government quite simply is seeking to inflict financial ruin on two men for no purpose other than to remove a dock

from property which is not within the boundaries of a federal facility and for which it has no current or prospective use.² The fact that the Navy's active explosive facilities have explosive arcs that encompass a actively used golf course, two public roadways and other facilities serves to highlight the complete lack of justification for its request in this case where there is and will be no activity creating the need for a safety arc.

There are other remedies available to address the only interest the government has identified – maintaining a safety arc. Defendants could be required to execute a release from liability which binds themselves and their successors. They could be required to do so in the form of a license or easement from the government. This sort of resolution would not deprive the government of any of the incidents of ownership and, as it admittedly has no current use for the property, would not interfere with any of its activities. Should the Navy or any agency of the government have any need for the property in the future, removal of the dock would be possible at that time.

The property at issue is not like high ground. It is not contiguous to or part of the Weapons Station proper, which lies across the waters of Yellow House Creek and the Cooper River. It is merely a narrow strip of submerged marsh over which the government has exercised the preeminent navigation servitude since the country was founded. The government can not be dispossessed of the right to make use of this land for any public purpose as it has always been the property of the United States held in trust for the people of the nation. U.S. v. Chandler-Dunbar Water Co., 229 U.S. 53, 33 S.Ct. 667, 670, 57 L.Ed. 1063 (1913), citing Shively v. Bowlby, 152 U.S. 1, 31, 38 L.Ed. 331,

² While it is a separate matter from this dispute, it should be noted that the government has announced that intends to do exactly the same thing to Paul Ahrens, a life long civil servant and fireman and with exactly the same lack of justification.

343 (1894). The power of the government to use navigable waters and the land under them is plenary and will in no way be diminished should the Defendants' dock be allowed to remain until such time as the government needs to use the area under it.

The government argues that where the public interest is involved, courts should balance the equities mindful of the public's rights and interests and measure the equities so as to favor those interests. Defendants do not disagree. In this case, however, the government has not identified *any* interest of the public which is affected by the existence of the Defendants' dock. If the evidence is construed in the light most favorable to Defendants, the facts do not weigh in favor of issuing an injunction requiring removal of the dock.

C.

Violation of the Rivers and Harbors Act of 1899

The government's claim that the Defendants' dock constitutes a violation of 33 U.S.C. § 403 turns entirely on the question of whether the general permit issued by the Corps and in effect when the dock was constructed covers Defendants' dock. In all respects except two, the government apparently concedes that the dock falls within the coverage of the general permit: the Navy's claim that its permission was required and the intent of Defendant's to sell the property.

The general permit, like all Corps permits issued under the Rivers and Harbors Act, provides that the permit does not constitute permission to erect a structure over land owned by another without that person's consent. A separate provision also provides that if the approval of another federal agency is required, the general permit does not apply unless that approval is given. In this case, Randy Drew testified that in his conversation

with an official of the Navy's command responsible for managing its real estate, NAVFAC, that official stated that the Navy regarded the matter of the dock permit resolved by the ALC decision and intended to take no further action to prevent the dock's construction. Exh. 8. This evidence creates a genuine issue of material fact as to whether the Navy gave its consent to construct the dock. Bob Riggs, the previous chief of the Corps' Regulatory Functions Division, who held that position at the time the general permit was issued, testified that from the Corps' perspective, if the Navy had given such assurance to one seeking to build a dock across the property at issue, that assurance would be "tantamount to me to be permission of that land owner" in the context of the general permit. Exh. 6, Riggs Deposition, pp 40-41.

The government also argues that Defendant's intent to sell the property from which the dock was constructed prevents it from being covered by that permit. It should be noted that the general permit does not contain language that would apply to this situation. The language cited by the government is in the introductory description of the coverage of the permit on page 1 which states that the permit is, "to authorize the construction and/or installation of piers, floating docks...for private non-commercial uses." Application of this limitation to a situation in which two men enter into a partnership to construct a single residence and a dock from the same single lot is an extrapolation not based on any language in the general permit itself.

Moreover, it is uncontested that one of the Defendants, Cogan, actually lives in the house which is fully furnished, part time. Exh. 3 and 4. Riggs testified that where someone is actually living in the house and intending to sell it, as is the case here, "then, I think it's private, recreational," and, therefore, covered by the general permit. Exh. 6, p.

38. As Riggs noted, “very few people today, I believe, move into a house with the idea that, I’m going to live there forever.”

On this record, summary judgment on the issue of application of the general permit to Defendants’ dock is not appropriate.

D.

Injunction as a Remedy for Violation of the Rivers and Harbors Act of 1899

The government argues that an injunction must be ordered if the Court finds that the general permit does not cover Defendants’ dock and it is, therefore, not authorized pursuant to 33 U.S.C. § 403. The general rule is that an injunction, as an equitable remedy, should only be issued after a balancing of the equities. The government properly cites Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S.Ct. 1798 (1982) for the proposition that courts hearing claims for violation of a statute such as the Rivers and Harbors Act must “do equity” and mold each decree to the necessities of the particular case. The court in that case also held that “a grant of jurisdiction to insure compliance with a statute hardly suggests an absolute duty to do so under any and circumstances” and that “a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.”

The government argues incorrectly that 33 U.S.C. § 406 mandates an injunction for every structure in navigable waters which has not been authorized by the Corps pursuant to the statute. By its own terms, the statute does not do so. The statute reads, “the provisions of this section *may be enforced* by the injunction of any district court.” This Court held in State of South Carolina v. South Carolina Electric and Gas, 42 F.Supp. 111 (E.D.S.C. 1941), “The Congress did not intend that it should be mandatory on the

Attorney General to institute proceedings in every case, or that it should be mandatory on the district court to grant an injunction in every suit." The grant of an injunction must, therefore, necessarily rest on the facts and circumstances of each case, including the equitable considerations.

In this case, if the Court holds that the portion of the dock located on land the government claims to own must be removed as a trespass, Defendant's submit that the appropriate remedy under the Rivers and Harbors Act is to remand the permit decision to the Corps to evaluate what must happen with the remainder of the dock landward of the submerged land owned by the government.

If the Court decides that there has not been a trespass or that removal of the dock is not an appropriate remedy for any trespass found in this case, it would be wholly inequitable to require its removal pursuant to the Rivers and Harbors Act solely because of the government's arguments concerning the general permit. The more equitable remedy, if the Court decides that the dock is not authorized by the general permit, is to remand the question to the Corps for consideration under its individual permit process. This case was brought only as the result of the Navy's complaint concerning occupation of a narrow strip of submerged land acquired as part of the safety arcs for the Weapons Station and not because the dock constitutes an unacceptable obstruction in navigable waters inconsistent with the statute or Corps regulations.

CONCLUSION

The government has not met the burden justifying grant of summary judgment as to either of its claims and Defendants respectfully request that summary judgment be denied.

Respectfully submitted,

s/ Stan Barnett

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December 20, 2009
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

App. Case No. 2013-000020
Case No. 2011-CP-10-3241

Keith Roberts and LOT 12 YELLOW HOUSE, L.L.C.. Appellants,

vs.

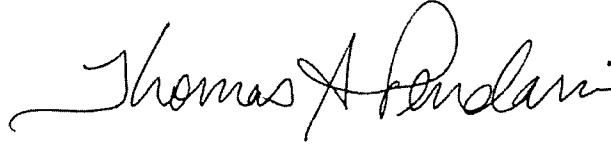
Randall J. Drew Respondent.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a horizontal line drawn underneath it.

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